STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-842

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

January 10, 1983

Mr. Thomas J. Wells
[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. Wells:

I have received your letter of December 21, in which you raised a series of questions relative to the Open Meetings Law.

According to your letter, an ad hoc committee was formed in a school district, presumably by a school board, consisting of four members of the board and six members of the public. You wrote that the committee in question "has held monthly meetings with the only known notice given as an announcement of the next committee meeting at the regular Board meeting and its' inclusion in the Board minutes".

Prior to responding to your inquiry, a question must first be answered with respect to the status of the ad hoc committee under the Open Meetings Law. Based upon your description of the committee, it would appear to constitute a "public body" required to comply with the Open Meetings Law in all respects.

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

> "...any entity, for which a quorum is required in order to 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 language quoted above differs from the original definition of "public body" as it appeared when the Open Meetings Law initially became effective in 1977. One among a series of amendments to the Law enacted in 1979 redefined "public body" to ensure that committees, subcommittees and similar bodies fall within the requirements of the Law, even though their authority might be solely advisory in nature. Under the current definition, once again, I believe that the committee is a "public body" subject to the Open Meetings Law.

Your first question is whether the notice, as you described it is "considered a legal public notice under the Open Meetings Law."

From my perspective, while notice of the meetings of the ad hoc committee may have been provided, it has not been given in a manner fully consistent with the Open Meetings Law.

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

Based upon the direction given in §99 of the Open Meetings Law, I believe that notice must be given to the news media and to the public by means of posting prior to all meetings of public bodies. Therefore, it does not appear that the notice of meetings of the ad hoc committee fulfilled the requirements of §99 of the Open Meetings Law.

Your second question is whether, if notice has not been properly given, are meetings "binding"? If I understand your inquiry correctly, you have asked whether meetings may have been illegally held and whether actions taken at such meetings are effective and "binding".

In my view, the meetings should likely be considered legally held unless and until a court renders a contrary determination. Section 102 of the Open Meetings Law concerns the enforcement of its provisions and permits any "aggrieved person" to initiate a judicial proceeding against a public body for failure to comply with the Law. Perhaps the most significanct penalty that may be imposed involves a situation in which a public body takes action behind closed doors in violation of the Law. In such cases, a court has discretionary authority, upon good cause shown, to nullify action taken by a public body. However, §102(1) also states in part 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."

Under the circumstances, it appears that notice of the meetings of the ad hoc committee might not have been given fully in compliance with §99 of the Open Meetings Law. Nevertheless, if such failure was unintentional, that alone would not constitute a basis for nullifying action taken by the committee.

Answers to your remaining questions as they relate to the Open Meetings Law could in my opinion be determined only by a court in conjunction with its specific findings.

In terms of the "legal recourse available to the public", as noted earlier, §102 provides a mechanism by which an aggrieved person may initiate suit under the Open Meetings Law. In the alternative, it is suggested that you bring to the attention of the ad hoc committee the provisions of the Open Meetings Law discussed in this opinion. Perhaps greater familiarity with the Law will help to ensure compliance.

To aid you in your efforts, I have enclosed two copies of both the Open Meetings Law and an explanatory pamphlet that may be useful to you and the members of the committee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2738
OML-AO-843

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

January 10, 1983

Mr. John J. Byczkowski
Reporter
Democrat and Chronicle
55 Exchange Street
Rochester, NY 14614

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. Byczkowski:

I have received your letter of December 23 in which you raised questions regarding the application of the Freedom of Information Law and the Open Meetings Law to a not-for-profit corporation.

The corporation is known as North East Area Development (NEAD), and you have asked whether its board is required to conduct its business in public, whether it is required to disclose its funding sources, whether its receipt of public funds would bring it within the scope of the Freedom of Information and Open Meetings Laws, and the nature of documents it is required to file with the state.

Without more detailed information regarding NEAD, I regret that I cannot provide specific advice. However, I would like to offer the following general comments.

First, the coverage of the Open Meetings Law is determined in part by its definition of "public body" and §97(2) 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."

Many not-for-profit corporations have a relationship with government, but might not themselves conduct public business or perform a governmental function. In short, unless each of the ingredients found in the definition of "public body" are present, the meetings of the NEAD board of directors would in my view fall outside the coverage of the Open Meetings Law.

Assuming that NEAD is indeed a not-for-profit corporation, it would likely be required to file a certificate of incorporation with the Department of State at the same address as indicated on the Committee's letterhead. To reach the Division of Corporations by telephone, you can call (518) 474-6200. The certificate of incorporation might provide you with additional information that may be useful.

For example, if the certificate indicates that NEAD is a local development corporation performing its duties under §1411 of the Not-for-Profit Corporation Law, I believe that its meetings would be subject to the Open Meetings Law. Otherwise, the meetings of the Board would likely fall outside the requirements of the Open Meetings Law.

Second, in terms of rights of access to records, the Freedom of Information Law applies to entities of government, and §86(3) of the Law defines "agency" to mean:

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

Under the circumstances, NEAD as a not-for-profit corporation probably is not a governmental entity performing a governmental function. If that is so, it would neither be an "agency", nor would its records fall within the scope of the Freedom of Information Law.

Lastly, if NEAD maintains some sort of relationship with government, whether contractual or by means of funding, for example, there may be an indirect method of obtaining records.

Specifically, §86(4) of the Freedom of Information Law expansively defines the term "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."

Due to the breadth of the definition, documentation relating to NEAD in possession of an agency would constitute a "record" subject to rights of access granted by the Freedom of Information Law. For instance, if NEAD has received a grant from an agency or maintains a contractual relationship with an agency, the agency with which the relationship exists would likely maintain possession of records pertaining to NEAD subject to the Freedom of Information 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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2743
OML-AO-844

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

January 12, 1983

V. James Granito, Jr.
D'Arrigo & Granito
Suite 300
290 Elwood Davis Road
Liverpool, NY 13088

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. Granito:

I have received your letter of December 28 and the correspondence attached to it. You have requested an advisory opinion regarding a denial of a request for records of the Hudson River - Black River Regulating District.

Specifically, the correspondence appended to your letter indicates that you requested from the District copies of "the Preliminary Economic Report and the Executive Summary" pertaining to the Hawkinsville Dam Project. In response to the request, the Board's chief engineer, Kenneth H. Mayhew, denied access, stating that:

> "1) The reports you have requested are not in final form and have not yet been presented to and accepted by the District's Board.
>
> "2) Disclosures of the request reports in their present form is exempt under Section 87(2)(g) of the Freedom of Information Law (Public Officer's Law) as intra agency materials."

I would like to offer the following comments regarding your inquiry.

It is noted at the outset that I have no knowledge of the nature or contents of the records sought. Nevertheless, I disagree with the bases for the denial offered by Mr. Mayhew.

The first basis for withholding is that the records sought are "not in final form", nor have they been presented to or accepted by the Board. In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" expansively to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical from 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 language quoted above, if the District maintains possession of the materials in which you are interested, they would in my view constitute "records" as defined in §86(4) of the Freedom of Information Law.

Further, §87(2) indicates that all records of an agency are available, except to the extent they fall within one or more among the eight ensuing grounds for denial.

The second basis for withholding cited by Mr. Mayhew is §87(2)(g). 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. Although 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 appears that the "executive summary" could properly be characterized as "intra-agency" material. The preliminary economic report was apparently prepared for the District by an engineering firm serving the District as a consultant. While the firm would likely fall outside the definition of "agency" [see Freedom of Information Law, §86(3)], there is case law indicating that, in a similar situation, records forwarded by a consulting engineer to an agency may be considered "intra-agency" materials [see Sea Crest Construction Corp. v. Stubing, 442 NYS 2d 130, 82 AD 2d 546 (1981)].

Notwithstanding the status of the records in question as inter-agency or intra-agency materials, as you indicated, those portions of the records consisting of "statistical or factual tabulations or data" would be available under §87(2)(g)(i). Moreover, the cited provision has been found to grant access to statistical tabulations that may be reflective of advice [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 Ad 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)] and to factual information appearing in narrative form [see Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied, (1979); Ingram v. Axelrod, Sup. Ct., Albany Cty., May 13, 1982, App. Div. 3rd Dept., October 7, 1982; and Kheel v. Ravitch, 454 NYS 2d 413].

Lastly, viewing the records sought from a different perspective, I believe that the District's Board is a "public body" subject to the Open Meetings Law. Having reviewed §15-2137 and §15-2139 of the Environmental Conservation Law, the Board consists of more than two members, is required to carry out its duties by means of a quorum pursuant to §41 of the General Construction Law, and in my view it clearly conducts public business and performs a governmental function.

If indeed the Board is a public body that falls within the scope of the Open Meetings Law, it is possible that some of the information found in the records sought have been publicly disclosed at its meetings. Further, information similar or related to records sought might be found within minutes of meetings required to be prepared under §101 of the Open Meetings Law.

In short, it may be that the substance of the information sought has been publicly disclosed by means of a vehicle other than the Freedom of Information Law, in this instance, the Open Meetings Law. To that extent, there may be inconsistencies between the bases for withholding offered by Mr. Mayhew and the information that has actually been disclosed to date.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth H. Mayhew
Edwin B. Haverly

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2750
OML-AO-845

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

January 19, 1983

Mrs. Barbara Broderson
[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 Mrs. Broderson:

I have received your letter of January 6 in which you requested an advisory opinion regarding a denial of a request for records.

According to the correspondence attached to your letter, you requested a copy of the Annual Report of the Curriculum Development Committee from the Ballston Spa Central School District. Dr. George Finnigan, the District's Records Access Officer, denied the request based upon §87 (2)(g) of the Freedom of Information Law.

From my perspective, a denial of access to the report is likely inappropriate in view of the terms of the collective bargaining agreement between the Superintendent and Ballston Spa Education Association, portions of which were enclosed with your letter, and the provisions of the Freedom of Information and Open Meetings Laws.

In this regard, I would like to offer the following comments.

First, §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."

Based upon the language quoted above, it would appear that as a "municipal...committee", the Curriculum Development Committee is an "agency" subject to the Freedom of Information Law, as is the school district.

Second, as you are aware, 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) of the Law.

Third, the basis for withholding by Dr. Finnigan, §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. Although 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.

Under the circumstances, the report would, in my view, fall within the scope of "inter-agency or intra-agency materials". In this regard, part of the collective bargaining agreement deals with the annual report of the Curriculum Development Committee and states that:

> "[B]y the end of each school year, the Curriculum Development Committee shall submit an annual report to the Superintendent and to the Association President summarizing its activities during the year and reflecting its reactions to the curriculum development projects. Simultaneously therewith, a copy of such report shall be made availabe to teachers in each school and a copy delivered to the Assistant Superintendent of Instruction."

Based upon the terms of the agreement quoted above, one aspect of the report involves a summary of the activities of the Committee. That portion would likely consist of factual information available under §87(2)(g)(i) of the Freedom of Information Law. The remaining portions, depending upon their contents, might be reflective of final determinations made by the Committee. To that extent, those portions of the report would be available under §87(2)(g)(iii).

Fourth, viewing your request from a different vantage point, I believe that the Curriculum Development Committee is a "public body" subject to the requirements of the Open Meetings Law. Section 97(2) of that statute 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 general construction law, or committee or subcommittee or other similar body of such public body."

According to the collective bargaining agreement, the committee consists of eleven members. It is, in my opinion, required to carry on its business by means of a quorum pursuant to §41 of the General Construction Law and it conducts public business and performs a governmental function for a public corporation, a school district. Further, the definition makes specific reference to committees and subcommittees.

Assuming that the Committee is a public body subject to the Open Meetings Law, its meetings are presumed to be open to the public [see §98(a)]. Moreover, it would be required to prepare minutes of the meetings. Here I direct your attention to §101(1) of the Open Meetings Law, which pertains to 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."

As such, minutes are required at a minimum to refer to all motions, proposals, resolutions and actings taken by a public body. Further, §101(3) indicates that minutes of open meetings must be prepared and made available within two weeks of meetings.

If the requirements of the Open Meetings Law have been met, it would appear that the substance of the report would have been discussed at open meetings and that minutes of these meetings would contain information similar to that found in the report.

It is noted, too, that advisory bodies similar to the Committee have been found to fall within the scope of the Open Meetings Law and are required to prepare minutes in conjunction with §101 [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (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

cc: Dr. George Finnigan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2759
OML-AO-846

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

January 19, 1983

Mr. Charles J. Theophil
[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. Theophil:

I have received your letter, which reached this office on January 13.

Based upon the correspondence attached to your letter, a communication that you sent to Ms. Lee Goldman, President of the Community School Board 26, questions have been raised that relate to both the Freedom of Information and Open Meetings Laws.

Prior to responding in relation to two specific events described in the correspondence, I would like to comment with respect to the final aspect of your letter to Ms. Goldman. Specifically, that letter refers to a statement by Ms. Esther Grodman, executive assistant to Ms. Goldman, in which she wrote that "[W]e do not give out minutes of Executive Sessions as those are unofficial meetings".

If that statement accurately reflects the policy of the Board of Education, it would appear that there may be a fundamental misunderstanding of the Open Meetings Law.

It is noted in this regard that the Open Meetings Law defines "meeting" broadly [see Open Meetings Law, §97(2)] and that the term has been expansively interpreted 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, found that the term "meeting" includes any gathering of a quorum of a public body 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, §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. In addition, §100 (1) of the Law prescribes a procedure that must be accomplished 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, it is in my view clear that an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting.

It is also noted that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §100(1) of the Law specify and limit the areas of discussion that may appropriately be considered during an executive session.

To provide the Board of Education with information regarding the Open Meetings Law, copies of the Law and explanatory pamphlet dealing with both the Freedom of Information Law and Open Meetings Law will be sent to the Board. Perhaps greater familiarity with the specific provisions of the Law will enhance compliance.

The first specific situation described in your letter involves a meeting held on November 18 in which the agenda referred to a resolution to purchase tickets to a scholarship dinner dance. However, the resolution was prefaced by a statement that:

> "[B]ecause time was of essence, action has been taken on resolution 1, which is herein presented for ratification only."

Since the resolution was approved "after the fact", it is your contention that the vote and the action by the Board were illegal "and must be voided".

In my view, although the action that you described might have violated the Open Meetings Law (and perhaps the by-laws of the New York City Board of Education), it remains valid unless and until a court determines otherwise. With respect to the enforcement of the Open Meetings Law, §102(1) states in part 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."

As such, if the Open Meetings Law is violated, the possibility of a remedy would involve the initiation of a lawsuit under Article 78 of the Civil Practice Law and Rules.

The second situation also pertains to the meeting held on November 18. In this regard, you wrote that the notice of the meeting included, in the form of an agenda, a list of seven resolutions to be considered. You also indicated, however, that "a hidden agenda of two more resolutions" was added and later "revealed in a two (2) page copy of the minutes of the Nov. 18, 1982 CSB 26 Public Meeting".

Those minutes apparently referred to two resolutions in which a total of more than nine thousand dollars was appropriated. Further, you wrote that the minutes indicate that the resolutions were unanimously approved, "even though one school board member was absent during the voting".

Assuming that the appropriating resolutions were approved at a closed meeting or meetings, I believe that the Open Meetings Law was violated. As indicated earlier, §100(1) of the Law prohibits a public body from appropriating public monies during a closed or executive session. Moreover, it is in my view questionable whether the subjects under discussion leading to the resolutions could properly have been considered during closed sessions.

Lastly, with respect to the unanimous vote, I direct your attention to the Freedom of Information Law. 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." Therefore, even though the votes may be unanimous, there should in my opinion be an indication of those members who were present or absent.

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: Ms. Lee Goldman
Ms. Esther Grodman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-847

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

January 25, 1983

Mr. D. John Vallee
[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. Vallee:

I have received your letter of January 17 concerning the Open Meetings Law as it relates to a board of fire commissioners.

Specifically, according to your letter, at a recent meeting of the Board of Fire Commissioners of the Halesite Fire District, it was stated that:

> "The Board has to notify the Public 24 hours in advance for any meeting they want to call."
>
> "Also if the Board of Fire Commissioner's determine that they have to call an emergency meeting, they do not have to give any prior Public notification of that meeting."

I disagree with the statements quoted above and would like to offer the following comments regarding those statements.

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 defines 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 v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

And third, §99 of the Open Meetings Law pertains to notice requirements. Subdivision (1) of §99 concerns meetings scheduled at least a week in advance and provides 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. Subdivision (2) of §99 concerns meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Consequently, notice must be given before all meetings, whether regularly scheduled or otherwise.

In view of the foregoing, the statement regarding twenty-four hour advance notice is in my view inaccurate. Once again, if a meeting is scheduled at least a week in advance, notice must be given not less than seventy-two hours prior to the meeting. Further, if, for instance, an emergency meeting must be called, the Open Meetings Law does not prohibit that the meeting be held; nor does it require that notice be given twenty-four hours in advance. By means of example, if it is determined this morning that a meeting must be held tonight, the notice provisions could be met by contacting the local news media by phone and posting the appropriate notices as soon as possible.

With respect to the second statement to the effect that notice need not be given prior to an emergency meeting, it is reiterated that notice must be given prior to all meetings. In the case of an emergency meeting, it is likely that the provisions of §99(2) described earlier would be applicable.

As requested, a copy of this opinion will be sent to the Board of Commissioners of the Halesite Fire 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:jm

cc: Board of Commissioners

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-848

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
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JOHN C. EGAN
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WALTER W. GRUNFELD
MARCELLA MAXWELL
STEPHEN PAWLINGA
BARBARA SHACK
GAIL S. SHAFFER
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 25, 1983

Ms. Harriett K. Tallmadge
Montgomery County Assessors'
Association
R.D. #1, Box 39
Fultonville, NY 12072

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. Tallmadge:

I have received your letter of January 19, in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry concerns the status of the Montgomery County Assessors' Association under the Open Meetings Law and whether meetings of the Association must be open to the public.

In my opinion, a response to your question hinges upon the definition of "public body". 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."

In my view, although the Association may be composed of public officials, it does not "conduct public business", nor does it perform a "governmental function". Therefore, I do not believe that the Association is a "public body" subject to the Open Meetings Law. As such, I do not believe that the Association is required to open its meetings 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-849

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

January 26, 1983

Mr. Dominic A. Ficarra
[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. Ficarra:

I have received your letter of January 21 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, residents of the West Genesee School District "were advised that a subcommittee of the Board of Education had conducted a meeting that had no notice as to the time and place the meeting was to take place". You wrote further that the subcommittee in question consists of four of the nine members of the Board of Education and that it submitted a report to the Board recommending that a particular elementary school should be closed. In addition, you indicated that apparently "only three of the four were in attendance at the unnoticed and unpublicized meeting".

You have raised questions regarding the status of the subcommittee under the Open Meetings Law and whether, if it violated the Open Meeting Law, its report would be "rendered null and void".

I would like to offer the following comments regarding your inquiry.

In terms of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in §97(2) of the Open Meetings Law. Perhaps the leading case on the subject involved a situation similar to that which you described in which a school board designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that the advisory committees in question which had no capacity to take final action fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During the debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body".

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §97(2) 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."

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies".

In view of the amendments to the definition of "public body", I believe that virtually any entity designed or created to serve as a body by a school board or any public body would fall within the requirements of the Open Meetings Law. I would also like to point out that a recent Appellate Division decision held that advisory committees designated by the executive head of the agency rather than a governing body of an agency are also subject to the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

In the context of your question, I believe that the subcommittee as you described would clearly constitute a public body. As such, the notice requirements found in §99 of the Open Meetings Law (see attached) must be met, and meetings of the subcommittee must in my view be convened open to the public.

Further, while a quorum of the School Board, a majority of its total membership, would be five, quorum requirements would also be applicable to the subcommittee (see General Construction Law, §41). Under the circumstances, a quorum of a subcommittee consisting of four members would be three. As such, I believe that the unannounced gathering to which you made reference was a meeting that fell within the scope of the Open Meetings Law and which should have been preceded by notice given in accordance with §99 of the Law.

Your remaining question involves the status of the subcommittee's report if the subcommittee violated the Open Meetings Law. In my view, action taken by a public body remains effective unless and until a court renders a contrary determination. In this regard, §102 of the Open Meetings Law provides a mechanism by which a person may seek judicial review. The cited provision states in part 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."

However, it is also noted that the same provision states that:

> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

As such, the Open Meetings Law does not provide for automatic nullification of action based upon a violation of the Open Meetings Law. Further, the language of §102 indicates that a court his discretionary authority to act in response to a violation of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-850

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

January 27, 1983

Ms. Hilary Gal
[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. Gal:

As you are aware, I have received your letter of January 4, which again pertains to the scope of §100(1)(f) of the Open Meetings Law. Please accept my apologies for the delay in response. After leaving a message for you, I hoped that you would call to provide more information concerning the background of your inquiries.

Your comments were written in response to an earlier advisory opinion that you requested, and their focus is upon the term "employment" as it might apply to discussions by public bodies relative to independent contractors. It is your view that "[T]he term 'employment' as used in the OML 100(1)(f) should be accorded the customary legal meaning of signifying the relationship between an employer and employee, in which the employer retains complete control over the performance of the work undertaken." In sum, you contend that the "relationship between the state as principal and an independent private party contracting with the state to perform services as a contractor does not constitute 'employment'" and that, therefore, a discussion regarding retaining a private contractor falls outside the scope of §100(1)(f) of the Open Meetings Law.

Based upon your comments, it appears that you have more legal expertise regarding the relationship between government agencies and independent contractors than I. Further, in view of the absence of case law on the specific subject matter at issue, it is possible that you may be correct.

However, if your contentions are accurate, I would question why the language of §100(1)(f) makes reference to discussions relative to a particular corporation as it does. Section 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..."

If the intent of §100(1)(f) is as you suggest, would the areas of consideration described in that provision (i.e., medical history, employment history, matters leading to appointment, etc.) make reference to a corporation at all?

In addition, I have always viewed the Freedom of Information and Open Meetings Laws as being based upon presumptions of openness, unless disclosure would result in harm, either to a governmental process or in terms of privacy. For example, if a public body engages in a review of particular persons who have applied for a position, discussions relative to their individual backgrounds, strengths and weaknesses, qualifications and the like have a bearing upon the privacy of those individuals. I would conjecture that you would agree that a discussion of that nature falls within the scope of §100(1)(f), for it deals with the employment history of particular persons and constitutes a matter leading to the employment of a particular person. From my perspective, analogous discussions concerning corporations that might contract with a public body involve similar considerations.

Also, by means of analogy, the Freedom of Information Law seeks to permit agencies to withhold records when disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. While the cited provision would not in my view apply to records concerning corporations, §87(2)(d) involves trade secrets and other records which, if disclosed, would "cause substantial injury to the competitive position" of a commercial enterprise. Some might view that provision as an attempt to permit agencies to withhold records when disclosure would result in an unwarranted invasion of corporate privacy. While the Open Meetings Law does not refer to trade secrets, perhaps §100(1)(f) was intended to apply to discussions which if publicly held would cause injury to the competitive position of commercial enterprises.

In another somewhat related area, one of the grounds for denial of access to records in the Freedom of Information Law involves inter-agency and intra-agency materials [see §87(2)(g)]. In this regard, the Appellate Division, Second Department, in Sea Crest Construction Corp. v. Stubing [442 NYS 2d 130, 82 AD 2d 546 (1981)], found that records submitted by a consulting firm to an agency based on a contractual agreement fell within the scope of §87(2)(g), even though the firm was not an "agency" as defined in §86(3) of the Freedom of Information Law. If under those circumstances, where records submitted by a contractor to government were considered to be "intra-agency" materials, might it not be inferred that the contractor was the agency's employee? I am not suggesting that the inference is correct or that I agree with the decision rendered in Sea Crest; nevertheless, it is possible that, in view of Sea Crest, such an analogy might be offered.

With respect to discussions of grant applications, the topic is in my view sufficiently diverse that the application of §100(1)(f) might be appropriately determined only on a case by case basis.

Lastly, it is suggested once again that you call me in order that we may discuss the factual background of your questions more fully. Such a discussion might result in greater consistency and, perhaps, agreement.

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-851

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

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 28, 1983

Mr. Joseph A. Glazer
[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. Glazer:

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

Your inquiry concerns the status of political caucuses conducted by the Ulster County Legislature, which consists of thirty-three members, twenty-six of whom represent one political party. According to your letter:

> "[S]ince this majority has become so large that any business conducted pertaining to policy and/or decision-making by the majority party during caucus normally constitutes a quorum of the members of the full legislature, the party in power splits in half to caucus, with one group meeting with the Chairman, and the other with the Majority Leader. These caucuses, now less than quorum, are not open to the public.
>
> "It appears that these two 'separate' caucuses discuss the same matters, as nearly all decisions that reach the floor of the Legislature have been decided beforehand, and no discussion ensues.

> "It appears that this is being done to avoid the Sunshine Laws."

You have requested an opinion regarding the situation.

In this regard, it is noted at the outset that §103 (2) of the Open Meetings Law states that the Law does not apply to "deliberations of political committees, conferences and caucuses". However, judicial interpretations of the Open Meetings Law indicate that not every gathering characterized as a "political caucus" is exempt from the Open Meetings Law. On the contrary, it appears that many gatherings traditionally described as political caucuses should now be considered as "meetings" subject to the Open Meetings Law that should be open to members of opposing political parties as well as the general public.

The case of Sciolino v. Ryan [103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 AD 2d 475, 440 NYS 2d 795 (1981)] dealt with a situation in which the majority members of a public body met to consider matters of public business in closed political caucuses during which both the lone minority member of the public body and the public were excluded. The Appellate Division, however, found that the exemption for political caucuses includes only discussions of purely political party business. It was also found that discussions of public business by a majority of the members of a public body, even though those individuals might represent a single political party, would constitute a "meeting" subject to the Open Meetings Law. More specifically, the Court found that:

> "[A]n expansive definition of a political caucus, as urged by respondents, would defeat the purpose of the Open Meetings Law that public business be performed in an open and public manner (Public Officers Law, §95), for such a definition could apply to exempt regular meetings of the Council from the statute. 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 479).

Based upon the Sciolino decision, if a caucus held to discuss public business consists of a majority of the County Legislature, i.e., at least seventeen, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law. In such a case, members of the minority party, as well as members of the public, would in my view have the right to attend.

However, if by "splitting" the majority of twenty-six, less than a quorum of the County Legislature attends either of the caucuses, I do not believe that the Open Meetings Law would be applicable. Stated differently, a gathering by members of a public body does not in my view constitute a "meeting" subject to the Open Meetings Law unless a quorum, a majority of the total membership of the public body, convenes for the purpose of conducting public business.

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-2772
OML-AO-852

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

February 1, 1983

Ms. Marcia Rubin
[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. Rubin:

I have received your letter of January 20 in which you raised a series of questions regarding the implementation of the Freedom of Information Law and, in a related sense, the Open Meetings Law, by the Williamsville School District.

Your first question is "[A]t what point does a document become public information and covered under the Freedom of Information Law?" In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which defines the term "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 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."

Due to the breadth of the language quoted above, it is my view that the Freedom of Information Law becomes applicable as soon as a "record" exists or comes into the possession of an agency, such as a school district. Therefore, if a document has not yet been reviewed or "adopted", for example, it is nonetheless a "record" subject to whatever rights of access might exist under the Freedom of Information Law.

Further, it is noted that 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) of the Law. Consequently, when a request for records is made, the question involves the extent, if any, to which its contents fall within one or more of the grounds for denial.

The second area of inquiry concerns the adequacy of Board policy #3300, a copy of which is attached to your letter. The policy, which is entitled "Public Access to Records", states that:

> "Access of residents of the Williamsville District to records of the District shall be consistent with the rules and regulations established by the State Committee on Public Access to Records and shall comply with all requirements of Section 88 (2) of the Laws of 1974."

I would like to offer several comments regarding the statement of policy.

First, it refers to "access of residents" of the District. Here I would like to point out that the Freedom of Information Law does not distinguish among applicants for records or those who might seek to request records. It has consistently been advised and 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, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Moreover, although §2116 of the Education Law states that District records are available to "qualified voters of

the district", it has been held that "[T]he Freedom of Information Law broadens the category of those to whom records are required to be made available beyond the disclosure required by Education Law, §2116" [Matter of Duncan v. Bradford Central School District, 394 NYS 2d 362, 363 (1977)]. As such, the Freedom of Information Law may be used by any person, and not only residents of the District, to obtain records from the District.

Second, the policy refers to "Section 88(2) of the Laws of 1974". The cited provision refers to the Freedom of Information Law as enacted in 1974. However, the Freedom of Information Law was repealed and replaced with a new statute enacted in 1977 and effective on January 1, 1978. Currently, §88 refers only to records of the State Legislature.

Third, the policy is in my view inadequate in many respects. Section 89(1) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations regarding the procedural implementation of the Law. In turn, §87(1) requires the School Board to adopt regulations in conformity with those promulgated by the Committee.

Rather than reviewing each area of deficiency, copies of this opinion, the Freedom of Information Law, and the Committee's regulations will be sent to you, as well as the School Board. In addition, to assist agencies regarding their responsibility to adopt procedures, the Committee has developed "model regulations" that enable agencies to comply by filling in the appropriate blanks. Copies of the model regulations will also be sent to you and the Board.

Your third question is whether, in an open meeting of the Board, the "audience is entitled under the law to receive a copy of the documents being discussed by the Board of Education at that time". You also asked whether reports discussed at an open meeting are available "after the meeting".

It is noted in this regard that the Open Meetings Law permits the public to attend and listen to deliberations of public bodies, such as school boards (see attached, Open Meetings Law, §95). However, the Open Meetings Law is silent with respect to public participation. Therefore, while a public body may permit public participation at meetings, it need not.

Further, in a technical sense, under the regulations required to be promulgated, requests for records should be directed to one or more designated "records access officers" (see §1401.2) during "regular business hours" (see §1401.4). Therefore, it is suggested that requests for records to be used at meetings be made prior to the meetings.

Perhaps most importantly, rights of access to the records considered at meetings are determined by the extent to which the grounds for denial might be applicable. It is also emphasized that the grounds for withholding records under the Freedom of Information Law may not be entirely consistent with the grounds for executive session listed in §100(1)(a) through (h) of the Open Meetings Law. Even though records might justifiably be withheld under the Freedom of Information Law, there may not be a ground for executive session under the Open Meetings Law.

By means of example, a memorandum from the Superintendent to the School Board in which the Superintendent recommends that a particular school be closed could be denied, for §87(2)(g) permits a denial with respect to intra-agency materials to the extent that such materials are reflective of advice or opinion. Nevertheless, when the issue is discussed by the Board, none of the grounds fro executive session would apply, and the matter would have to be discussed publicly.

In short, there is no general rule that can be cited regarding access to materials discussed at a meeting of the Board. If a request is made prior to a meeting, the records access officer would in my view be obliged to review the materials in their entirety to determine with portions, if any, could justifiably be withheld. Those portions might be deleted, while the remainder would be available. Therefore, if, for example, a memorandum contains advice as well as statistical or factual information, the advice might be deleted, while the statistical or factual information would be available.

I would also like to stress that the Freedom of Information Law is permissive; although certain records or portions of records may be withheld, there is no requirement that they must be withheld. As a consequence, many public bodies prepare extra packages of materials for the public that are distributed to board members in order that members of the public can have a better understanding of a discussion.

Following a meeting, often records that could have been withheld become available. A recommendation previously deniable might become the policy of an agency when it is reviewed and adopted. In such cases, it would become available under §87(2)(g)(iii) of the Freedom of Information Law, which grants access to inter-agency or intra-agency materials that are reflective of "final agency policy or determinations". Further, a review of the grounds for denial indicates that many are based upon potentially harmful effects of premature disclosure. Often, however, after a matter is discussed, the harmful effects of disclosure essentially disappear, and the records might, therefore, become available.

In addition, §101 of the Open Meetings Law requires that minutes of open meetings must be prepared and made available within two weeks.

Lastly, you asked whether school districts are required to "clock in" mail and whether "that act" would "qualify" records "as public information".

I know of no such specific requirement. However, I believe that most agencies operate under a procedure in which mail is generally "clocked in" or logged in some fashion. Additionally, as noted earlier, based upon the definition of "record", documents are "records" subject to rights of access as soon as they are "kept, held, filed, produced or reproduced by, with or for an agency..."

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

OML-AO-853

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

February 9, 1983

Ms. Jody Adams
[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. Adams:

I have received your letter of January 26 as well as a copy of your letter to the Hon. Angelo Mauceri, Deputy Administrative Judge of Suffolk County.

You have asked for my comments regarding the status of "informal nonpublic luncheons" relative to §2407 of the Uniform District Court Act and the Open Meetings Law.

Section 2407 indicates that the judges of the Suffolk County District Court "shall constitute a board of judges of the county". The cited provision also states that meetings of the Board shall be public and that its proceedings "shall be recorded by the secretary and shall be preserved".

On your behalf, I have attempted to obtain additional information regarding the application of §2407 of the Uniform District Court Act. In this regard, an official of the Office of Counsel at the Office of Court Administration indicated that the Board of Judges might not continue to exist due to various changes in the law enacted since 1962, the effective date of §2407. In addition, I spoke with Judge Mauceri's clerk, who indicated that the Board of Judges no longer continues to function.

If that is so, I do not believe that the gatherings that you described could be considered either meetings of the Board of Judges or meetings of a public body subject to the Open Meetings Law. Moreover, once again assuming that the information provided is accurate, it is my view that the luncheon meetings to which you made reference fall outside the scope of the any statute of which I am aware that would require that they be 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:jm

cc: Hon. Angelo Mauceri

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-854

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

February 14, 1983

Mr. William J. Keehan
[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. Keehan:

I have received your letter of February 8 and the correspondence attached to it.

You have asked that this office conduct an "investigation of illegal meetings held in violation of the 'Open Meetings Law'". According to your letter, the Town of Mohawk Board of Assessment Review held a series of "illegal meetings" in June and July of 1982.

I would like to offer the following remarks regarding your letter.

First, the Committee on Public Access to Records has neither the statutory authority nor the resources to conduct an "investigation". In short, §104 of the Open Meetings Law provides the Committee with the capacity to advise.

Second, although I believe that an assessment board of review is a "public body" subject to the Open Meetings Law [see attached, Open Meetings Law, §97(2)], it is possible that the gatherings to which you made reference might have legally been conducted outside the scope of the Open Meetings Law.

I have on several occasions since the enactment of the Open Meetings Law discussed the issue with representatives of the Office of Counsel of the Division of Equalization and Assessment, and I believe that we are in substantial agreement. In this regard, §103(1) of the Open Meetings Law provides that the Law does not apply to "judicial or quasi-judicial proceedings..." Having reviewed the functions of a board of assessment review and the relevant case law, this office has consistently advised that the deliberations of members of such a board regarding assessment complaints are quasi-judicial in nature and therefore outside the scope of the Open Meetings Law.

As indicated in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], which in part pertained to quasi-judicial proceedings of a zoning board of appeals, there is a distinction between that portion of the meeting in which a board of assessment review conducts its regular, administrative business and in which the board votes, and that portion of a meeting during which the board deliberates with respect to complaints on assessments. While the latter is in my view quasi-judicial in nature and therefore exempt from the Open Meetings Law, the remainder would not be quasi-judicial and would be subject to the Open Meetings Law in all respects.

In the context of your complaint, if the gatherings in question were "quasi-judicial proceedings" and were held to deliberate with respect to complaints or grievances, it would appear that the Open Meetings Law would not have been applicable. If that is so, no violation of the Open Meetings Law occurred. If, on the other hand, the Board met to consider other matters within its jurisdiction, it is possible that the Open Meetings Law might have been violated.

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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-854

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

February 14, 1983

Mr. William J. Keehan
[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. Keehan:

I have received your letter of February 8 and the correspondence attached to it.

You have asked that this office conduct an "investigation of illegal meetings held in violation of the 'Open Meetings Law'". According to your letter, the Town of Mohawk Board of Assessment Review held a series of "illegal meetings" in June and July of 1982.

I would like to offer the following remarks regarding your letter.

First, the Committee on Public Access to Records has neither the statutory authority nor the resources to conduct an "investigation". In short, §104 of the Open Meetings Law provides the Committee with the capacity to advise.

Second, although I believe that an assessment board of review is a "public body" subject to the Open Meetings Law [see attached, Open Meetings Law, §97(2)], it is possible that the gatherings to which you made reference might have legally been conducted outside the scope of the Open Meetings Law.

I have on several occasions since the enactment of the Open Meetings Law discussed the issue with representatives of the Office of Counsel of the Division of Equalization and Assessment, and I believe that we are in substantial agreement. In this regard, §103(1) of the Open Meetings Law provides that the Law does not apply to "judicial or quasi-judicial proceedings..." Having reviewed the functions of a board of assessment review and the relevant case law, this office has consistently advised that the deliberations of members of such a board regarding assessment complaints are quasi-judicial in nature and therefore outside the scope of the Open Meetings Law.

As indicated in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], which in part pertained to quasi-judicial proceedings of a zoning board of appeals, there is a distinction between that portion of the meeting in which a board of assessment review conducts its regular, administrative business and in which the board votes, and that portion of a meeting during which the board deliberates with respect to complaints on assessments. While the latter is in my view quasi-judicial in nature and therefore exempt from the Open Meetings Law, the remainder would not be quasi-judicial and would be subject to the Open Meetings Law in all respects.

In the context of your complaint, if the gatherings in question were "quasi-judicial proceedings" and were held to deliberate with respect to complaints or grievances, it would appear that the Open Meetings Law would not have been applicable. If that is so, no violation of the Open Meetings Law occurred. If, on the other hand, the Board met to consider other matters within its jurisdiction, it is possible that the Open Meetings Law might have been violated.

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
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2786
OML-AO-855

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

February 14, 1983

Ms. Pat Posner
New York Public Interest
Research Group, Inc.
5 Beekman Street
New York, NY 10038

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. Posner:

I have received your letter of February 3 and the materials attached to it.

The materials pertain to portions of the New York State Radiological Emergency Preparedness Plan concerning public information and education. You have asked that I review the materials and provide an opinion regarding "how the State and local governmentals and the utilities plan to relate to the public via the news media and how the working press will be handled".

I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. As such, I believe that I am obliged to restrict my remarks to the application of those statutes to the materials. From my perspective, the Open Meetings Law has minimal application to the content of the plan, and the Freedom of Information Law has but tangential relevance.

It is noted that the title of the Freedom of Information Law may be somewhat misleading, for it is not a statute that grants access to information per se; rather it is a statute under which a person may request records. Therefore, the Freedom of Information Law is not a vehicle by which a person is entitled to raise questions or otherwise request information from government that does not exist in the form of a record or records.

The only deficiency in the plan that I can envision relative to the Freedom of Information Law involves the intent to funnel information into and disclose information from a single source. While that alone would not conflict with the Freedom of Information Law, it is possible that records regarding a particular situation might be in the possession of a variety of agencies, both state and municipal.

In this regard, if, for example, a request for records is directed to one or more agencies other than the official spokesperson or agency, I believe that those agencies would nonetheless be required to respond in accordance with the Freedom of Information Law.

I would conjecture, however, that this deficiency would be minor, for records would likely be developed following an incident. Further, the Freedom of Information Law does not require that a response to a request for records be given immediately, but rather within five business days of its receipt [see attached, Freedom of Information Law, §89(3)].

With respect to the Open Meetings Law, it is conceivable that in the event of an incident, a public body, such as a municipal board, might convene an emergency meeting. So long as notice requirements are met (see attached, Open Meetings Law, §99), such a meeting could legally be convened, even on short notice.

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
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-856

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 16, 1983

Shirley L. Bachrach, Pres.
League of Women Voters of
Riverhead/Southold
Box 1054
Southold, NY 11971

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. Bachrach:

I have received your letter of February 10 in which you requested an advisory opinion regarding the application of the Open Meetings Law to a town zoning board of appeals.

Although you requested that an opinion be prepared in time for a meeting scheduled for February 15, it is noted that your letter did not reach this office until February 14. As such, it was all but impossible to respond in time for the meeting to which you made reference.

With respect to your question, 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.

It is noted that confusion regarding the degree of openness of zoning boards of appeals has arisen due to distinctions in the law between town and village zoning boards of appeals, for example, and city zoning boards of appeals. The Open Meetings Law in §103(1) states that its provisions do not apply to quasi-judicial proceedings. From my perspective, when a zoning board of appeals deliberates, it acts in a quasi-judicial manner. As such, it

would appear that the deliberations of zoning boards of appeals would be exempted from the Open Meetings Law. To further complicate the matter, in a decision regarding a city zoning board of appeals, it was found that the deliberations of such a board were indeed outside the scope of the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Nevertheless, I believe that the Law which governs the conduct of town and village zoning boards of appeals differs from that which governs city zoning boards of appeals.

To reiterate, §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, the 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 expansive decision of which I am aware that focused upon the issue as it concerns town zoning boards of appeals confirmed the advice of the Committee and held that a town zoning board 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 a copy 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, specifically 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.

Lastly, due to the confusion regarding meetings of zoning boards of appeals, the Committee has recommended legislation which if enacted would treat all such boards in the same manner as public bodies generally under the Open Meetings Law. Enclosed is a copy of the Committee's latest annual report on the Open Meetings Law, which contains the proposal.

As requested, this opinion and the Katz decision cited above will be sent to Mr. Pell, Southold Town Supervisor and Mr. Tasker, Town Attorney.

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: William Pell, III
Robert Tasker, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-857

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 15, 1983

Mr. Wayne A. Hall
Newburgh Bureau Chief
40 Mulberry Street
Middletown, NY 10940

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. Hall:

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

According to your letter, on December 16, the City Council of the City of Newburgh, "acting as the new IDA, discussed and adopted bylaws in executive session". You also indicated that the Mayor, "as a private citizen", was named chairman. Following the executive session, you indicated that when the Council voted in public to create the IDA, there was no discussion of the by-laws or the chairmanship.

I would like to offer the following comments regarding the situation as you described it.

First, whether the group in question was acting as the City Council or as the board of an industrial development agency, it was in my view a "public body" required to comply with the Open Meetings Law. As a governing body, it is clear that meetings of the City Council are subject to the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Further, since an industrial development

agency is a "corporate governmental agency, constituting a public benefit corporation" [see General Municipal Law, §856(2)], its board would also be a public body subject to the Open Meetings Law.

Second, as you are aware, a public body cannot enter into an executive session to discuss the subject of its choice. Moreover, a public body must accomplish a procedure during an open meeting before it may convene an executive session. Section 100(1) of the Open Meetings Law states in relevant part that:

> "[U]pon a majority vote of its total memberhsip, 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, prior to entry into an executive session, it is clear that a motion to enter into an executive session must be made during an open meeting, that the motion must identify in general terms the subject to be considered, and that the motion must be carried by a majority vote of the total membership.

Third, §100(1)(a) through (h) of the Open Meetings Law specify and limit the areas of discussion that may appropriately be considered during an executive session. I do not believe that a discussion of the by-laws of an IDA would fall within any ground for executive session. In addition, under the circumstances, it does not appear that a discussion of the IDA's chairman would fall within the scope of any ground for executive session.

Lastly, you intimated that since the Council ratified its action by means of a public vote, "it would seem that they had rectified any mistakes they made". You may be correct, for §102 of the Open Meetings Law, in the event of a lawsuit, permits a court to nullify action taken in violation of the Open Meetings Law. In this instance, although discussions may have been improperly held during an executive session, action was nonetheless taken during an open meeting.

In this regard, it is noted that the Committee has recognized this potential "loophole" in the Open Meetings Law. In its latest annual report, the Committee pointed our that if a public body takes action behind closed doors in violation of the Open Meetings Law, a court may declare the action null and void. The Committee, however, noted that:

> "[B]ut what if a public body deliberates toward final action behind closed doors in violation of the Law, and later takes 'action' during an open meeting. In such a situation the deliberative process, which is at the heart of the Open Meetings Law, might be closed in violation of the Law, but there may be nothing to invalidate if 'action' is taken during an open meeting. To avoid the most significant penalty that may be imposed under the Law, a public body might deliberate secretly in violation of the Law but escape the penalty by taking action in public."

Consequently, the Committee recommended that §102 of the Law be amended to permit a court to nullify action "when any portion of a meeting required to be open was closed in violation of this article". I have enclosed a copy of the report for your consideration.

In addition, as requested, copies of this opinion will be sent to Mayor Joan Shapiro and William Kavanagh, Corporation Counsel.

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: Mayor Joan Shapiro
William Kavanagh

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2800
OML-AO-858

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

February 18, 1983

Mr. Fredric Steven Harri
[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. Harri:

I have received your letter of February 14, in which you raised a series of questions that relate to the Freedom of Information and Open Meetings Laws. An attempt will be made to respond to each.

Your first question involves a situation in which "a resident of a school district petitions the Board of Education to overrule the Superintendent's ruling on a matter of transportation", and whether the Board may consider the issue during an executive session.

In this regard, it is noted that the Open Meetings Law (see attached) does not permit a public body, such as a board of education, to enter into an executive session to discuss the subject of its choice. On the contrary, §100(1) in paragraphs (a) through (h) specifies and limits the topics that may appropriately be considered during an executive session.

From my perspective, it is unlikely that a discussion regarding transportation, if it involves policy matters, routes or other matters unrelated to particular individuals, could be conducted during an executive session. Under those circumstances, no ground for executive session could in my

view be appropriately cited. If, on the other hand, the issue pertains to the performance of a school bus driver or a particular student, for example, an executive session might properly have been convened [see e.g., §100(1)(f)]. Without greater specificity regarding the nature of the discussion, it is difficult to provide a specific response.

It is noted that, prior to entry into an executive session, a public body must accomplish a procedure during an open meeting. Specifically, §100(1) of the Open Meetings 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..."

As such, before entering into an executive session, a motion should indicate the subject to be considered. Further, I believe that the subject described should be consistent with one or more of the bases for entry into executive session.

Your second question is based upon the assumption that the Board could properly enter into an executive session. Under those circumstances, you asked whether the Board could "bar the petitioner from its discussion of the petition, after hearing from the petitioner".

If there is a proper basis for entry into an executive session, the Board in my view could exclude any person, including the petitioner from an executive session. 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 persons authorized by the public body."

Therefore, a public body may exclude from an executive session all but its own members, including a person who may have initiated a discussion or who may be the subject of a discussion.

The third question is whether a board of education may vote during an executive session, or whether it must return to an open session for the purpose of voting.

While public bodies may generally vote during executive sessions, the courts have on several occasions interpreted the Education Law, §1708(3), to prohibit a school board from taking action during an executive session [see e.g., Sanna v. Lindenhurst Board of Education, 85 AD 2d 157, aff'd ___ NY 2d, November 16, 1982], except in specified situations (i.e., tenure proceedings). As such, in most instances, a school board must vote during an open meeting.

The fourth question pertains to requirements "for reporting the result of the Board of Education to the petitioner". In this regard, §101 of the Open Meetings Law contains requirements regarding the preparation of minutes.

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."

When action is taken during an executive session, which, as indicated earlier, should not generally be so in relation to school boards, §101(2) states in part 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..."

Further, §101(3) states that minutes of open meetings must be prepared and made available within two weeks of such meetings, and that minutes of action taken during executive sessions must be prepared and made available within one week of the executive sessions.

Your last area of inquiry concerns a situation in which the Board requests a document from the Superintendent, who in turn seeks the document from staff. The document later apparently is used in an "oral discussion" at an open meeting. The question is whether the document is available to the public.

Here I direct your attention to the Freedom of Information Law (see attached). 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 categories of denial appearing in §87 (2)(a) through (h) of the Law.

Without greater specificity regarding the nature of a document, specific direction regarding rights of access cannot be offered. However, it is noted that the bases for entry into an executive session in the Open Meetings Law are not necessarily consistent with grounds for denial of access to records in the Freedom of Information Law. Therefore, in some instances, even though a discussion might be required to be discussed in public, it is possible that records involved in the discussion might justifiably be withheld.

By means of example, if staff sent to the Board a memorandum containing an opinion or recommendation regarding transportation policy, that record might be deniable under the Freedom of Information Law [see §87(2)(g)]. Nevertheless, discussion of the topic by the Board would not likely fall within any ground for executive session. Once again, however, without more information regarding the nature of a record, specific advice cannot be given.

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

FOML-AO-859

162 WASHINGTON AVENUE, ALBANY, NEW YORK 1223
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 1, 1983

Mrs. Raye Grant
Buchanan-Verplank Parent-
Teachers Club
160 Westchester Avenue
Buchanan, NY 10511

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 Mrs. Grant:

I have received your note of February 20 and appreciate your kind words.

As a parent representative to a school board, you wrote that it is difficult to report on board activities, for the executive sessions are often "longer than the open meetings sessions".

While the board may be acting fully within the scope of the Open Meetings Law, I would like to offer the following comments.

First, there is a procedure that must be accomplished during an open meeting before an executive session may be conducted. Specifically, §100(1) of the Open Meetings 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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2808
OML-AO-860

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

March 1, 1983

Mr. Joseph Jaffe
Levine, Silverman & Jaffe
33 Chestnut Street
P.O. Box 390
Liberty, NY 12754

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. Jaffe:

I have received your letter of February 18, which reached this office on February 25.

You have requested an advisory opinion regarding the following question:

> "[A]fter a Board of Education has voted to discuss a personnel matter in executive session, what information is required to be put into the public record at the conclusion of the executive session, and what information may not be put into the public record concerning the ongoings of the executive session?"

I would like to offer the following comments regarding your inquiry.

As a general rule, a public body must prepare minutes of meetings, and §101 of the Open Meetings Law contains what may be characterized as minimum requirements concerning the contents of minutes. With respect to 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."

Section 101(2) contains provisions regarding minutes of executive sessions. That 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."

Based upon the language quoted above, a public body must generally prepare minutes of executive sessions only when action is taken during an executive session. Therefore, if, for example, a public body enters into an executive session and merely discusses public business but takes no action, minutes of the executive session need not be compiled.

It is important to point out, however, 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 must be taken behind closed doors (i.e., see §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:

> "...any 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)].

Most recently, the Appellate Division, Second Department also found that a school board may act only by means of a vote taken during an open meeting. Although the Court of Appeals affirmed, it did not deal specifically with the so-called "open vote" provision of the Education Law [see Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd ___ NY 2d ___ (1982)]. Nevertheless, since §1708(3) of the Education Law is apparently "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can generally act only during an open meeting.

Therefore, in conjunction with your question regarding the information that must be "put into the record" after an executive session, since no action can be taken during an executive session, presumably no record is required to be compiled.

The second aspect of your question involves what "may not be put into the public record concerning the ongoing of an executive session."

Here I direct your attention to the Freedom of Information Law (see attached). Assuming that a record is prepared regarding discussions that occurred during an executive session, it would in my view be subject to the Freedom of Information Law.

Section 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 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."

Therefore, in my view, the mere creation of a record by a school board would bring the record within the scope of the Freedom of Information Law. Moreover, it has been held that notes taken at a meeting fall within the definition of record and, consequently, fall within the scope of the Freedom of Information Law [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

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) of the Law. However, it is emphasized that the Law is permissive; while an agency may withhold records in accordance with the grounds for denial, there is generally no obligation to do so, even if records may be withheld.

In my view, the only instances in which records must be withheld involve situations in which a statute prohibits disclosure. In those cases, §87(2)(a) of the Freedom of Information Law, which pertains to records that are "specifically exempted from disclosure by state or federal statute", would apply.

By means of example, if a school board convenes an executive session to discuss the medical history of a particular student, records identifiable to the student created regarding the discussion could not in my view be disclosed, for federal law prohibits disclosure of such records (see Family Educational Rights and Privacy Act, 20 U.S.C. §1232g).

As a general rule, however, if a record exists, unless the record falls within the scope of a statute prohibiting disclosure, I believe that the record may be disclosed.

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.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-861

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

March 4, 1983

Pamella L. Smith
Town Clerk
Town of Franklinville
Franklinville, NY 14737

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. Smith:

I have received your recent letter and thank you for your kind words.

According to your letter, the Town Board of the Town of Franklinville is attempting to adopt a resolution that would forbid you, as Town Clerk, from using a tape recorder during its meetings. You have requested an advisory opinion regarding the legality of such a resolution and your right as a Town Clerk to employ a tape recorder.

In my view, assuming that you seek to employ a battery-operated, cassette tape recorder, I do not believe that the Town Board can prohibit you or any member of the public from using such a tape recorder in an inconspicuous manner at meetings of the Board.

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.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2823
OML-AO-862

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

March 8, 1983

Mrs. Martha Weale
[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 Mrs. Weale:

I have received your correspondence of March 7, which concerns the Addison Central School District.

Your initial question is whether this office will "check the legality of the regularity with which executive sessions of the Board of Education are held".

Please be advised that the Committee on Public Access to Records does not have the resources or the authority to "investigate" with respect to either of the statutes it oversees, the Freedom of Information and the Open Meetings Laws. Nevertheless, I would like to offer general comments regarding executive sessions.

First, §97(3) of the Open Meetings Law (see attached) defines "executive session" to mean a portion of an open meeting during which the public may be excluded.

Second, the Open Meetings Law contains a procedure that must be followed by a public body during an open meeting before it enters into an executive session. Specifically, §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 in my view that an executive session is not separate and distinct from a meeting, and that a public body must indicate in general terms in a motion made and carried during an open meeting the subject or subjects to be considered during an executive session.

Third, a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, §100(1) of the Law specifies and limits the areas of discussion that may be appropriately considered during an executive session. It is suggested that you review the eight grounds for executive sessions.

Fourth, it appears that many of the executive sessions deal with personnel matters. In this regard, §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..."

From my perspective, if personnel matters are discussed generally or in terms of policy, it is unlikely that an executive session could be held. Section 100(1)(f) would in my opinion apply only to matters specified in its language when those matters involve a "particular" person.

Your second question is general, for you have requested suggestions regarding the means by which an interested citizen can "effect professional conduct and fiscal responsibility by administrative personnel employed by Addison Central School District". In this regard, I direct your attention to the Freedom of Information Law (see attached).

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) of the Law.

With respect to fiscal responsibility, I believe that books of account, ledgers, checks, contracts and similar records regarding the expenditure of public monies are open to the public [see §87(2)(g)(i)]. Perhaps a review of those materials would enable you or any other interested person to learn of the financial condition and transactions of the District.

Several of the notations contained within the attachment to your letter appear to deal with salaries and other expenditures concerning District employees. Here I would like to point out that §87(3)(b) of the Freedom of Information Law requires that each agency maintain a payroll record which identifies each officer or employee of the District by name, public office address, title and salary. By reviewing the payroll record required to be prepared under the Freedom of Information Law, you could determine the salaries of District employees.

Further, as indicated earlier, records of payments made to individuals as well as contracts between individuals and the District are in my view available. Even though such records might identify particular persons, based upon judicial interpretations of the Freedom of Information Law, such records are in my opinion likely available. One of the grounds for denial in the Freedom of Information Law pertains to records which if disclosed would result in "an unwarranted invasion of personal privacy". Nevertheless, the courts on several occasions have found, in brief, that records relevant to the performance to the official duties of public employees are available

[see e.g., Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1979); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980]. As such, it would appear that many of the events that you described would be referenced in records, which, in turn, would in most instances be available under the Freedom of Information Law.

Enclosed for your consideration is a copy of an explanatory pamphlet dealing with both the Freedom of Information Law and the Open Meetings Law. If you would like additional copies, they are available on request.

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-863

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

March 9, 1983

Mr. Robert W. Tasker
Town Attorney
Town of Southold
425 Main Street
Greenport, LI, NY 11944

Dear Mr. Tasker:

I have received your letter of February 24 concerning an advisory opinion rendered at the request of Shirley L. Bachrach on February 16.

It is your view that the opinion indicating that deliberations of a town zoning board of appeals must be conducted open to the public is erroneous.

In this regard, it is reiterated that the decision rendered in Katz v. Town of Mamaroneck (see attached) is the only "expansive" decision of which I am aware that deals with zoning boards of appeals and the relationship between the Town Law and the Open Meetings Law. I would like to point out, too, that the issue of openness was argued twice in Katz due to reliance by the zoning board of appeals on the decision rendered in Orange County Publications, Division of Ottaway Newspapers, Inc. v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As you are aware, the Newburgh decision involved a city zoning board of appeals. There is no provision of law that deals specifically with the capacity to open or close a meeting of a city zoning board of appeals. Consequently, certainly I agree with the finding of the court that deliberations of city zoning boards of appeals would fall within the exemption for quasi-judicial proceedings appearing in §103(1) of the Open Meetings Law. The court in Katz, however, stressed that the requirement of openness

was not based upon a construction of the Open Meetings Law, but rather upon §267 of the Town Law. In a technical sense, I agree that a closed meeting of a town or village zoning board of appeals would not violate the Open Meetings Law, as indicated in Independent Church v. Zoning Board of Appeals of the Village of Muttontown [81 AD 2d 585, motion for leave to appeal denied, 54 NY 2d 609 (1981)]. Nevertheless, based upon Katz, it would appear that the Town Law might nonetheless be violated.

As requested, enclosed is a copy of the Committee's most recent annual report to the Legislature on the Open Meetings Law. The report points out the distinction between city zoning boards of appeals which operate without specific statutory direction in terms of openness, and the provisions of the Town Law and Village Law that deal specifically with meetings of their respective zoning boards of appeals. The Committee further recommended, based upon considerations of public policy, that zoning boards of appeals should be required to operate under the same conditions of openness, as well as the same capacity to enter into executive sessions, as public bodies generally.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2837
OML-AO-864

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

March 16, 1983

Mr. John B. Schamel
New York Educators Association
Elmira Service Center
Mark Twain Building - Suite 200
N. Main and W. Gray
Elmira, New York 14901

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. Schamel:

I have received your letter of March 7, as well as the materials attached to it. You have requested assistance regarding a request made under the Freedom of Information Law directed to the Odessa Central School District.

Specifically, in a letter dated February 28, you requested the following records from the District's records access officer:

> "1. A copy of the form filled out by Jim Lewis for his vacation day on June 25, 1982.
>
> 2. A copy of the minutes taken by the Superintendent of any other Board member or administrator at Executive Board sessions on June 24, 1982, as it relates to discussions concerning certain teachers playing golf.

> 3. Copies of all vouchers for mileage, submitted voucher forms or any other means of reimbursement for mileage claimed by any administrator within the Odessa Central School District for a period from July 1, 1981 through February 15, 1983."

In response to your request, on March 3, James E. Lewis, District Clerk, wrote that:

> "[T]he Odessa-Montour Central School District has received your letter requesting information under the Freedom of Information Law, Article 6 of the Public Officers Law. The district has a Board Policy that requires requests for information to be on the prescribed form."

Based upon the facts described above, I would like to offer the following comments.

With regard to the use of a form, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot validly be cited as a basis for withholding or delaying access to records. Section 89(3) of the Freedom of Information Law merely requires that a request be made in writing that "reasonably describes" the records sought. Therefore, in my view, any request made in writing that reasonably describes records should suffice. I believe, too, that the purpose of the Freedom of Information Law is to facilitate the process by which records are made available by government. A requirement that a specific form be used would in my opinion likely have the opposite effect in some cases. For instance, if this office required that a form be completed, a member of the public in Odessa would be required to write to this office, request the form, have the form sent to Odessa, require the applicant to complete it and return it to Albany. In short, such a procedure would simply involve an unnecessary amount of time.

In terms of rights of access to the records requested, I would like to offer the following remarks.

It is noted initially that 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) of the Law.

The first aspect of the request involves a form completed for use of a vacation day by a named individual. In my view, rights of access are dependent upon the nature and content of the form, for two grounds for denial may be relevant.

Section 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. Although 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. The form in question could likely be characterized as "intra-agency material". If it merely contains a request to use vacation time, I believe that it would be deniable, for it would not contain any accessible information as described in subparagraphs (i), (ii) or (iii) of §87(2)(g). If, however, the form contains an indication of approval or disapproval of the request, that aspect of the form would be available, for it would in my opinion represent a final agency determination.

The other ground for denial of possible relevance is §87(2)(b), which permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". If, for example, the form included a description of the proposed use of vacation time, it is possible that disclosure of that portion of the form might constitute an unwarranted invasion of personal privacy.

The second aspect of the request involves minutes of an executive session pertaining "to discussions concerning certain teachers playing golf". At this juncture, I direct your attention to the Open Meetings Law.

In terms of the nature of the discussion, "teachers playing golf", it is in my view questionable whether an executive session could appropriately have been held. The only ground for executive session that might have been applicable is §100(1)(f). That provision 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..."

From my perspective, §100(1)(f) is applicable only when one or more of the topics described therein is considered with respect to a "particular person". Whether §100(1)(f) could appropriately have been invoked would have been dependent upon the specific nature of the discussion.

With regard to minutes, as a general rule, §101 of the Open Meetings Law contains what may be characterized as minimum requirements concerning the contents of minutes. With respect to 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."

Section 101(2) contains provisions regarding minutes of executive sessions. That 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."

Based upon the language quoted above, a public body must generally prepare minutes of executive sessions only when action is taken during an executive session. Therefore, if, for example, a public body enters into an executive session and merely discusses public business but takes no action, minutes of the executive session need not be compiled.

It is important to point out, however, 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 must be taken behind closed doors (i.e., see §3020-a of the Education Law concerning tenure).

Section 105(2) of the Open Meetings Laws 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, it has been held that:

> "...any 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 Educaion, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959)].

Most recently, the Appellate Division, Second Department also found that a school board may act only by means of a vote taken during an open meeting. Although the Court of Appeals affirmed, it did not deal specifically with the so-called "open vote" provision of the Education Law [see Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd ___ NY 2d ___ (1982)]. Nevertheless, since §1708(3) of the Education Law is apparently "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can generally act only during an open meeting.

Consequently, if no action was taken during the executive session, minutes need not have been prepared. If action was taken, it should in my opinion have occurred during an open meeting and recorded in minutes.

The last aspect of your request involves claims for reimbursement, such as vouchers, for mileage submitted by District administrators within a specified period.

In my opinion, vouchers and similar records regarding claims for reimbursement are available. Although such records might constitute intra-agency materials, as indicated earlier, statistical or factual information found within such materials are available under §87(2)(g)(i). Moreover, although the vouchers would identify the administrators who submitted them, based upon judicial interpretations of the Freedom of Information Law concerning the privacy of public employees, disclosure would likely result in a permissible and not an unwarranted invasion of personal privacy

[see e.g., Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1979); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 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: James E. Lewis
School Board

OML-AO-865

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO :Ken Mackintosh March 17, 1983

FROM :Bob Freeman

SUBJECT :Status of Advisory Body under the Open Meetings Law

You have requested my opinion with respect to the status of an advisory committee created by a county legislature which is composed largely of members of the public.

In this regard, it is noted that there was substantial controversy under the Open Meetings Law as originally enacted regarding the status of committees, subcommittees and similar advisory bodies that have only the capacity to advise and no authority to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 97(2) of the 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."

The original definition referred to entities that "transact" public business; the current definition refers to entities that "conduct" public business. Moreover, there was no reference in the original definition to committees or subcommittees, for example.

Based upon the changes in the Law, the specific language of the current definition of "public body" and its judicial interpretation, I believe that a committee, such as that which you described, would constitute a "public body" subject to the Open Meetings Law.

I would like to point out, too, that all public bodies, including committees, are required to comply with §99 of the Open Meetings Law concerning notice of meetings.

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) concerns meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed 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.

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2841
OML-AO-866

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

March 17, 1983

Ms. Jody Adams
[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. Adams:

I have received your letter of March 8 in which you requested that I comment with respect to a request directed to Richard S. Zummo regarding the Suffolk County Criminal Justice Coordinating Committee.

According to the application attached to your letter, you requested a listing of the members of the Coordinating Committee and their addresses. Further, you asked to be placed on a mailing list to receive notices of meetings as well as agendas or materials to be used at meetings of the Coordinating Committee.

In response, Mr. Zummo wrote that there is no requirement that a mailing list for the purpose of receiving notice be maintained, nor is the public entitled to a "meetings packet". Although Mr. Zummo forwarded a list of the names and addresses of members of the Coordinating Committee, he indicated that there would be a charge of "$.35 per copy".

I would like to offer the following comments regarding the correspondence between you and Mr. Zummo.

First, I agree that there is no requirement that a mailing list be developed for the purpose of sending notices of meetings to members of the public. The requirements concerning notice of meetings are found in §99 of the Open Meetings Law. The cited provision generally 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. Mr. Zummo identified the locations where notices will be posted.

I would like to point out, too, that the provisions concerning notice require only an indication of the time and place of a meeting. There is nothing in the Open Meetings Law that requires that the subject matter to be discussed at a meeting be included in a notice. Further, there is no requirement of which I am aware concerning the creation of agendas prior to a meeting, even though such materials are generally prepared and made available.

Second, with respect to Mr. Zummo's comment that the public is not entitled to a "meetings packet", I disagree with his contention due to its breadth.

From my perspective, the records contained within a meetings packet would be subject to whatever rights of access might exist under the Freedom of Information Law. While it is possible that some aspects of the materials might justifiably be denied, it is equally possible that various aspects of the contents of such materials might be accessible to any person.

It is suggested that, prior to a meeting of the Coordinating Committee, you request the packet for the purpose of obtaining those aspects of its contents that are available under the Freedom of Information Law.

Third, Mr. Zummo wrote that the fees for copying would be thirty-five cents per copy. In this regard, as you are aware, §87(1)(b)(iii) of the Freedom of Information Law states that the maximum fee that may be assessed is twenty-five cents per photocopy, unless a different fee is prescribed by statute. In my view, it is unlikely that any statute under the circumstances is applicable that would permit an assessment of a fee of thirty-five cents per photocopy.

Lastly, your request was made on February 11, but Mr. Zummo responded on March 3. In this regard, the Freedom of Information Law and the regulations prescribed by the Committee contain time limits for responses to requests. Specifically, §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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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: Richard S. Zummo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-867

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

March 18, 1983

Ms. Bette Smith
[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. Smith:

I have received your letter of March 8 in which you raised questions regarding the Open Meetings Law.

Specifically, you have asked whether the Newburgh Planning Board may enter into executive sessions, and whether the Zoning Board of Newburgh is considered a "quasi-judicial body".

I would like to offer the following comments regarding your questions.

First, the Open Meetings Law is applicable to public bodies. 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 language quoted above, I believe that both the Planning Board and the Zoning Board of Appeals are "public bodies" subject to the Open Meetings Law.

Second, §98(a) of the Open Meetings Law requires that all meetings of public bodies be open to the general public. Further, based upon the definition of "meeting" appearing in §97(1), all meetings must be convened as open meetings.

Third, the discussions held by public bodies must generally be held during open meetings. However, §100(1) lists eight areas of discussion that may appropriately be considered during a closed or "executive" session. Unless and until a topic arises that may properly be discussed during an executive session, a public body must in my view conduct its business open to the public. Therefore, with respect to the planning board, executive sessions may be held only in accordance with §100(1) of the Open Meetings Law.

With respect to the Zoning Board of Appeals, certain aspects of its proceedings may be characterized as "quasi-judicial". Here I direct your attention to §103(1) which states that the Open Meetings Law does not apply to "judicial or quasi-judicial proceedings..." Therefore, to the extent that the Zoning Board of Appeals engages in quasi-judicial proceedings, those proceedings are in my view outside the scope of the Open Meetings Law.

It is noted that the leading decision regarding the exemption for quasi-judicial proceedings involved the City of Newburgh Zoning Board of Appeals. In that decision, the Court sought to distinguish those portions of a meeting which may be considered quasi-judicial from the remaining portions that would be subject to the Open Meetings Law. Specifically, the Court stated 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 nonjudicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals...Accordingly, pur-

suant to subdivision 1 of section 103 of the Public Officers Law, the deliberations of the Newburgh Board of Zoning Appeals as to the zoning variances are not subject to the Open Meetings Law" [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409 at 418, aff'd 45 NY 2d 947 (1978)].

Enclosed for your consideration are copies of 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

Encs.

cc: Planning Board
Zoning Board of Appeals

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2846
OML-AO-868

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

March 21, 1983

Mr. Joseph Jaffe
Levine, Silverman & Jaffe
33 Chestnut Street
P.O. Box 390
Liberty, NY 12754

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. Jaffe:

I have received your letter of March 4 in which you requested assistance from this office.

Specifically, you have requested a response to the following question:

> "[I]f a Board of Education has properly voted to discuss a particular person in a particular personnel area and does so at an Executive Session at which no action is taken, are there any statutory or other proscriptions on individual members making public that which was discussed at the Executive Session?"

I would like to offer the following comments regarding your inquiry.

First, from my perspective, neither the Freedom of Information nor the Open Meetings Laws generally prohibits a member of a board of education from disclosing information obtained by that individual during a discussion held

during an executive session. Further, while the Freedom of Information Law permits certain records to be withheld, it does not generally require that records must be withheld, even when a ground for denial may appropriately be asserted. Similarly, under the Open Meetings Law, while a topic might fall within a ground for discussion during an executive session, there is no requirement that the topic must be discussed during an executive session.

The only instances in which the permissive aspects of those statutes would not apply, in my opinion, would involve situations in which disclosure is prohibited by state or federal statute. For example, with respect to discussions concerning a particular student, the Family Educational Rights and Privacy Act, commonly known as the Buckley Amendment, would often preclude a board member from publicly discussing information identifiable to an individual student.

Second, the only provision that may be relevant to your inquiry of which I am aware is §805-a(1)(b) of the General Municipal Law which states that:

> "[N]o municipal officer or employee shall:
>
> b. disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests..."

Since the jurisdiction of the Committee on Public Access to Records is limited to advising under the Freedom of Information and Open Meetings Laws, I am unable to offer advice with respect to the application of the General Municipal Law to your inquiry. However, it is suggested that you contact Ken Pirro, an attorney for the Department of Audit and Control who is responsible for providing advice in this area. He can be reached at (518) 474-3517.

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

RJF:PPB:jm
cc: Ken Pirro

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2860
OML-AO-869

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

April 1, 1983

Ms. Carol Mailloux
[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. Mailloux:

I have received your letter of March 18 regarding a response to an appeal following a denial of a request for minutes and tape recordings of a meeting held by the Lindenhurst Board of Education on March 2.

Specifically, Dr. Harry Burggraf, appeals officer for the District, indicated that your request would be granted "within a reasonable time after the April 13, 1983 Board meeting". As such, he wrote that he affirmed the earlier action taken by the records access officer. Further, according to your letter, Dr. Burggraf failed to follow the requirements of the Freedom of Information Law relative to appeals.

In this regard, you have requested an opinion regarding Dr. Burggraf's "attitude of disregard", the sufficiency of his determination on appeal, and the duties of an appeals officer.

First, it is emphasized that the issues raised are virtually the same as those discussed in an advisory opinion that was sent to you on December 22, 1982. Since no copy of that opinion was sent directly to Dr. Burggraf, I will forward a copy to him.

Second, the Freedom of Information Law and the Open Meetings Law in my opinion clearly delineate the responsibilities of the District and the Board regarding both tape recordings and minutes of meetings.

With respect to minutes, as indicated on December 22, §101(3) of the Open Meetings Laws states that:

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting..."

As such, minutes of open meetings must be prepared and made available within two weeks of meetings, whether or not the minutes have been approved.

In recognition of the possibility that some public bodies might not meet within two weeks and therefore might not have the capacity to approve minutes within that time, it has been suggested that, to comply with the Law, minutes should be prepared and made available within the appropriate time period but that they may be marked as "unapproved", "non-final", "draft", for instance. By so doing, the requirements of the Open Meetings Law can be met; concurrently, members of the public body who receive the minutes are aware that the contents may be changed.

With respect to access to tape recordings of a meeting, it has been held judicially that a tape recording of an open meeting is a "record" that is available [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978].

It is difficult to envision a rationale for delaying access to a tape recording until minutes have been approved. Minutes as initially prepared may be subject to review, correction, or modification, for example. Nevertheless, the contents of a tape recording would not change, regardless of the nature of minutes that may be developed following a meeting.

Third, I believe that the responsibilities prescribed by the Freedom of Information Law regarding appeals are also clear. The applicable provision is §89(4)(a), which provides in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within seven business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on public access to records a copy of such appeal and the determination thereon."

Having reviewed our files of appeals from March, I do not believe that the District or Dr. Burggraf complied with the requirement that copies of appeals and the ensuing determinations be sent to this office.

Further, with regard to Dr. Burggraf's determination, I believe that it was deficient.

The language of §89(4)(a) indicates that an appeals officer has two choices when rendering a determination on appeal. One choice involves "fully" explaining the reasons for further denial. From my perspective, no such explanation was given. It is also noted that a denial can in my view be based only upon one or more grounds for denial listed in §87(2)(a) through (h) of the Freedom of Information Law. No mention was made of any ground for denial. The other choice is to "provide access to the record sought", which has not occurred.

Lastly, in terms of the "disregard" for the law, I can only state that, in terms of your request, both the Open Meetings Law and the Freedom of Information Law provide clear direction that could easily be carried out. In addition, the recalcitrance on the part of the District in view of the fact that the meeting to which the records sought relate was open to the public is particularly difficult to understand.

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: Dr. Harry Burggraf
School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-870

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

April 1, 1983

Mr. Michael A. Connors
[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. Connors:

I have received your letter of March 17 in which you requested an advisory opinion under the Open Meetings Law regarding the practices of the Board of Education of the Cheektowaga/Sloan Union Free School District.

According to your letter, at a recent meeting "the Board moved to go into Executive Session for the purpose of discussing policies and community relations". Your question is whether an executive session can be "legally held for either or both of those purposes."

In my view, neither of the two topics that you described could appropriately be discussed during an executive session.

Paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. Unless and until one or more of those subjects arise, a public body must in my opinion discuss its business in public. Since "policies and community relations" would not fall within any of the stated grounds for executive session, presumably those matters should have been discussed during an open meeting.

Your second area of inquiry concerns the procedure that must be followed prior to entry into an executive session. Specifically, you asked whether it is "suffi- for the Board of merely proclaim as the purpose, 'contractual matters' or 'personnel matters' or 'pending litigation' or must there be some additional identification of the subject matter of the session?"

I do not believe that a statement of the purposes for entry into executive session as you described them would be sufficient.

It is noted that §100(1) of the Open Meetings Law prescribes a procedure that must be accomplished by a public body during an open meeting before an executive session may be convened. 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..."

From my perspective, the requirement that a motion identifying the general area of the subject to be considered is intended to enable the public to know whether the subject indeed falls within a ground for executive session. Identification of topics as "contractual matters" or "personnel matters" without more would not in my view indicate to the public whether those subjects qualify for consideration in executive session.

With respect to "contractual matters", it is impossible to know without greater description what the nature of such matters might be. Further, in my view, not all "contractual matters" could be discussed during an executive session. For instance, while discussions of collective bargaining negotiations under the Taylor Law could properly be held during an executive session [see §100(1)(e)], other types of contractual matters would fall outside any of the grounds for executive session.

With regard to discussions of "personnel matters", the applicable provision relative to personnel 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..."

Based upon the language quoted above, I believe that a motion should indicate the topic within §100(1)(f) as well as the fact that the discussion will refer to a "particular" person. For example, if a board is in the process of reviewing the performance of a specific employee for the purpose of determining whether or not that individual merits a pay increase, the following motion would in my view be acceptable: "I hereby move to enter into an executive session to discuss the employment history of a particular person". I do not believe that the identity of the individual who is the subject of the discussion must be included, for there may be serious privacy considerations, depending upon the nature of the discussion.

Lastly, in a determination involving pending litigation, it was held in Daily Gazette v. Town Board, Town of Cobleskill [444 NYS 2d 44 (1981)] that a mere recitation of the statutory language of a ground for executive session is insufficient. The court emphasized further that a motion to enter into executive must indicate "the pending, proposed or current litigation to be discussed during the executive session" [id. at 46, emphasis supplied by the court].

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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2871
OML-AO-871

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

April 6, 1983

John E. Donovan
[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. Donovan:

I have received your letter of March 22 in which you requested an opinion regarding the obligation of school boards "to keep and make available a record of votes in their meetings".

The correspondence attached to your letter indicates that records of votes of action taken by individual Board members are not generally kept by the Hammondsport Central School Board. Further, you indicated that such records are particularly important since the Board often takes action during executive sessions.

I would like to offer the following comments regarding your inquiry.

First, there are two statutes that are relevant to the situation that you described, the Freedom of Information Law and the Open Meetings Law.

Although the Open Meetings Law provides general direction regarding the conduct of meetings by public bodies, the Freedom of Information Law contains specific direction regarding the preparation of records of votes. Specifically, §87(3)(a) states 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, in every instance in which the School Board votes, I believe that a record must be prepared which indicates the manner in which each member voted.

Second, the Open Meetings Law in §101 pertains to minutes that must be prepared following meetings. As a general rule, §101 of the Open Meetings Law contains what may be characterized as minimum requirements concerning the contents of minutes. With respect to 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."

Section 101(2) contains provisions regarding minutes of executive sessions. That 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."

Based upon the language quoted above, a public body must generally prepare minutes of executive sessions only when action is taken during an executive session. Therefore, if, for example, a public body enters into an executive session and merely discusses public business but takes no action, minutes of the executive session need not be compiled.

It is important to point out, however, 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 must be taken behind closed doors (i.e., see §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 specifically state that school boards must vote publicly, it has been held that:

> "...any 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)].

Most recently, the Appellate Division, Second Department also found that a school board may act only by means of a vote taken during an open meeting. Although the Court of Appeals affirmed, it did not deal specifically with the so-called "open vote" provision of the Education Law [see Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 Ad 2d 157, aff'd ___ NY 2d ___ (1982)]. Nevertheless, since §1708(3) of the Education Law is apparently "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can generally act only during an open meeting.

Consequently, if no action is taken during the executive session, minutes need not be prepared. If action is taken, it should in my opinion occur during an open meeting and recorded in minutes.

Third, enclosed as requested is a copy of the Open Meetings Law. With respect to the capacity to conduct executive sessions, §100(1) of the Law specifies and limits the topics that may appropriately be considred by a public body during an executive session.

Also enclosed are copies of the Freedom of Information Law and an explanatory pamphlet dealing with both subjects that may be useful to you.

Lastly, in conjunction with your request, 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
Executive Director

RJF:jm

Encs.

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-822

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

April 11, 1983

Ms. Hazel Shader
[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. Shader:

I have received your letter of March 28 in which you raised a question regarding the practices of the Reading School Board under the Open Meetings Law. It is your view that "some of the issues the Brd. discusses in Exc. Session belong in the Open Session".

Based upon the information that you have provided, I agree with your contention.

Throughout your letter, you described topics discussed during executive sessions at a number of meetings of the Board. There is also a pattern that indicates that the Board schedules executive sessions at one meeting to be held at an ensuing meeting.

In this regard, I would like to offer the following comments.

First, based upon the definition of "meeting" appearing in §97(1) of the Open Meetings Law and the direction provided in §98(a), I believe that all meetings must be convened as open meetings. Unless I am mistaken, the Board begins its meetings by conducting executive sessions.

Second, in my opinion, a public body cannot schedule an executive session in advance of a meeting. Section 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. Moreover, §100(1) prescribes a procedure that must be followed by a public body prior to entry 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 purpoes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the language quoted above, three steps must be accomplished by a public body during an open meeting before an executive session may be convened. They include a motion to enter into an executive session, an indication in general terms of the subject or subjects to be considered, and a vote to carry the motion by a majority of the total membership of the public body.

From my perspective, an executive session cannot be scheduled in advance of a meeting, for, in a technical sense, it cannot be known in advance how many members of a public body will attend a meeting or whether a motion to enter into an executive session will indeed be carried by a majority of of the total membership.

Third, as you are aware, a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of the Open Meetings Law specify and limit the subjects that may appropriately be discussed during an executive session.

While several of the topics that you described could in my view have appropriately been discussed during executive sessions (i.e., matters leading to the appointment of a particular person, collective bargaining negotiations under the Taylor Law and pending litigation), others should have likely been discussed during open meetings, including the discussions of the budget, requests made under the Freedom of Information Law, adding items

to an agenda, budget guidelines, heath insurance, the "pay system" for substitute teachers, the use of school facilities, "Band T Shirts and sale of candy", board meetings and elections and complaints regarding locker room facilities. In short, as you described them, those topics simply do not fall within any of the grounds for executive sessions listed in the Open Meetings Law. As such, I believe that they should have been discussed during open meetings.

Fourth, with respect to your question regarding administrators' salaries, I do not believe that specific advice can be offered, for the issues are likely governed by the terms of the contractual agreements.

In order to attempt to provide guidance, copies of this opinion, the Open Meetings Law and several explanatory pamphlets on the subject will be sent to you for distribution 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
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-873

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

April 11, 1983

Mr. Jonathan Rosenblum
Mr. Steven Billmyer
[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 Messrs. Rosenblum and Billmyer:

I have received your letter of March 29 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry pertains to a meeting of the Cornell University Board of Trustees. As you are aware, meetings of the Board are subject to the Open Meetings Law when the Board discusses matters concerning Cornell's statutory colleges [see Holden v. Board of Trustees of Cornell University, 440 NYS 2d 58, aff'd 80 AD 2d 378 (1981)]. According to your letter, for the past two years, the Board has adopted a policy under which meetings are generally held at a site that accommodates approximately twenty people. In addition, prior to meetings, tickets may be obtained. It appears that the Board enjoys some flexibility regarding the location of its meetings, for you wrote that, for a meeting held last fall, "provisions were made for about three dozen spectators".

In this regard, on March 25, the Board met "and about 23 people were allowed in. Three persons -- the two undersigned and another Cornell student -- were not allowed in, because [you] had not been able to obtain tickets and because, according to a University official, no public seating remained".

Your question is whether, in my view, "In light of the University's refusal to admit some members of the public to an open meeting...the University's interpreation of the Open Meetings Law is unreasonable."

I would like to offer the following comments regarding your inquiry.

As suggested in an advisory opinion sent to you on October 20, 1981, I believe that the Open Meetings Law, like all laws, should be given a reasonable interpretation. It was also indicated in that opinion that what is reasonable might vary, depending upon specific facts and circumstances.

From my perspective, the question is whether the Board could reasonably have anticipated that its seating facilities in the site chosen for the meeting would be exhausted, and that, therefore, people interest in attending would be excluded.

If, for example, the supply of tickets available for a meeting is exhausted prior to the meeting, perhaps the Board could reasonably assume that more than twenty people would be interested in attending. On the other hand, if only a dozen tickets are requested prior to a meeting, it could likely be reasonably assumed that a site accommodating twenty would be adequate. Therefore, if the ticket supply was exhausted prior to the meeting of March 25, perhaps the Board could have assumed that a greater number would want to attend than that represented by those who had obtained tickets.

In a related vein, it is possible, too, that the policy adopted by the University, i.e., that only those with tickets may attend meetings, constitutes what might be characterized as a "chilling effect" upon those who opt not to attend due to the limitation on the distribution of tickets. Stated differently, if it is known in advance of meetings that only twenty persons may attend, and within that total six to twelve representatives of the news media are included, some of those interested in attending might be dissuaded from attempting to attend or seeking a ticket. If that is so, it might be contended that the site of the meeting chosen by the Board is unreasonable.

In sum, I believe that an answer to your question can be given only in conjunction with factual circumstances, and whether the Board, based upon those facts, could reasonably anticipate the number of people interested in attending the 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: Walter J. Relihan, Jr.
Arthur B. Spitzer
Steven Shapiro

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-874

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

April 29, 1983

Mr. Anthony J. Liccione
[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. Liccione:

As you are aware, your letter of April 19 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 Hamlin Planning Board gave approval to a proposal to build a townhouse complex in your neighborhood. Due to the opposition to the proposal expressed at a public hearing conducted by the Zoning Board of Appeals, the proposal was rejected. You wrote, however, that during the hearing before the Zoning Board of Appeals, it was found that the earlier proceedings of the Planning Board were not open to the public.

Your questions are whether the Planning Board acted "in violation of any law", and what, if anything, might be done to prevent similar situations from arising in the future.

In this regard, applicable under the circumstances is the Open Meetings Law. That statute applies to meetings of all public bodies, including the Planning Board.

In brief, the Open Meetings Law requires that notice be given prior to all meetings (see §99) and that all meetings be convened open to the public. Further, all meetings are open to the public, except when a topic may be discussed during an executive session. Section 100(1) of the Law specifies and limits the subjects that may appropriately be discussed during an executive session. As such, a public body cannot exclude the public from a meeting to discuss the subject of its choice.

If the facts presented in your letter are accurate, it would appear that the failure of the Planning Board to give notice of its meeting and to discuss the issue in question during an open meeting represented violations of the Open Meetings Law.

While the Committee does not have the resources or the authority to conduct an "investigation", copies of this opinion, the Open Meetings Law and an explanatory pamphlet will be sent to the Planning Board. Perhaps a review of those materials, copies of which have also been enclosed for your consideration, will result in compliance with the Open Meetings Law 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

Encs.

cc: Hamlin Planning Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-875

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

May 2, 1983

Ms. Eileen McGarvey
[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. McGarvey:

I have received your letter of April 18 in which you requested an advisory opinion under the Open Meetings Law.

Specifically, according to your letter, at an open meeting of the Hannibal School Board, you were asked to turn off your tape recorder. Your question, therefore, is whether the School Board could prohibit the use of a tape recorder at an open meeting.

I would like to offer the following comments regarding your inquiry.

It is noted at the outset that the Open Meetings Law is silent with respect to the use of tape recorders at open meetings of public bodies. Nevertheless, it has been advised that a public body cannot restrict the use of portable, battery-operated tape records at such meetings.

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, 413 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 open of the Attorney General is consistent with the direction provided by the Committee (see attached opinion of May 13, 1980). 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.

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: Gordon Hastings
Dr. Burton Ramer
NYS Council of School Superintendents
Frank Cardillo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-876

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

May 2, 1983

Mr. David Cohen
[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. Cohen:

I have received your letter of April 21 in which you requested comments regarding requests for minutes of meetings of the Mamaroneck Town Board.

Specifically, according to your letter, in response to a recent request for minutes of several meetings held in 1982, "the elected Town Clerk acknowledged receipt of the request and stated in her reply that the minutes were being typed or located..." You indicated further that it appears that minutes have not been prepared regarding several meetings held in 1982 and that official minute books have not been assembled since 1977.

It is your contention that since minutes must be available within two weeks after a meeting, there is no reason for any delay in complying with the request for minutes.

I concur with your contention and would like to offer the following comments regarding the situation.

First, as you are aware, the Open Meetings Law contains requirements concerning the contents of minutes and the time within which minutes must be prepared and made available. Section 101(3) of the Open Meetings Law states that:

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Therefore, minutes of open meetings must be prepared and made available within two weeks of the meetings to which they relate. Further, in situations in which action is taken by a public body during an executive session, minutes reflective of that action must be prepared and made available within one week of the executive session.

Second, it is noted that the provisions regarding the periods of time within which minutes must be prepared and made available went into effect on October 1, 1979. Prior to that date, copies of the Open Meetings Law as amended were sent to all public bodies with a cover memorandum describing the amendments.

In that memorandum, it was anticipated by the Committee that some public bodies might not have the capacity to approve minutes within two weeks after a meeting. Consequently, to comply with the Law, it was suggested that minutes be created within the statutory periods but that they might be marked "unapproved", "draft", or "non-final", for example. By so doing, the public has the ability to learn generally what may have transpired at a meeting. Concurrently, the public is given notice that the minutes are subject to change.

Third, with respect to what you have characterized as "official minutes", the only provision of which I am aware other than the Open Meetings Law that relates to the topic is §30 of the Town Law. That provision, which is entitled "Powers and duties of town clerk", states in part that the town clerk of each town:

> "[S]hall have the custody of all records, books and papers of the town. He shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting, and of all propositions adopted pursuant to this chapter."

While the language quoted above does not refer to minutes as "official" or otherwise, it clearly imposes an obligation on a town clerk to "keep a complete and accurate record of the proceedings of each meeting".

Lastly, in conjunction with your question regarding the enforcement of either the Open Meetings Law or §30 of the Town Law, the remedy would appear to involve an initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. However, in an effort to enhance compliance, a copy of this opinion will be sent to the Town Clerk of the Town of Mamaroneck. Perhaps greater familiarity with the requirements of the Open Meetings Law will result in compliance.

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 Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-877

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 3, 1983

Ms. Harriett K. Tallmadge
Chairman of Assessors
Town of Glen
R.D. #1
Box 39
Fultonville, NY 12072

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. Tallmadge:

I have received your letter of April 26 and appreciate your interest in the Open Meetings Law.

According to your letter, at a recent meeting of the Town Board of the Town of Glen, "a committee consisting of two councilmen and the town assessors was appointed to 'look into changing the method of Veteran's Exemptions on the Assessment Roll'." You wrote further that "[T]he two councilmen, the assessors and one concerned Veteran plan to have an informal meeting to discuss the issue and the results that it would have on other taxpayers".

The question is whether "this informal discussion-type meeting have to be open to the public with notice as to the time and date the meeting is planned."

In my view, the meeting in question would have to be open to the public and preceded by notice given in accordance with §99 of the Open Meetings Law for the following reasons.

First, as you have described it, the newly created committee 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."

While the Open Meetings Law as originally enacted was subject to conflicting interpretations regarding its coverage of committees and advisory bodies, the amended definition of "public body" quoted above makes specific reference to committees and subcommittees. Consequently, I believe that the committee described in your letter is a "public body" required to comply with the Open Meetings Law.

Second, under the definition of "meeting" [§97(1)] and its judicial interpretation, any convening of a quorum, a majority of the total membership of a public body (in this case, a majority of the new committee), for the purpose of conducting 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 v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, an "informal discussion-type meeting" would in my opinion fall within the requirements of the Open Meetings Law.

Third, as you intimated, §99 of the Open Meetings Law requires that notice be given of the time and place of all meetings. Section 99(1) pertains to 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 in the same manner as prescribed in §99(1), to the extent practicable, at a reasonable time prior to such meetings.

Enclosed are copies of the Open Meetings Law and an explanatory pamphlet that may be helpful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-878

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

May 10, 1983

Ms. Linda L. Searles
New Haven Town Clerk
R.D. #1 Box 314
Oswego, NY 13126

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. Searles:

I have received your letter of April 26 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, the New Haven Town Board on April 12 entered into an executive session "for personnel reasons". Apparently the issues involved a grievance brought against you, Town Clerk, and a member of the Town Board by other Town employees. You wrote further that, based upon our conversation, it is your understanding that "Town officials are not considered employees or personnel and therefore would not come under this law". You also raised a question regarding direction given to you by the Town Supervisor to the effect that you cannot discuss anything that may have been considered during an executive session.

I would like to offer the following comments regarding the situation.

First, contrary to what you suggested, I believe that there may be situations in which matters involving Town officials may be discussed during an executive session. However, it does not appear that the issue in question could properly be considered during an executive session, due in part to your status as Town Clerk and that of a member of the Town Board.

Second, the so-called "personnel" exception for executive session 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..." [see attached, Open Meetings Law, §100(1)(f)].

In view of the language quoted above, it is clear that not every matter concerning "personnel" may be considered during an executive session. On the contrary, §100(1)(f) of the Open Meetings Law may in my view be appropriately invoked only in conjunction with its specific language.

If, for example, the Town Board considered a matter concerning a Town employee, perhaps the discussion would involve a matter leading to the dismissal, removal or discipline of that person and, therefore, could be discussed during an executive session. However, it does not appear that an executive session on a similar subject could justifiably be held regarding elected officials, for it does not appear that elected officials could under the circumstances be the subjects of removal, dismissal or discipline, particularly, if as you indicated, the Town has not adopted a code of ethics.

Third, it is emphasized that the Open Meetings Law is permissive. Stated differently, although a public body may enter into an executive session to discuss certain topics enumerated in §100(1) of the Law, there is no requirement that executive sessions be held to discuss those subject. I would like to point out in this regard that an executive session must be preceded by a motion to enter into an executive session made during an open meeting and which is carried by a majority of the total membership of a public body. Therefore, even though a topic might appropriately fall within a ground for executive session, unless a majority of the total membership of a public body carries a motion to enter into executive session, the issue presumably would be discussed in public.

Lastly, with respect to the direction given by the Supervisor to the effect that you could not discuss an issue previously considered during an executive session, I know of no law that would generally preclude you or any person from discussing the subject matter considered during an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Town Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2923
OML-AO-879

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

May 12, 1983

Mr. James E. Switzer
School District Clerk
Wayne Central School District
6076 Ontario Center Road
Ontario Center, NY 14520

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. Switzer:

I have received your letter of May 9 and appreciate your continuing interest in complying with the Freedom of Information Law.

Your inquiry concerns the "salary listing" required to be prepared under the Freedom of Information Law. Specifically, you wrote that "the question centers on whether the salary, name and public office address information is to be for the current school year or for the past school year." It is your view that the information in question should refer to salaries for the current fiscal year. A second question is whether the list should be "formally incorporated in Board of Education minutes."

I would like to offer the following comments regarding your inquiry.

First, as you are aware, §87(3)(b) of the Freedom of Information Law states that each agency, including a school district, shall maintain:

> "a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

The language quoted above is in my view somewhat unique, for it represents one of the few instances in the Freedom of Information Law in which an agency is required to prepare a record.

Second, I agree with your contention that the payroll record envisioned by §87(3)(b) should pertain to the current fiscal school year, rather than a previous school year. Further, to fully comply with §87(3)(b), it is my view that the payroll listing should be current on an ongoing basis. Stated differently, if, for instance, employees are hired by or leave the employ of the District during the course of a fiscal year, the payroll listing should be altered to reflect both the additions to and the removals from the employ of the District.

Lastly, with respect to whether the payroll listing should be incorporated in minutes, I do not believe that such action is required. In this regard, I direct your attention to §101 of the Open Meetings Law. The cited provision provides what might be characterized as minimum requirements concerning the contents of minutes. With regard 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."

Based upon the language quoted above, although the Board of Education might take action relating to a list of employees in conjunction with the Freedom of Information Law, I do not believe that there is any requirement in the Law concerning the incorporation of the list in the minutes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-880

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

May 12, 1983

The Honorable Joseph DeFazio
Mayor
Village of Sylvan Beach
Harborview Drive
Sylvan Beach, NY 13157

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 Mayor DeFazio:

I have received your letter of May 3 and appreciate your interest in complying with the Open Meetings Law.

According to your letter, questions apparently arose with respect to notice requirements relative to a public hearing held in conjunction with §5-508 of the Village Law. In view of a comment made in your letter, I would like to offer the following clarification.

Specifically, in your letter, you wrote that you realize "that all meetings are open meetings and must be advertised..." In this regard, although a public hearing held under §5-508 of the Village Law is required to be preceded by a paid legal notice, the Open Meetings Law in §99 (3) (see attached) states that meetings need not be preceded by publication in the form of a legal notice.

Section 99 of the Open Meetings Law merely 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 prior to meetings. In the case of a meeting scheduled at least a week in advance, notice must be

given not less than seventy-two hours prior to such a meeting [see §99(1)]. If a meeting is scheduled less than a week in advance, notice must be given "to the extent practicable" at a reasonable time prior to such a meeting [see §99(2)].

Once again, I thank you for your interest in complying with the Open Meetings Law. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2925
OML-AO-881

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

May 12, 1983

Dennis T. Barrett, Esq.
Barrett, Maier & Barrett, P.C.
80 E. Main Street
Webster, New York 14580

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. Barrett:

I have received your letter of May 5 addressed to Ms. Baldasaro of this office.

Your inquiry concerns the Open Meetings Law as it relates §3020-a of the Education Law. Specifically, you wrote that your concern:

> "...was with whether the action of the Board of Education pursuant to that section in considering at Executive Session whether probable cause exists to present charges under that section is entirely exempt from the Open Meetings Law as a quasi-judicial proceeding."

It is your understanding that Ms. Baldasaro expressed the belief that the portion of a proceeding conducted under §3020-a to which you alluded above is entirely exempt from the Open Meetings Law.

Having discussed the matter with Ms. Baldasaro, it appears that there may have been some misunderstanding. It is our view that the step in §3020-a of the Education Law that you described does not fall within the exemption for quasi-judicial proceeding appearing in §103(1) of the Open Meetings Law.

While it is often difficult to draw a line of demarcation between a quasi-judicial proceeding and an administrative or quasi-legislative proceeding, Black's Law Dictionary defines "quasi-judicial" as:

> "[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."

From my perspective, based upon the language of §3020-a of the Education Law, the step in that provision in question is not quasi-judicial, for it involves merely a finding of probable cause; I do not believe that there is any significant investigation or final determination that is rendered.

Subdivision (1) of §3020-a concerns charges that may be made "against a person enjoying the benefits of tenure". Subdivision (2) states that:

> "[U]pon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify such board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists."

From that point, depending upon the response of the person charged, hearings may be held that might be considered quasi-judicial in nature. Nevertheless, the steps leading to the proceeding would not in my view be quasi-judicial for the reasons expressed above; rather it appears that they are largely administrative.

As such, in my view, when a board discusses charges pursuant to §3020-a(2) of the Education Law, it is required to comply with the Open Meetings Law. I believe that notice must be given and that a meeting of the Board of Education must be convened open to the public. However, as you are aware, the Open Meetings Law permits a public body to enter into an executive session in accordance with §100(1) of the Open Meetings Law. Relevant under the circumstances would be §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."

Since charges would likely involve a review of the employment history of a particular person or perhaps a matter leading to the discipline or dismissal of a particular person, I believe that an executive session could properly be held to consider charges made against a person.

It is noted, too, that this office has advised that the identity of a person who may be the subject of discussion in an executive session need not be included in a motion to enter into an executive session. In my view, a motion indicating that a public body seeks to discuss the employment history of a particular person or a matter leading to the discipline of a particular person would constitute a sufficient motion for entry into an executive session.

With respect to minutes, as you are aware, §101 of the Open Meetings Law requires that minutes be prepared when action is taken either during an open meeting or an executive session. However, §101(3) states in part that "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law..." In this regard, as you are aware, it was held in Herald Company v. School District of City of Syracuse [430 NYS 2d 460 (1980)] that charges reflective of a finding of probable cause against a named individual need not be made available under the Freedom of Information Law. Based upon that decision, minutes would not in my view be required to identify a person who may be the subject of a finding of probable cause.

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-882

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

May 16, 1983

Ms. Bonnie Colwell
[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. Colwell

I have received your letter of May 10 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry concerns a meeting of the Hudson Board of Education and its discussion of the DISTAR (Direct Instruction System for Arithmetic and Reading). According to your letter:

> "[T]he meeting which was scheduled to begin at 7:00 P.M. apparently began at 6:00 P.M. in a closed session to the public. At the end of the closed meeting, which ended at 8:19 PM Hudson City School District's Reading Coordinator and 3 or 4 other teachers emerged from the closed meeting. It is common knowledge that 'DISTAR' was discussed and the purpose of the meeting."

When you questioned the reason for the closed meeting, you indicated that:

> "[I]t was stated that they have the right to discuss certain matters in executive session and that the meeting was closed because somebody might slip with a child or teacher's name and they would be open to litigation."

I would like to offer the following comments regarding your inquiry.

First, the term "meeting" has been interpreted broadly by the courts. In a landmark decision rendered in 1978, the state's highest court found 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 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)].

Therefore, if a quorum of the School Board convened at 6 p.m., as you wrote, to discuss the DISTAR program, that gathering should in my view have been convened as an open meeting and preceded by notice indicating that the meeting would begin at that time (see attached, Open Meetings Law, §99).

Second, §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. Moreover, the Law prescribes a procedure that must be completed by a public body during an open meeting before an executive session may be held. Specifically, §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 be formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, it is in my opinion clear that an executive session is not separate and distinct from a meeting, but rather is a portion thereof.

Further, a public body cannot in my opinion enter into an executive session to discuss the subject of its choice. Although §100(1) of the Law in paragraphs (a) through (h) lists the topics that may appropriately be considered during an executive session, I believe that a public body must conduct its business in public unless and until a proper subject for discussion in executive session arises.

I would like to point out, too, that the mere mention of a teacher's name, for instance, would not automatically permit an executive session. The so-called "personnel" exception for executive session states that a public body may close its doors 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..."

Unless a discussion focuses upon a "particular person" in conjunction with the specific topics listed in §100(1)(f), I believe that a discussion should be conducted in public.

Further, it appears that the discussion involved a consideration of the DISTAR program generally. If that is so, I believe that the discussion should have been open to the public. To the extent that a "slip" could occur, I would conjecture that the professionals involved, if told that names should not be mentioned, could discuss the issues without reference to specific individuals.

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: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-883

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

May 17, 1983

Mr. Jose Velez
Executive Director
Midwood Development Corp.
1416 Avenue M
Brooklyn, NY 11230

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. Velez:

I have received your letter of May 11 and appreciate your interest in complying with the Open Meetings Law.

Your inquiry concerns the status of committees of a community development corporation under the Open Meetings Law.

A response to your question is contingent upon whether the board of directors of a community development board is considered a "public body" subject to the Open Meetings Law. In short, if such a board falls within the scope of the Open Meetings Law, the committees to which you referred would in my opinion also fall within the requirements of the Open Meetings Law.

Although I am unaware of any judicial determination that pertains to the Open Meetings Law as it affects community development boards, I believe that such boards, as well as committees designated by them, are required to comply with the Open Meetings Law based upon the following rationale.

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. Ths 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-Proft Corporation Law.

Third, based upon the direction provided in the Private Housing Finance Law and Article 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 city.

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 the board of directors of a community development corporation is a "public body" subject to the Open Meetings Law in all respects. Further, since the definition of "public body" includes a "committee or subcommittee or other similar body of such public body", I believe that the committees in question fall within the requirements of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2929
OML-AO-884

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

May 18, 1983

Ms. Beatrice M. Mills
[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. Mills:

I have received your recent letter in which you raised a series of questions involving the Board of Trustees of the Village of Sylvan Beach.

Your first question concerns meetings of the Board held in relation to the budget process. According to your letter, the Board held a meeting "at about 3 p.m. without notice to the public" on April 18 during which "they made changes in the Village Budget". On the evening of the 18th, a meeting was held on the budget, and due to controversies regarding the budget, it was continued the next day. You wrote, however, that notice concerning the meeting of April 19 "was never posted and was never put in the paper..."

In this regard, it is noted that the Mayor of Sylvan Beach, Joseph DeFazio, also wrote to the Committee. I would also like to point out that the Open Meetings Law likely was not completely applicable to the situation, for the gatherings held on the evening of April 18 and on April 19 were public hearings subject to provisions of the Village Law.

Section 5-508 of the Village Law required publication of a legal notice regarding the public hearing on the evening of April 18. Mayor DeFazio wrote that a legal notice was published in the Rome Sentinel and that "notice was also posted in 6 locations throughout the Village on April 11, 1983".

Subdivision (3) of §5-508 of the Village contains direction relative to situations in which a public hearing cannot be completed on the date on which it is scheduled, stating that "[T]he hearing may be adjourned from day to day but not beyond the twentieth day of April..." Based upon the provisions of the Village Law, it appears that the public hearings were conducted properly. Further, Mayor DeFazio wrote that approximately the same number of people attended the hearings on April 18 and 19.

With respect to the gathering held in the afternoon of April 18, if in fact four members of the Board met to discuss the budget, that gathering in my view was a "meeting" subject to the Open Meetings Law that should have been preceded by notice and convened open to the public.

Your remaining areas of inquiry concern games of chance played at a village park, items sold at a flea market in the park and the amount of tax paid by the owner of a restaurant. In all honesty, this office has no expertise regarding those issues.

However, I would like to offer a suggestion relative to the assessment of the property on which the restaurant is located.

In this regard, it is noted that the Freedom of Information Law provides broad rights of access to government records. Assessment rolls and related information are generally available. Perhaps it might be worthwhile to compare the assessments concerning properties similar to or near the restaurant in question. If, based upon a review of available records, it is found that inequities exist, perhaps persons owning similar properties could challenge their assessments.

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 DeFazio

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2928
OML-AO-885

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

May 18, 1983

Ms. Alice Knapik
[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. Knapik:

I have received your letter of May 12 in which you raised a series of questions involving the Freedom of Information and the Open Meetings Laws.

It is apparently your view that the Town Board of the Town of Glen has held various "closed door meetings". Based upon your correspondence, it appears that some of the closed meetings may have been appropriate, while others should have been open.

The first situation that you described pertains to a complaint relative to a contaminated well. You wrote that there was a meeting with an attorney on the subject and that no other mention was made of the problem until the Town Board adopted a resolution to "buy the house for $10,000".

In this regard, the Open Meetings Law is generally based upon a presumption that meetings of public bodies are required to be open. Some five years ago in a landmark decision, the state's highest court determined that the definition of "meeting" includes any gathering of a quorum of a public body for the purpose of conducting pubic business, whether or not there is an intent to take

action and regardless of the manner in which a gathering may be characterized [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, any convening of a quorum of the Town Board for the purpose of conducting public business in my view would constitute a meeting subject to the Open Meetings Law that should be preceded by notice (see attached Open Meetings Law, §99) and convened open to the public.

It is noted, however, that §103 of the Law contains "exemptions". If an exemption applies, the Open Meetings Law does not. Of possible significance in this instance is §103(3), which states that "matters made confidential by federal or state law" are exempt from the Open Meetings Law.

It is has been advised in the past that if a public body meets with its attorney solely for the purpose of seeking legal advice, the communications between the attorney and the public body fall within the scope of the attorney-client privilege. Since such communications are confidential under state law, they would fall outside the scope of the Open Meetings Law. If, however, other meetings occurred during which the advice of the Town Board's attorney was not sought, those gatherings should in my view have been conducted pursuant to the Open Meetings Law.

The second situation that you described concerns an executive session held for the purpose of discussing "personnel". Following the executive session, you wrote that the Supervisor mentioned veterans and thereafter the Supervisor appointed a Veterans Committee. During the following month, the Committee met in an "informational meeting". You indicated that, since the informational meeting was held, no additional information regarding the work of the Veterans Committee has been disclosed.

Although some issues regarding "personnel" may properly be considered during an executive session, the Open Meetings Law provides limitations concerning the scope of the "personnel" exception for executive session.

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..."

In my view, if the executive session was held to discuss the creation of a veterans committee, such a discussion involved policy and not any "particular person". Under those circumstances, I do not believe that any ground for executive session would have applied.

Nevertheless, if after determining to create a veterans committee, the Board sought to discuss particular individuals to be appointed to such a committee, I believe that an executive session to consider the appointments of particular persons to the committee would have been proper.

It is also noted that the Veterans Committee is in my view a "public body" required to comply with 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."

Since the Veterans Committee was designated by the Town, and in view of judicial interpretations of the Open Meetings Law, I believe that the Veterans Committee is itself a "public body" subject to the Open Meetings Law in all respects [see e.g., Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)].

The third situation described in your letter involves the purchase of property by the Town. You wrote that "Town officials came from behind close[d] doors, with minds made up to purchase the building for $58,000". Apparently residents of the Town indicated their disapproval of the action and the Town Board voted against the purchase of the building. Following the vote, you indicated that you were unsuccessful in your efforts to obtain copies of records relating to the transaction.

In terms of the Open Meetings Law, it would appear that one of the grounds for executive session may have been relevant to the issue. Specifically §100(1)(h) 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."

Under the lanugage quoted above, not every discussion regarding the proposed transfer of real property may be discussed during an executive session; on the contrary, an executive session held under §100(1)(h) is appropriate only when "publicity would substantially affect the value" of the property. Since the particulars surrounding the purchase appear to have been known, it is difficult to envision how publicity would have substantially affected the value of the property. If publicity would not have substantially affected its value, it does not appear that an executive session could appropriately have been held.

With respect to access to records, I direct your attention to the Freedom of Information Law. As in the case of the Open Meetings Law, 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) of the Law.

Under the circumstances, records pertaining to the situation would in my view be available, unless a ground for denial applies. Without greater knowledge of the contents of the records, I cannot provide specific advice.

Your last question concerns Town records generally. If I understand your comment correctly, you indicated that the Supervisor stated that his records are not available to the public.

In my view, books of account, contracts, ledgers and similar records relating to financial transactions of a municipality, including a town, are available under several provisions of law, including the Freedom of Information Law, §87(2)(g)(i), §51 of the General Municipal Law and §29 of the Town Law, which is entitled "Powers and duties of supervisor". Section 29 of the Town Law states in subdivision (4) that the supervisor:

> "[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."

Based upon the provision quoted above, records concerning town finances are required to be kept and made available by the town supervisor during "all reasonable hours of the day".

As requested, enclosed are twenty copies of the brochure entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

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: Town Board and Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2937
OML-AO-886

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

May 24, 1983

Mr. Joseph J. Carrus
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Carrus:

I have received your letter of May 16 in which you requested an advisory opinion.

According to your letter, "the NAACP is suing the City of Dunkirk and HUD" relative to low income housing. You wrote further that "[T]he lawyers of all parties have signed a preliminary agreement" regarding "sites, sewage, streets, etc." Nevertheless, having requested information on the subject, the City has denied access on the ground that litigation is pending. Since the City of Dunkirk and HUD "are not in litigation with each other", your question is whether "information in meetings between the city and HUD [can] be kept secret..."

In all honesty, without additional facts concerning the situation, I cannot provide either specific advice or a specific answer. However, I would like to offer the following general comments.

First, with respect to meetings between "the city and HUD", I direct your attention to the Open Meetings Law (see attached). In brief, the Open Meetings Law is applicable to meetings of public bodies and requires that all such meetings be open to the public, unless an "executive session" closed to the public may properly be held.

In the context of your question, it is unclear who attends the meetings. If, for example, the staffs of the City and HUD meet, no public body would be present, and the Open Meetings Law would not in my view be applicable. If, on the other hand, a quorum of the City Council convenes with representatives of HUD, that type of gathering would in my opinion constitute a "meeting" subject to the requirements of the Open Meetings Law.

It is emphasized, however, that §100(1)(d) of the Open Meetings Law permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". If the meetings in question involve the discussion of litigation initiated against the City by the NAACP, it appears that an executive session could appropriately be held.

There may be other sources or vehicles that may be used to obtain the information sought. While courts and court records fall outside the scope of the Freedom of Information Law, many court records are available from the clerk of a court (see e.g., Judiciary Law, §255). As such, it is suggested that you might want to request records from the clerk of the court in which the suite was brought.

In addition, it is suggested that you submit a request for the information sought under the Freedom of Information Law (see attached). To submit a request, §89(3) of the Freedom of Information Law requires that the records sought be "reasonably described".

Further, although I am not familiar with the records in which you may be interested, a denial based upon a contention that litigation is pending without more specificity may be insufficient, particularly if the records sought have been disclosed to all of the parties involved. Therefore, while I cannot advise that records reflective of the information sought must be made available, it is possible that they may be accessible, depending upon their nature.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2936
OML-AO-887

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

May 24, 1983

Ms. Cissy Falk
LegiTech
99 Washington Avenue
Albany, NY 12210

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Falk:

I have received your letter of May 16 in which you requested an advisory opinion.

According to your letter, LegiTech, the firm by which you are employed, is a "legislative information service". Among the services you provide "is access to legislative committee votes". You indicated that "[R]ecently LegiTech discovered many of the official votes obtained from the Senate Journal Clerk's office have been changed to add members as voting when they were previously recorded as absent". Further, to highlight the discrepancies, you enclosed separate copies of records of the same committee votes. In each of the examples that you sent, "not only has a vote been added, but the totals have been changed on the official records."

Your question involves "the legality of this practice of adding votes after the original vote has been recorded".

It is noted at the outset that this office is responsible for providing advice with respect to the Freedom of Information and Open Meetings Laws. Based upon provisions of those statutes, §41 of the General Construction Law, and judicial determinations that relate to the issue that you

raised, the "practice" as you described it, is in my view inconsistent with the Freedom of Information and Open Meetings Laws. In this regard, I would like to offer the following comments.

First, I believe that a committee of the Senate or the Assembly is a "public body" required to comply with the Open Meetings Law. Section 97(2) of that statute 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."

A committee of either house is an entity consisting of at least two members, it is in my opinion required to conduct public business by means of a quorum of its membership, and it performs a governmental function for the state. Moreover, the definition quoted above as amended in 1979 makes specific reference to committees and subcommittees.

Second, of relevance under the circumstances is the term "quorum", which is defined in §41 of the General Construction Law as follows:

> "[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 of similar body, a majority of the whole number or 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 in my opinion 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 may deliberate and has the capacity to act only during duly convened meetings. Further, by implication, I believe that a member of a public may cast a vote only at a duly convened meeting of the public body.

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. Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assemble 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. As stated earlier, it is my opinion that a member may cast a vote only at a "meeting", a convening of a quorum of a public body.

Although I could not locate any judicial determination that deals specifically with the issue, there are several opinions, all of them rendered by appellate courts, that intimate that the physical presence and majority vote of a quorum of a public body is necessary for the taking of action [see e.g., Matter of Smithtown v. Howell, 31 NY 2d 365 (1972); Rockland Woods v. Village of Suffern, 40 AD 2d 385 (1973); and Squicciarini v. Planning Board of the

Town of Chester, 48 AD 2d 687 (1975)]. Squicciarini, supra, dealt with a situation in which a town planning board consisted of seven members, and in which a vote of three in favor with one abstention was cast. The Court stated that "[T]he planning board's denial of petitioners' application was by less than a majority of its seven members. Such vote was ineffectual...and was equivalent to nonaction" (id.). If an absent member could have cast a vote following the meeting, perhaps the result may have been different. However, by implication, it does not appear that such a vote could legally have been cast.

I am not suggesting that the practice would, under the specific circumstances that you described, alter the nature of action taken by a committee. However, based upon the decisions cited above, it is reiterated that a vote of a member of a public body may in my view be cast only at a duly convened meeting of the public body.

Third, viewing the matter from a somewhat different perspective, the legislative declaration of the Open Meetings Law, §95, 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."

One of the ingredients described in the statement of legislative intent pertains to the ability to "observe the performance of public officials...and listen to the deliberations and decisions that go into the making of public policy." In short, if a member of a public body is absent from a meeting but later adds his or her vote to the vote previously taken by the public body, the public could not "observe" that member's performance.

Further, the Open Meetings Law contains direction regarding the content of minutes. Section 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."

Further, which respect to minutes of open meetings, §101 (3) states in relevant part that:

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting..."

When the provisions quoted above are read in conjunction with the Freedom of Information Law, I believe that minutes must indicate the votes of members present at meetings. Section 88(3)(a) of the Freedom of Information Law, which applies specifically to the State Legislature, states that:

> "[E]ach house shall maintain and make available for public inspection and copying:
>
> (a) a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes..."

In my view, the requirement concerning the creation of a voting record concerns the vote of a member "in...every committee and subcommittee meeting in which the member votes". Stated differently, if a member votes during a meeting, §88(3)(a) in my opinion requires that the member's vote be recorded; conversely, if a member is not present at a meeting, I do not believe that the record of votes required to be prepared could reflect a vote of that member.

In sum, it is my view that the records required to be prepared under the Freedom of Information and Open Meetings Laws must reflect the votes taken by members at meetings, and that the practice that you described is inconsistent with the provisions discussed in the preceding paragraphs.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 888

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

May 31, 1983

Ms. Mary Wallace
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Wallace:

Your letter addressed to the Secretary of State has been forwarded to the Committee on Open Government, which is housed in the Department of State and of which Secretary Shaffer is a member.

Your questions involve whether political meetings, such as those of a political party's district committee are subject to the Open Meetings Law, and the representation on the district committee.

In this regard, the Open Meetings Law is applicable to meetings of a "public body", which is defined in §97(2) of the Open Meetings Law (see attached). It is emphasized, however, that §103(2) of the Open Meetings Law exempts from its provisions "deliberations of political committees, conferences and caucuses". Consequently, I believe that meetings of political committees are generally outside the scope of the Open Meetings Law.

With respect to your remaining questions, in all honesty, this office does not have significant expertise. However, I have enclosed copies of §§2-110 and 2-114 of the Election Law, both of which may serve to provide guidance. If further questions arise on the subject, it is suggested that you contact either the State Board of Elections or your county board of elections.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-889

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

June 6, 1983

Ms. Marcia Baker
Deputy Town Clerk
Town of Hamburg
S-6100 South Park Avenue
Hamburg, New York 14075

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Baker:

I have received your letter of May 18 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, at a recent meeting of the Town Board of the Town of Hamburg, "the Town Board dismissed the Deputy Town Clerk attending an open work session of the Board to hold a personnel session". The following day, the Clerk's office "received a written resolution adopted at the closed session notifying [you] of the vote taken".

You have asked "whether or not it is necessary for the Town Clerk to be present at executive sessions called by the Town Board at which resolutions are adopted". In conjunction with that question, you also requested that I respond to the following two areas of inquiry:

> "1) Is this resolution legally adopted and should it be accepted by me for inclusion in the minutes of the work session?

> "2) What options shall the Town Board exercise if this situation arises in the future at executive sessions and the Board wishes to adopt resolutions and the Clerk has been dismissed?"

It is noted at the outset that the courts have broadly interpreted the definition of "meeting" [see attached, Open Meetings Law, §97(1)]. In a landmark decision rendered in 1978 that dealt specifically with "work sessions", the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting 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)]. Based upon the decision cited above, it has been suggested that public bodies avoid the use of the phrase "work session", for under the Open Meetings Law, a "work session" and a "meeting" are one in the same and are equally subject to the Open Meetings Law.

I would also like to point out that the phrase "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. As such, an executive session is not separate or independent of a meeting, but rather is a portion thereof.

With respect to attendance at an executive session, §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."

In view of the language quoted above, the only persons who have the right to attend an executive sessions are the members of a public body, in this instance, members of the Town Board. Therefore, as a general rule, I believe that the Town Board may permit the Clerk to attend an executive session, but it is not required to do so.

In the event that the Board takes action, as in the situation that you described, minutes must be prepared. With regard to open meetings, §101(1) of the Open Meetings Law 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 regard to action appropriately taken during an executive session, §101(2) states in relevant part 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 determinations of such action, and the date and vote thereon..."

Although the Open Meetings Law does not specifically indicate who is responsible for preparing minutes, §30 the Town Law concerning the duties of a town clerk states in part that the town clerk:

> "...shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting, and of all propositions adopted pursuant to this chapter."

Since the "work session" to which you referred was a "meeting" as defined by the Open Meetings Law, since §101 of the Open Meetings Law requires that minutes of meetings must be prepared, and since §30 of the Town Law requires that the clerk be present for the purpose of keeping a record of the proceedings, I believe that the clerk must be present to record the minutes in any situation in which minutes must be prepared in conjunction with either §101 of the Open Meetings Law or §30 of the Town Law.

With respect to your questions, to comply with the provisions of law discussed above, it is suggested that there may be three options. First, the Town Board could permit the Clerk to attend an executive session in its entirety. Second, the Town Board could deliberate during an executive session without the presence of the Clerk. However, prior to any vote, the Clerk could be called into the executive session for the purpose of

taking minutes in conjunction with the duties imposed upon the Clerk by §30 of the Town Law. And third, the Town Board could deliberate toward a decision during an executive session, but return to an open meeting for the purpose of taking action.

Lastly, you asked whether the resolution adopted during an executive session without the presence of the Clerk was legally adopted, and whether it should be accepted by the Clerk for the inclusion in the minutes. With respect to the legality of the resolution, in my opinion, it is legal unless and until a court determines otherwise. With regard to the inclusion or acceptance of the resolution, I do not believe that any clear response can be given. To avoid any problem, perhaps the Board could merely reintroduce the resolution and act upon it at another meeting during which the Clerk is present for the purpose of taken minutes.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Town Board, Town of Hamburg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-890

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

June 6, 1983

Ms. Evelyn C. Heady
Town Clerk
Town of Beekman
Walker Road
Hopewell Junction, NY 12533

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Heady:

As you are aware, I have received your letter of May 20 and the materials attached to it. Your interest in complying with the Open Meetings Law is much appreciated.

You have asked for information "pertaining to the Town Clerk's role in the taking of minutes at worksessions". You have expressed the belief that "any time the Board meets as a body and formal action is taken minutes of these proceedings are to be recorded and made a permanent record". However, you also indicated that you "have been criticized and informed that it is not necessary for [you] to record minutes or even, for that matter, attend the worksession".

I agree with your contentions based upon the Open Meetings Law, its judicial interpretation, and the Town Law.

It is noted at the outset that the courts have broadly interpreted the definition of "meeting" [see attached, Open Meetings Law, §97(1)]. In a landmark decision rendered in 1978 that dealt specifically with "work sessions", the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public

body for the purpose of conducting 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)]. Based upon the decision cited above, it has been suggested that public bodies avoid the use of the phrase "work session", for under the Open Meetings Law, a "work session" and a "meeting" are one in the same and are equally subject to the Open Meetings Law.

With respect to minutes, direction is provided by §101 of the Open Meetings Law. Subdivision (1) of the cited provision 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, resultions and any other matter formally voted upon the the vote thereon."

The materials attached to your letter indicate that motions are made, resolutions are adopted and action is often taken at the work sessions of the Town Board of the Town of Beekman. Consequently, minutes reflective of those activities must in my view be created.

Lastly, although the Open Meetings Law does not specifically indicate who is responsible for preparing minutes, §30 of the Town Law concerning the duties of a town clerk provides guidance. In this regard, subdivision (1) of §30 of the Town Law states in part that the town clerk:

> "...shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting, and of all propositions adopted pursuant to this chapter."

Since the work sessions to which you referred are "meetings" as defined by the Open Meetings Law, since §101 of the Open Meetings Law requires that minutes of meetings be prepared, and since §30 of the Town Law requires the clerk to be present at meetings for the purpose of keeping

a record of the proceedings, it is my opinion that, under the circumstances described, the Clerk is required to attend the "work sessions", and that minutes must be prepared in conjunction with §101 of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Town Board, Town of Beekman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-891

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

June 6, 1983

Mrs. Sylvia K. Huber
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Huber:

I have received your letter of May 23 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry concerns the implementation of the Open Meetings Law by the Corning-Painted Post School Board, on which you serve, in relation to events that led to the selection of a new superintendent.

Specifically, you indicated that a regular meeting of the Board held on May 18, the President of the Board stated that the Board would meet the following morning to discuss "personnel and negotiations". Your objection is that no notice was given to the effect that action would be taken at the meeting of May 19.

Having reviewed the minutes of the meeting of May 18, I would like to offer the following comments.

First, the final item in the minutes states that:

> "[T]he Board agreed by consensus to hold a special meeting on Thursday, May 19, 1983 at 8:00 a.m. at the Administration Building. Dr. Wexell will request an executive session to discuss a personnel matter."

While in a technical sense, I do not believe that an executive session can be scheduled in advance of a meeting [see Open Meetings Law, §100(1)], an executive session was not scheduled; rather, the minutes indicate that Dr. Wexell would "request an executive session".

Second, although the selection of a superintendent represented a matter of importance and significant public interest, the Open Meetings Law does not in my opinion require that notice be given regarding the nature of action that might be taken by a public body. The only requirements relative to notice found in the Open Meetings Law involve the time and place of the meeting (see §99). As such, assuming that the Board gave notice to the news media and to the public by means of posting pursuant to §99(2) of the Open Meetings Law regarding the meeting of May 19, the notice requirements of the Open Meetings Law would in my view have been met.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 892

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

June 6, 1983

Mr. D.C. Hadley
Managing Editor
Finger Lakes Times
218 Genesee Street
P.O. Box 393
Geneva, NY 14456

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hadley:

I have received your letter of "protest" of May 20 concerning the implementation of the Open Meetings Law by the Seneca Falls Hospital Board of Managers.

According to your letter, at a recent meeting of the Board of Managers, the Board entered into an executive session "for the express purpose of discussing 'personnel' matters". Although your reporter and others were excluded from the executive session, the discussion by the Board could apparently be heard. In this regard, your reporter indicated that "no portion of the executive session dealt with 'personnel' matters", but rather with various other considerations, including a reaction to a recommendation by another board that the Seneca Falls Hospital be closed, a suggestion to conduct a lobbying campaign designed to influence the potential outcome in relation to the recommendation, and the relationship between the hospital administration and the news media.

Assuming that your reporter's account of the discussion during the executive session is accurate, the Board in my opinion violated the Open Meetings Law. In this regard, I would like to offer the following comments.

First, I believe that the Board of Managers is a "public body" 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."

The Board consists of more than two members, it is required to conduct its business by means of a quorum (see General Construction Law, §41), and it conducts public business and performs a governmental function for a public corporation, in this instance, the Town of Seneca Falls. As such, each element in the definition of "public body" is met by the Board.

Second, while some "personnel" matters may properly be discussed during an executive session, none of the areas of discussion described by your reporter could in my opinion have appropriately been considered during an executive session.

It is emphasized that the so-called "personnel" exception for executive session differs in the current Open Meetings Law from the provision that appeared in the Law as originally enacted.

The former §100(1)(f) permitted a public body to enter into executive session to discuss:

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

Under the language quoted above, public bodies entered into executive sessions to consider issues that related tangentially or indirectly to personnel as a group. It was the Committee's contention, however, that §100(1) was largely intended to protect privacy, not to shield matters of policy under the guise of privacy.

In an effort to remedy the deficiency and clarify the Law, the Committee recommended amendments to §100(1)(f) that were approved by the State Legislature and which became effective on October 1, 1979.

Section 100(1)(f) now 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).

Consequently, the "personnel" exception may in my view be cited to enter into an executive session only when the matter pertains to a "particular" person in conjunction with one or more of the topics included in §100(1)(f). I do not believe that the cited provision can serve to exclude the public when an issue concerns personnel generally.

In terms of recourse, as you are aware, the Committee on Open Government does not have the authority to compel compliance with the Open Meetings Law. However, in an effort to educate members of the Board of Managers regarding their responsibilities under the Law, and to attempt to enhance future compliance, copies of this opinion and the Open Meetings Law will be sent to the Board and its president.

Lastly, §102(1) of the Open Meetings Law states in part 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."

Further, subdivision (2) of §102 provides 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."

Therefore, if a board violates or is about to violate the Open Meetings Law, any aggrieved person may seek injunctive relief for the purpose of compelling compliance or may initiate a proceeding under Article 78 of the Civil Practice Law and Rules.

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: Arthur Seld, President, Board of Managers
Board of Managers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-893

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

June 10, 1983

Mr. Stephen L. Epstein
President
Nottingham Association, Inc.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Epstein:

I have received your letter of May 30 in which you raised questions regarding rights of access to meetings of the Nottingham Association, Inc.

According to your letter, the Association is a "not-for-profit community service organization". Your questions are whether the press has the right to attend membership meetings or meetings of the board of directors, and, if so, under what provision of law the meetings must be open.

Based upon the facts that you presented, there is no provision of law that gives the news media a right to attend membership meetings or those of the Association's board of directors.

The statute that generally deals with public rights of access to meetings is the Open Meetings Law (Public Officers Law, Article 7, §§95-106), a copy of which is attached. The scope of the Open Meetings Law is determined by its definition of "public body". Section 97(2) of the 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."

From my perspective, although you indicated that the Association receives "public anti-crime funding", the Association is not part of government, for it is a not-for-profit corporation; it likely does not conduct public business or perform a governmental function. It is noted, too, that the Open Meetings Law contains a declaration of legislative intent (§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."

The meetings in question are not conducted by public officials and the Association does not make public policy.

In view of the foregoing, based upon the information provided in your letter, I do not believe that the Open Meetings Law applies to the meetings described. Further, although the Association may permit the news media or members of the public unaffiliated with the Association to attend the meetings, neither the news media nor the public would in my view have the right to attend those 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-894

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

June 10, 1983

Mr. Joseph A. Reinschmidt
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Reinschmidt:

Your letter of May 23 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government, which is responsible for advising with respect to the Open Meetings Law, and of which the Secretary of State is a member.

Your inquiry concerns legislation affecting the conduct of meetings of zoning boards of appeals, particularly in relation to the capacity to enter into executive sessions.

In this regard, I have enclosed a copy of the Open Meetings Law, which contains provisions that prescribe the procedure to be followed to enter into an executive session. Specifically, §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 ares of the subject or subject to the 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..."

Further, as indicated in the language quoted above, an executive session may properly be held only to consider one or more of the subjects appearing in paragraphs (a) trhough (h) of §100(1). As such, the Board could not enter into an executive session based only upon a majority vote of its total membership, for the law specifies and limits the subjects that may be considered during an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2952
OML-AO-895

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

June 14, 1983

Mr. Richard G. Della Ratta
Della Ratta & Palmiotto
650 Franklin Street - 409
Schenectady, NY 12305

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Della Ratta:

I have received your letter of June 1 and the materials attached to it.

You wrote that it is your understanding that "when a vote is made in Executive Session concerning a tenured teacher, minutes should be kept..." You indicated further that your understanding is based upon an opinion that I prepared and which you attached to your letter.

I would like to offer the following comments regarding your inquiry and the materials.

First, having reviewed the opinion that you attributed to me, I do not believe that I prepared the documentation. There is nothing, however, in the enclosed opinion with which I strongly disagree.

Second, as you are aware, the Open Meetings Law generally permits public bodies to take action during appropriately convened executive sessions. Nevertheless, this office has consistently advised that, due to judicial interpretations of §1708(3) of the Education Law [see e.g., Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); and Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd __ NY 2d __ (1982)], school boards must take action only during open meetings, unless there is specific statutory direction to the contrary.

One of those instances in which such statutory direction is given involves §3020-a of the Education Law pertaining to charges made against a tenured individual. Specifically, §3020-a(2) states in part that:

> "[U]pon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail."

In view of the language quoted above, action by a board of education regarding a finding of probable cause following receipt of charges must be accomplished during an executive session.

Third, with respect to minutes, §101 of the Open Meetings Law provides what in my view may be characterized as minimum requirements concerning the contents of minutes. With regard to minutes of executive sessions, §101(2) 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."

From my perspective, the Open Meetings Law does not require that minutes must make reference to the nature of comments made or that they constitute the equivalent of a verbatim account of what may have been stated during an executive session. Rather, minutes of executive session are required to consist of a record or summary of a final determination, and that date and vote thereon. Further, if no action is taken during an executive session, there is not, in my opinion, any requirement that minutes must be prepared.

Fourth, as indicated above, §3020-a(2) of the Education Law requires that a detailed statement of charges must be forwarded to the accused employee. As such, it would appear that such a record is more detailed than minutes required to be prepared under the Open Meetings Law, and that the statement is available as of right under the Education Law to an employee who has been charged. It is noted, however, that it has been held judicially that the charges are deniable if requested by the public under the Freedom of Information Law [Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Therefore, under §101(2) of the Open Meetings Law, it is possible that minutes might be prepared, but that they need not be made available under the Freedom of Information Law.

Lastly, assuming that the records in question exist and pertain to your client, and assuming that the client is the subject of charges brought under §3020-a of the Education Law, it would appear that such records are available for inspection and copying to the client or his or her legal representative. In this regard, Mr. Lawrence, Assistant Superintendent of the Hudson City School District, wrote that "[W]e are not obligated to provide access to our photocopy equipment or to provide copies for you". In my opinion, if a record is available under either the Freedom of Information Law or some other provision of law, such as §3020-a of the Education Law, copies must be made by the agency upon payment of the appropriate fees.

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: Lester L. Lawrence

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-896

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

June 14, 1983

Mr. Martin Halpert
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Halpert:

As you are aware, your letter of June 3 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Open Meetings Law.

According to your letter, at all open meetings of the Board of Education of the Ticonderoga School District, "the clerk of the board writes the names of the public in attendance down and places them as part of the minutes". Apparently you raised questions regarding the practice, for the public was not aware of such a policy. Further, it is your view that the inclusion of names of members of the public who attend meetings represents a "violation of civil rights". Consequently, you have asked whether rights are being violated when the names of those in attendance "are taken without their knowledge and made part of a permanent public record".

I would like to offer the following comments regarding your inquiry.

First and perhaps most importantly, §98(a) of the Open Meetings Law states in part that "[E]very meeting of a public body shall be open to the general public..." Based upon the quoted language, any person, in my opinion, has the right to attend an open meeting of a public body, whether or not an individual is a resident or taxpayer within the jurisdiction of the public body.

Second, there is nothing in the Open Meetings Law that deals specifically with the issue that you have raised. In terms of minutes, §101 of the Law prescribes what might be characterized as minimum requirements concerning the contents of minutes. Therefore, minutes may be more expansive and detailed than the Law requires.

Third, in my view, no "right" would be violated when the identities of members of the public in attendance at a meeting are included as part of the minutes of a meeting. Nevertheless, I do not believe that a member of the public is required to identify himself or herself or sign a register or attendance log that is distributed at the meeting. Further, should a member of the public fail or refuse to identify himself or herself, such action could not in my opinion affect that person's right to attend the meeting.

In sum, I do not believe that any violation of rights occurs by means of recording the names of those who attend a meeting of the public body. Concurrently, however, there is no requirement in my opinion that an individual must indicate his or her identity in order to attend an open 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
Executive Director

RJF:jm

cc: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-897

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

June 14, 1983

Michael J. Gallant, Esq.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gallant:

As you are aware, your letter of June 3 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Open Meetings Law.

According to your letter, the Ticonderoga School District Board of Education, of which you are a member:

> "...has the practice of writing down the names of all persons attending the Board of Education Public meetings. This is done without the knowledge of the citizens present.
>
> "Thereafter, the names of such citizens are placed in the minutes of each meeting as a permanent record of the meeting. Persons whose names are not known are asked to sign a "pass-around" sheet."

You have raised a series of questions concerning the legality of the practice, and I would like to offer the following comments in response to your questions.

First and perhaps most importantly, §98(a) of the Open Meetings Law states in part that "[E]very meeting of a public body shall be open to the general public..." Based upon the quoted language, any person, in my opinion, has the right to attend an open meeting of a public body, whether or not an individual is a resident or taxpayer within the jurisdiction of the public body.

Second, there is nothing in the Open Meetings Law that deals specifically with the issue that you have raised. In terms of minutes, §101 of the Law prescribes what might be characterized as minimum requirements concerning the contents of minutes. Therefore, minutes may be more expansive and detailed than the Law requires.

Third, in my view, no "right" would be violated when the identities of members of the public in attendance at a meeting are included as part of the minutes of a meeting. Nevertheless, I do not believe that a member of the public is required to identify himself or herself or sign a register or attendance log that is distributed at the meeting. Further, should a member of the public fail or refuse to identify himself or herself, such action could not in my opinion affect that person's right to attend the meeting.

Fourth, in terms of "the procedure to stop this practice", I do not believe that any procedure exists, other than a change in policy by the Board, that could preclude the Board from including the information in question in its minutes. However, once again, I believe that a person may act individually merely by refusing to sign the "pass-around" sheet to which you referred.

With respect to existing minutes, I do not believe that any procedure or statute enables individuals to remove their names from minutes of a meeting.

Lastly, you asked whether persons who address the Board during open meetings "must state their names or otherwise identify themselves". It is noted in this regard that the Open Meetings Law is silent with respect to public participation. Consequently, it has been advised that a public body is not required to permit members of the public to speak or otherwise participate at meetings;

it has also been advised, however, 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 in like manner. If, for example, any person present is accorded an opportunity to speak, there may be no reasonable basis for requiring individuals to identify themselves. In short, a response to your last question in my view can be based only upon the nature of the rules or procedures that have been adopted by the Board in relation to public participation.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-898

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

June 15, 1983

Mr. Joseph A. Glazer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Glazer:

I have received your letter of May 31 as well as the materials attached to it.

You have referred to an advisory opinion prepared at your request on January 28 pertaining to political caucuses of the Ulster County Legislature. In brief, the majority party apparently splits its caucus in two in order that less than a majority of the membership of the County Legislature convenes. Under those circumstances, it was advised that the Open Meetings Law is not applicable to the caucuses, for there is not a majority of the Legislature present at either of the gatherings.

Your question now is:

> "[I]n light of the public interest that is involved here, and the Sunshine Laws, does the Committee on Public Access to Records believe that the majority party in the Ulster County Legislature is acting properly by splitting, and should they be allowed to do so?"

I believe that the question that must be raised is whether the practice of splitting is specifically intended to evade the Open Meetings Law and its judicial interpretation in Sciolino v. Ryan [103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 AD 2d 475, 440 NYS 2d 795 (1981)]. From there, only a court could in my opinion determine whether the practice of "splitting" the caucus violates the Open Meetings Law.

At this juncture, I believe that my advice must remain the same as that provided in my earlier opinion, i.e., that the convening of less than a quorum of the majority of the total membership of the public body falls outside the scope of the Open Meetings Law. Perhaps a court would view the intent of the Law and find that the practice represents a violation of its spirit, if not the letter of the Law. Nevertheless, I could not at this time, due to the absence of specific judicial direction, advise that the practice violates the Open Meetings Law. In short, it is reiterated that only judicial review of the situation could in my view provide you with an answer to your question.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2956
OML-AO-899

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

June 15, 1983

David Kelsey
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff 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 June 6 and the materials attached to it.

Your inquiry concerns requests directed under the Freedom of Information Law to the Akron Central School District, as well as the "appropriateness" of an executive session held by the District's Board of Education.

First, with respect to your requests made under the Freedom of Information Law, having reviewed the materials, while I believe that the information sought is accessible, I would like to offer comments regarding the form in which your requests were made.

In one of the requests of May 10, you asked for the salaries of various named administrators by preparing boxes within which the Superintendent could write figures reflective of salaries. From my perspective, although the salary information is clearly available, you were essentially asking that a District official prepare a new record on your behalf. In this regard, §89(3) of the Freedom of Information Law states in part that an agency is not obligated to create a record in response to a request. I believe that the request should likely have involved payroll records required to be maintained pursuant to §87(3)(b) of the Freedom of Information Law. The cited provision requires each agency to maintain:

> "a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

Based upon a review of payroll records envisioned by §87 (3)(b), you could obtain the same information without asking that District officials complete the form that you devised.

Similarly, in your inquiries made in 1981, you requested salary information pertaining to all "non-teaching personnel". If such a record did not exist, the District would in my view have no obligation to create a new record on your behalf. Once again, a more appropriate request in my view would have involved an attempt to review the payroll record required to be maintained pursuant to §87(3)(b) of the Freedom of Information Law.

With regard to the other request of May 10, you raised questions regarding policies. In my view, a more appropriate request under the Freedom of Information Law would have involved a request for current policies on the subjects that you described. Upon receipt of those records, a comparison could be made between existing policies and those formerly adopted.

Your remaining question regarding the Freedom of Information Law concerns a charge of sixty dollars for a copy of the payroll record. When you first requested that record in 1981, apparently the District obtained the information from the local BOCES and charged you sixty dollars on the basis of computer time. In my opinion, that fee is inappropriate. Once again, §87(3)(b) of the Freedom of Information Law requires each agency to maintain a payroll record. Based upon the language of that provision, I believe that the School District is required to have in its possession on an ongoing basis a list of employees which includes their names, public office addresses, titles and salaries. The fee that may be assessed for a copy of such a record would be twenty-five cents per photocopy.

Lastly, your letter and the minutes of a meeting of the Board of Education indicate that the Board held an executive session to discuss your requests made under the Freedom of Information Law.

As you are aware, the Open Meetings Law requires that a meeting of a public body, including a board of education, must be open to the public except when an issue may be discussed during an executive session. However, a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the topics that may appropriately be considered during an executive session. In my opinion, a discussion of your request would not have fallen within any of the grounds for executive session.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. David W. Fish
School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2962
OML-AO-900

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

June 21, 1983

Mr. Robert W. Parks
General Manager
Tri-States Publishing Company
84-88 Fowler Street
Port Jervis, NY 12771

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Parks:

I have received your letter of June 8, as well as that of Mr. Glass of June 13. Mr. Glass is Corporation Counsel for the City of Port Jervis. The correspondence pertains to committees of the City of Port Jervis and their responsibilities under the Open Meetings Law. The interest in compliance with the Open Meetings Law expressed by yourself and Mr. Glass by means of his thoughtful letter is much appreciated.

Since there are differences of opinion expressed by yourself and Mr. Glass in relation to occurrences involving the Port Jervis Public Works Committee, the ensuing comments will be largely legal in nature.

First, as Mr. Glass has conceded, meetings of a committee are subject to the Open Meetings Law. In this regard, the application of the Open Meetings Law is determined in part by the definition of "public body". That term 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" [see Open Meetings Law, §97(2)].

Although Mr. Glass recognized the change in the Open Meetings Law made in 1979 that clearly brought committees and subcommittees within the scope of the Law, he also indicated that §101 of the Law regarding minutes remained unchanged. It appears to be his contention that requirements concerning minutes apply only to the governing body, the Common Council of the City of Port Jervis, and not advisory bodies, such as the Public Works Committee.

In my opinion, even though a committee might not have the authority to take final and binding action, I believe that it is a "public body" required to carry out whatever obligations might exist under the Open Meetings Law. Stated differently, it is my view that the Public Works Committee is itself a public body required to provide notice in accordance with §99 of the Open Meetings Law, required to follow the procedure prescribed by §100(1) prior to entry into an executive session, and required to prepare minutes to the extent prescribed by §101. I would like to point out, too, that it has been held judicially that advisory committees are themselves public bodies required to prepare minutes, even though their minutes may be reflective of advice [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY ad 995 (1982)]. Therefore, §101 concerning minutes refers to governing bodies as well as advisory bodies.

Second, you raised questions regarding notice of meetings and "[H]ow much prior notification is required". It appears that your question was precipitated by a situation in which notice of the wrong time was given. Mr. Glass has indicated that the error was inadvertent and that steps have been taken to ensure that the appropriate notice is given.

For future reference, §99(1) of the Open Meetings Law pertains to meetings scheduled at least a week in advance and requires that notice of the time and place of such meetings 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 meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting "to the extent practicable" at a reasonable time prior to such meetings.

As such, although the Open Meetings Law does not preclude the holding of emergency meetings, for example, efforts must in my view be made to provide notice pursuant to §99(2). In those instances, compliance might merely involve posting notice in the usual locations and telephoning representatives of the news media.

Third, the major source of controversy between yourself and Mr. Glass concerns minutes of meetings of committees. On one hand, in describing the business of the Public Works Committee, you wrote that:

> "[T]here are a series of discussions, reports on work completed, and recommendations agreed upon by the committee members. These recommendations will later be presented to the full council for approval. Notes are kept by Councilman Richard McGoey throughout the meeting. There are no votes taken, but there is a general consensus on most matters."

On the other hand, Mr. Glass wrote that, although notes may be taken by individual members:

> "no votes are taken, no motions are passed, no resolutions are offered and no action is taken at a workshop or committee meeting. It would be an exercise in futility to require minutes where the minutes would be a blank page."

Consequently, minutes are not taken.

With respect to minutes of open meetings, §101(1) of the Open Meetings Law 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 in my view represents what may be characterized as minimum requirements concerning the contents of minutes. Clearly §101 does not require that every comment made at a meeting be recorded or that a verbatim account of a meeting be prepared.

However, as noted earlier, it was held in Syracuse United Neighbors, supra, that advisory committees must prepare minutes. From my perspective, if the Public Works Committee offers a proposal, as a body, to the Common Council, such a step is in my view reflective of action taken by the Committee that must be recorded in minutes, even if the Common Council has the authority to accept, reject or modify the Committee's recommendation. Therefore, if a "consensus" is reached by the Committee to forward a proposal to the governing body, I believe, based upon the language of the Open Meetings Law and its judicial interpretation, that minutes should be prepared.

Similarly, since a committee is itself a public body, it may enter into executive sessions where appropriate [see Open Meetings Law, §100(1)(a) through (h)]. However, the Law contains procedural requirements that must be accomplished during an open meeting before an executive session may be held. Specifically, §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..."

Since a motion must be made prior to entry into an executive session, and since minutes must include reference to motions, a committee that enters into an executive session must in my opinion maintain minutes that include reference to motions to go into executive sessions.

In a related area, I direct your attention to the Freedom of Information Law. Section 87(3)(a) states that each agency, including a committee, shall maintain:

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

In my opinion, the record of votes envisioned by §87(3)(a) should be included in minutes, when action is taken by a committee. Once again, while action taken by a committee might not be the final action, which may only be taken by the Common Council, such a step is its (i.e., the committee's) final action.

Fourth, you referred to the "subject matter of list" of the City of Port Jervis. In this regard, §87(3)(c) of the Freedom of Information Law states that each agency shall maintain:

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

Mr. Glass indicated that the subject matter list is available on request.

Lastly, both your letter and that of Mr. Glass referred to notes taken by members of the Public Works Committee at its meetings. I believe that the notes are subject to whatever rights of access might exist under the Freedom of Information Law.

It is noted that the Freedom of Information Law is expansive in scope due in part to the definition of "record". Section 86(4) provides that the term "record" includes:

> "...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 a situation that may be somewhat similar to that described, it was found that notes of meetings prepared by the Secretary to the Board of Regents and kept separate from minutes constituted "records" subject to rights of access. Therefore, it appears that the notes in question are accessible or deniable depending upon the extent to which one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law might apply [see Warder v. Board of Regents, 410 NYS 2d 742(1978)].

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 A. Glass, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-901

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

June 22, 1983

Ms. Kim Hummel
The Daily Star
59 Main Street
Cobleskill, NY 12043

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Hummel:

I have received your letter of June 10 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, the "[M]embers of the Schoharie County press are particularly concerned with committee meetings called by Schoharie County supervisors". You indicated that meetings "have been held but not posted and not mentioned to the press until after the fact." Since "Schoharie supervisors have always conducted business in this fashion and feel no need to alter tradition", you have asked for an advisory opinion regarding the notice requirements of the Open Meetings Law.

In this regard I would like to offer the following comments.

First, although there had been varying interpretations of the Open Meetings Law with respect to its coverage of meetings of committees when the Law became effective in 1977, amendments to the Law enacted in 1979 in my opinion make clear that a committee of a board of supervisors is subject to 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."

It is noted that the definition of "public body" in the original Open Meetings Law referred to entities that could "transact" public business. The current language, however, includes entities that "conduct" public business. Further, the existing definition makes specific reference to committees, subcommittees and similar bodies. Consequently, I believe that a committee of the Board of Supervisors is a "public body" required to comply with the Open Meetings Law in all respects and in the same manner as the County's governing body.

Second, §99 of the Open Meetings Law requires that notice be given prior to all meetings of a public body.

Section 99(1) pertains to meetings scheduled at least a week in advance. The cited provision requires that notice of the time and place of such meetings 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.

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

Therefore, although the Open Meetings Law does not preclude a public body from convening a meeting on short notice, I believe that reasonable efforts must be made to provide notice of every meeting to the news media and to the public by means of posting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2965
OML-AO-902

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

June 22, 1983

Mr. Irving Schachter
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schachter:

I have received your letter dated May 27 in which you raised questions regarding the Freedom of Information and Open Meetings Laws.

You indicated that you wanted a response for the purpose of presenting a research paper on June 8. In this regard, it is noted that your letter was postmarked June 13 and reached this office on June 15.

With respect to your questions, I would like to offer the following comments.

First, you have requested a citation for the provision of law concerning the definition of "executive session". I direct your attention to §97(3) of the Open Meetings Law, which defines "executive session" to mean:

> "...that portion of a meeting not open to the general public."

Second, you have asked whether the term "executive session" as used in §3020-a(2) of the Education Law has the same meaning as the term "executive session" appearing in the Open Meetings Law. In my opinion, "executive session" is used in both provisions to pertain to a situation in which the public may be excluded from a meeting

and in which a public body is permitted to conduct its business in private. However, there are distinctions between the Open Meetings Law and the cited provision of the Education Law. In the case of the former, as you may be aware, §100(1) requires that a procedure must be accomplished during an open meeting before a public body is permitted to enter into an executive session. Further, the Open Meetings Law indicates that a public body may enter into an executive session to discuss certain matters, but only after having carried a motion by a majority vote of its total membership. Section 3020-a(2) of the Education Law states in part that "the employing board, in executive session, shall determine..." whether probable cause regarding charges against a tenured person exists. It is possible, therefore, that a board of education, for example, acting under §3020-a(2) of the Education Law, is required to consider the charges during an executive session.

Your next question is whether an executive session may be held "without a public meeting first being held". In my opinion, since an executive session is a portion of an open meeting, a public body must convene an open meeting prior to entry into an executive session. As indicated earlier, the procedural requirements for entry into an executive session involve a motion made and carried during an open meeting. As such, under the Open Meetings Law, it is in my view 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.

If an executive session is held by an "employing board" pursuant to §3020-a(2) of the Education Law "without there being first an open meeting and the board takes action", you asked whether the action would have legal effect and if a finding of probable cause remains valid. From my perspective, there is no automatic invalidity of action due to a violation of the Open Meetings Law. On the contrary, I believe that action of a public body remains valid or legal unless and until a court renders a determination to the contrary. It is noted that §102 of the Open Meetings Law states that a court may in its discretion and upon good cause shown nullify action taken in violation of the Open Meetings Law. As such, a court is not required to nullify action taken in violation of the Open Meetings Law.

The next area of inquiry pertains to a situation in which there are nine members of an "employing board" and seven meet to enter into an executive session following a vote of four to three in favor of an executive session. Your question is whether "this is a lawful executive session". In my opinion, under the Open Meetings Law, on a board consisting of nine members, an affirmative vote by five would be necessary to approve any motion, including a motion to enter into an executive session. As indicated in §100(1) of the Open Meetings Law, a motion to enter into an executive session must be carried by a "majority vote of its total membership" [see also, General Construction Law, §41].

In the case of an executive session held under §3020-a (2) of the Education Law, it is not clear whether the same conclusion would be reached. If that provision requires that an executive session be held, it might be argued that the employing board has no discretion and that it must enter into an executive session. However, it might also be contended that any action taken by a board consisting of nine members must be accomplished by a majority vote of its total membership.

Your last question involves a situation in which an "employing board" enters into an executive session and finds probable cause, "but keeps no minutes of this session". Your question is whether if minutes are not prepared, such a failure would invalidate the finding of probable cause. Once again, I believe that any such invalidation could be carried out only by a court. Further, as you are likely aware, §3020-a(2) requires that if an employing board determines that probable cause exists, "a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certfied mail". Assuming that such a step is taken, it would appear that minutes of the executive session might make reference only to the fact that a finding of probable cause was reached, with the date and the vote of the members. I do not believe that minutes of a more expansive nature would be required to be compiled. It is noted, too, that while the notification prescribed in the preceding paragraph must be sent to the accused employee, and that §101(2) of the Open Meetings Law requires that minutes be prepared which action is taken during an executive session, it has been held that charges based upon a finding of probable cause may be withheld under the Freedom of Information Law [see Herald Company v. School District of City of Syracuse, Sup. Ct., Suffolk Cty., NYLJ, Nov. 18, 1977].

Lastly, as requested, enclosed are copies of the Freedom of Information Law, the Open Meetings Law, and summaries of judicial determinations rendered under both of those statutes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-903

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

June 23, 1983

Mr. Richard Mickelson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mickelson:

As you are aware, I have received your letter of June 6 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, the Tully Village Board of Trustees on May 24 "met in secret with a contractor to discuss the use of our water & sewer outside the Village". Further, you wrote that, having discussed the matter with Scott Chatfield, the Village Attorney, he informed you that "a private meeting was held on Wednesday May 18, 1983 with the contractor..." You indicated that Mr. Chatfield "stated that the meeting did not have to be public as it was for information purposes only" and that he told you "that the Village Board could meet at any time in this manner without an open forum". It is your belief that a "deal was worked at the meeting of May 18".

I would like to offer the following comments regarding your inquiry.

First, as a general rule, the Open Meetings Law prohibits a public body from holding a private or "secret" meeting. In addition, if your rendition of Mr. Chatfield's comment to the effect that the Village Board could meet at any time in privacy is accurate, I disagree with his assertion. It is noted that the Open Meetings Law applies

to all meetings of a public body, such as a village board of trustees. Moreover, in a landmark decision rendered in 1978 by the Court of Appeals, the state's highest court, it was found that the definition of "meeting" [see Open Meetings Law, §97(1)] includes any gathering of a quorum of a public body held 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Consequently, the Open Meetings Law applies to any convening of a quorum of a public body for the purpose of conducting public business, even if a meeting is held "for information purposes only".

Second, the vehicle for closing a meeting is the "executive session". However, the term "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)]. Therefore, a public body may enter into an executive session only after having convened an open meeting. To conduct an executive session, a procedure prescribed in the Open Meetings Law must be accomplished during an open meeting. 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..."

As such, it is clear in my opinion that a closed or executive session is not separate and distinct from an open meeting but rather is a portion of an open meeting.

Third, it is emphasized that a public body cannot enter into an executive session to discuss the subject of its choice. Paragraphs (a) through (h) of §100(1) specify and limit the topics that may appropriately be considered during an executive session. Therefore, unless and until one or more of those topics arises, the Board must in my view conduct its business open to the public. Under the circumstances described in your letter, it is doubtful in my opinion that any ground for executive session could justifiably have been asserted.

Fourth, meetings of public bodies must be preceded by notice. Section 99 of the Law requires that notice of the time and place of every meeting be given. Section 99(1) pertains to meetings scheduled at least a week in advance. The cited provision requires that notice of the time and place of such meetings 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.

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

Fifth, the Open Meetings Law contains provisions regarding its enforcement (see §102). It is noted that, in a proceeding brought under the Open Meetings Law, a court may, in its discretion and "upon good cause shown", invalidate action taken behind closed doors in violation of the Open Meetings Law.

Lastly, you asked for the names of agencies "that would investigate the legality of the sewer & water sale". In my view, the offices to which you referred in your letter of May 25 addressed to members of the Village Board of Trustees are likely the best contacts relative to your inquiry.

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: Village Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-904

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

June 23, 1983

Ms. Barbara Vancheri
Gannett Rochester Newspapers
55 Exchange Street
Rochester, New York 14614

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Vancheri:

I have received your letter of June 17 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter:

> "...the Board of Visitors at the State Agricultural and Industrial School at Industry voted at its most recent session (June 15) to hold its entire next meeting as an executive session.
>
> "They also discussed scheduling a second 'rap session' to iron out details as to how the 15-member board should function."

I would like to offer the following comments regarding your inquiry.

First, I believe that the Board of Visitors of the School at Industry constitutes a "public body". 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."

The Board consists of fifteen members (see Executive Law, §512), it is required to conduct its business by means of a quorum (see General Construction Law, §41), and it conducts public business and performs a governmental function for the Division of Youth and for the state generally. Therefore, I believe that the Board clearly falls within the scope of the definition of "public body" and is required to comply with the Open Meetings Law in all respects.

Second, a public body cannot, in my view, schedule an executive session, for in a technical sense, it cannot be known in advance of a meeting whether an executive session can or will be held.

The Open Meetings Law defines "executive session" in §97(3) to mean a portion of an open meeting during which the public may be excluded. Moreover, §100(1) prescribes a procedure that must be followed by a public body during an open meeting before an executive session may be held. Specifically, §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 is not separate and distinct from a meeting. On the contrary, an open meeting must be convened before a public body may enter into an executive session.

Third, with respect to notice, §99 of the Law requires that notice of the time and place of every meeting be given. Section 99(1) pertains to meetings scheduled at least a week in advance. The cited provision requires that notice of the time and place of such meetings 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.

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

Fourth, although the upcoming meeting has been scheduled as an "executive session", it is emphasized that a public body cannot enter into an executive session to discuss the subject of its choice. Paragraphs (a) through (h) of §100(1) specify and limit the topics that may appropriately be considered during an executive session. Therefore, unless and until one or more of those topics arises, the Board must in my view conduct its business open to the public.

Lastly, you wrote that the Board alluded to the possibility of holding a "rap session" to "iron out details as to how the 15-member board should function". I believe that a "rap session" or similar gathering, even though informal, is a "meeting" that falls within the requirements of the Open Meetings Law. In a landmark decision rendered in 1978 by the Court of Appeals, the state's highest court, it was found that the definition of "meeting" [see Open Meetings Law, §97(1)] includes any gathering of a quorum of a public body held 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Consequently, it is my view that a so-called "rap session" held to discuss the operation of the Board would be a "meeting" required to be convened open to the public and conducted in accordance with 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: Board of Visitors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 905

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

June 28, 1983

Mr. Brian J. Molinaro
City Treasurer
City of Little Falls
City Hall
659 E. Main Street
Little Falls, NY 13365

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Molinaro:

I have received your letter of June 17 as well as the materials attached to it.

Your inquiry concerns a "'secret' meeting held between the two city boards" on May 25. The entities in question are the Golf Commission and the Board of Public Works of the City of Little Falls.

According to your letter to the editor of the Little Falls Evening Times, a meeting was held by the two boards on May 25 without any prior notice. Further, although you indicated that meetings are generally held at City Hall, the meeting in question was conducted at the City Waste Water Treatment Plant. When the meeting began, a motion was made to enter into an executive session to discuss matters of "personnel and possible litigation". Although you contended that you should have had the right to be present as an elected City official, you were nonetheless excluded.

In this regard, I would like to offer the following comments.

First, the Board of Public Works and the Golf Commission in my view constitute public bodies subject to the Open Meetings Law. Section 97(2) of the 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."

Since the boards in question are entities of City government that are required to conduct public business by means of a quorum (see General Construction Law, §41) and that perform a governmental function for a public corporation, the City of Little Falls, I believe that either board could be characterized as a "public body" required to comply with the Open Meetings Law.

Second, as a general rule, the Open Meetings Law prohibits a public body from holding a private or "secret" meeting. It is noted that the Open Meetings Law applies to all meetings of a public body. In a landmark decision rendered in 1978 by the Court of Appeals, the state's highest court, it was found that the definition of "meeting" [see Open Meetings Law, §97(1)] includes any gathering of a quorum of a public body held 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Consequently, the Open Meetings Law applies to any convening of a quorum of a public body for the purpose of conducting public business. Therefore, if a quorum of either the Board of Public Works or the Golf Commission was present on the evening of May 25 for the purpose of conducting public business, a "meeting" subject to the Open Meetings Law was held.

Third, you asked whether notices of City meetings are required to be published in the official newspaper designated by the City. Section 99(3) of the Open Meetings Law specifically states that the notice to be given under the Law is not required to be legal notice. Stated differently, a meeting held under the Open Meetings Law need not be preceded by a paid publication of a legal notice.

However, all meetings of public bodies must be preceded by notice. Section 99 of the Law requires that notice of the time and place of every meeting be given. Section 99(1) pertains to meetings scheduled at least a week in advance. The cited provision requires that notice of the time and place of such meetings 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 meeting.

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

Fourth, it is questionable in my view whether the site of the meeting, the Waste Water Treatment Plant was appropriate. Section 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 access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

Under the circumstances, it is questionable whether reasonable efforts were made to hold the meeting of May 25 in a location that permitted barrier-free access to physically handicapped persons.

Fifth, you questioned the sufficiency of a motion to enter into an executive session to discuss "personnel and possible litigation".

With respect to "personnel", it has been advised that a motion to enter into an executive session to discuss "personnel" without greater description is insufficient. The so-called "personnel exception" for executive session permits a public body to close its doors 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..." [see §100(1)(f)].

Since an executive session regarding personnel may be held only to consider a "particular" person in conjunction with one or more of the topics listed in §100(1)(f), I believe that a motion to enter into an executive session should indicate that a discussion involves a particular person and mentions one of those topics. For instance, if a situation arises in which the performance of a particular employee is the subject of a review, a motion might be made to discuss "the employment history of a particular person". A motion to discuss "personnel" without more would not indicate whether a particular person is the subject of the discussion or whether the topic pertains to any of the subjects listed in §100(1)(f) [see Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981].

With respect to "possible litigation", this office has consistently advised that such a subject is not an appropriate topic for discussion in an executive session. In brief, since any matter discussed by a public body could eventually result in litigation, virtually any topic might be characterized as "possible litigation". From my perspective, §100(1)(d) involving "proposed, pending or current litigation" is intended to pertain to discussions of litigation strategy [see Concerned Citizens to Review the Jefferson Mall, 84 AD 2d 612, appeal dismissed 54 NY 2d 957 (1981)]. If litigation strategy is discussed during an open meeting, a legal adversary would have the capacity to learn of that strategy.

With regard to the sufficiency of a motion to discuss "litigation" or "possible litigation", it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981)].

Based upon the language of the judicial decision quoted above, it appears that the grounds for executive session cited in the motion should have been more expansive.

Lastly, as a City official you contended that you had the right to attend the executive session. In this regard, §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."

As such, I believe that only the members of a public body have a "right" to attend an executive session held in compliance with 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: John Nemcek
Cheryl Crimmins
Michael Izzo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-906

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

June 30, 1983

Mr. Lester E. Hendrix
Schenectady Gazette
Cobleskill Bureau
Box 196
Cobleskill, NY 12043

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hendrix:

I have received your letter of June 22 in which you raised a series of questions under the Open Meetings Law regarding the activities of the Cobleskill Central School District Board of Education.

In terms of background, you wrote that you are a reporter for the Schenectady Gazette, which maintains a Schoharie County office and is the most widely circulated daily newspaper in the County. In 1976, you notified the clerk of the Board, as well as the clerks of all towns, villages and school boards in the County of the enactment of the Open Meetings Law and offered to "assist in compliance by publishing meeting notices at no cost".

In May, you learned that the Cobleskill Board of Education held several special meetings at 6:30 a.m. to "formulate a new budget". Notice of those meetings was not given to you. Moreover, having contacted representatives of other news media that serve Cobleskill, you learned that none of them had been informed of the special meetings. Consequently, on May 18 at 6:30 a.m. you delivered a letter to the Board at one of its unannounced meetings. The letter, a copy of which you enclosed, per-

tains to general requirements of the Open Meetings Law regarding meetings of public bodies and notice. Despite your presence at that meeting and the delivery of the letter, ensuing meetings were apparently held by the Board without giving notice. You also indicated that minutes regarding several meetings were not compiled, that the minutes of a meeting on April 11 indicated that an executive session was held but that the motion does not specify the reason for entry into executive session, and that executive sessions were held on several occasions but that no minutes of those executive sessions were prepared.

In conjunction with those facts, you have raised nine questions. I will attempt to respond to each.

The first is whether the School Board meetings of May 18 and 19, during which a quorum of the Board was present, were subject to the Open Meetings Law. From my perspective, those gatherings were subject to the requirements of the Open Meetings Law in all respects. In a landmark decision rendered in 1978 by the Court of Appeals, the state's highest court, it was found that the definition of "meeting" [see Open Meetings Law, §97(1)] includes any gathering of a quorum of a public body held 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Consequently, the Open Meetings Law applies to any convening of a quorum of a public body for the purpose of conducting public business. Therefore, since a quorum of the Board was present at those meetings and since the Board convened to conduct public business, those gatherings in my view fell within the requirements of the Open Meetings Law.

Your second question is whether the Board complied with the Law "by merely announcing the meetings of May 18 and 19 at preceding meetings..." While an announcement of those meetings might have been given, the Open Meetings Law provides specific direction regarding the manner in which notice must be given.

Specifically, §99 of the Law requires that notice of the time and place of every meeting be given. Section 99(1) pertains to meetings scheduled at least a week in advance. The cited provision requires that notice of the time and place of such meetings 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 meeting.

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

Therefore, if notice of the time and place of those meetings was neither given to the news media nor posted as required by §99, the notice requirements of the Law would not in my opinion have been fulfilled.

Third, you asked whether the School Board is required "to take and keep minutes of the May 18 and 19 meetings". Here I direct your attention to §101 of the Open Meetings Law, which provides what might be characterized as miminum requirements concerning the contents of minutes. 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."

Based upon the language quoted above, if the Board engaged in any motions, proposals, resolutions, other formal actions or votes, those activities should be recorded in the form of minutes.

Fourth, you asked if the School Board is required "to take and keep minutes of executive sessions". As a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law, §100(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in

minutes pursuant to §101(2). Nevertheless, various interpretations of the Education Law, §1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd __ NY 2d __ (1982)]. Since a school board cannot generally take action during an executive session, and since §101(2) requires that minutes of executive session be prepared only when action is taken, as a general rule, there need not be minutes of executive sessions.

Your fifth question is whether notice of a meeting held on June 20 given "to only one person" was sufficient to comply with the Open Meetings Law. As noted earlier, §99 of the Law requires that notice be given to the news media and posted in one or more designated locations for the public. As such, notice to one person likely would not have complied with the Law.

Sixth, you asked whether a newspaper of general circulation that has a branch office in the County and "which regularly receives and publishes publicity from the school and attends school board meetings", can "be legally excluded from notification of meetings after twice asking for such notification". In this regard, although §99 of the Law requires that notice be given to the news media, the Law does not specify which news media must be given notice. In my opinion, however, every law should be given a reasonable interpretation. With respect to notice requirements, reasonable notice would in my view be given to at least two members of the news media representing newspapers or broadcast outlets that would most likely reach those who might be interested in attending. Therefore, although I could not advise with certainty that the Schenectady Gazette has the right to require that the School Board provide notice of its meetings to the Gazette, as the daily newspaper with the greatest circulation in the area, it appears that it would be reasonable for the School Board to provide notice to the Gazette.

Seventh, if a special meeting is scheduled at a regular meeting, you asked whether the news media must be notified of such special meeting and whether the minutes of the regular meeting should "reflect the fact another meeting was scheduled". Once again, §99 requires that the news media be given notice of all meetings, whether regularly scheduled or otherwise. With respect to minutes, I would contend that a proposal and an ensuing agreement by a Board to meet on a particular date is required to be recorded in minutes.

Eighth, you asked whether a school board is required to announce to the news media "when a regular meeting is rescheduled". In my view, notice of a rescheduled meeting must be given to the news media and to the public by means of posting in accordance with §99. It is noted that the Open Meetings Law does not preclude a public body from scheduling a meeting on short notice. However, as indicated in §99(2) pertaining to meetings scheduled less than a week in advance, notice of such meetings must be given to the extent practicable at a reasonable time prior to such meetings. Therefore, for example, if it is determined at 9 a.m. that a meeting will be held at 7:30 p.m. on the same day, a public body would in my opinion be required at the very least to contact the local news media by telephone for the purpose of providing notice and posting notice in the designated locations.

Lastly, you asked whether school board minutes must "reflect the reasons for an executive session, if a reason is stated when the session is called". Section 100(1) of the Open Meetings Law prescribes a procedure that must be followed by a public body before it may enter into an executive session. The cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, a motion for an executive session must be made during an open meeting, and the motion must indicate in general terms the subject or subjects to be considered during an executive session.

Since §101 concerning minutes requires that minutes include reference to all motions, and since a motion to go into executive session must include the reason, I believe that minutes of a meeting are required to reflect the reason for entry into 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
Executive Director

RJF:jm

cc: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 2972
OML-AO- 907

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

July 5, 1983

Mr. Henry Wyatt
[redacted]

Dear Mr. Wyatt:

I have received your note of June 28 and the materials attached to it.

Having reviewed the materials, I would like to offer the following brief comments.

First, as you may be aware, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law. In turn, §87(1) requires each agency, in this instance the governing body of the City of Utica, to adopt regulations consistent with those of the Committee.

Second, the City's regulations appear to be based upon the regulations adopted by the Committee, as well as model regulations designed to assist agencies in complying. In my view, the only deficiency in the City's regulations involves the issue that you have raised. Specifically, although the procedures are in my view appropriate, no particular person has been designated as records access officer. I believe that, as indicated in the City's regulations, such a designation should be made.

Third, regarding a different but related subject, you sent a copy of a memorandum sent by Councilman Critelli to Mayor Pawlinga. One of the Councilman's proposals involves the establishment of a notice board to be used to comply with the notice requirements of the Open

Meetings Law. In my opinion, which is based upon §99 of the Open Meetings Law, the proposal has merit. The cited provision requires that notice of the time and place of meetings of all public bodies shall be given to the news media and "shall be conspicuously posted in one or more designated public locations..." Implementation of Councilman Critelli's proposal would likely serve to enhance compliance with public notice requirements in 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: Mayor Pawlinga
Councilman Critelli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-908

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

July 6, 1983

Mr. Patrick J. King, Jr.
Village Clerk
Village of Woodsburgh
30 Piermont Avenue
Hewlett, NY 11557

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. King:

I have received your letter of June 24 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, you are the Clerk of the Village of Woodsburgh and its zoning board of appeals. At a meeting of the Board held on June 22, the "Board went into executive session without first polling the entire Board". Having later discussed the executive session with the village attorney, he indicated that the ground for executive session pertained to "proposed, pending or current litigation" [see Open Meetings Law, §100(1)(d)]. Nevertheless, you wrote that the issue involved an application for a land use variance for the purpose of building a swimming pool.

Based upon the facts as described in your letter, I would like to offer the following comments.

First, as you are likely aware, the Open Meetings Law was amended in May (Chapter 80, Laws of 1983). While it was often contended that the deliberations of zoning boards of appeals were quasi-judicial and, therefore, exempt from the Open Meetings Law [see §103(1)], the amendments bring zoning boards of appeals within the requirements of the Law in the same manner as public bodies generally.

Second, the Open Meetings Law prescribes a procedure that must be followed by a public body, including a zoning board of appeals, during an open meeting before an executive session may be convened. Specifically, §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..."

As such, a motion to enter into executive session must in my view be made during an open meeting and carried by a majority vote of the total membership of a public body. Further, the motion must indicate in general terms the subject or subjects to be considered during the executive session.

Third, as indicated in your letter, the basis for entry into executive session apparently involved a discussion of "proposed, pending or current litigation". In this regard, it has consistently been advised that "possible" litigation does not constitute a valid basis for entry into an executive session, for virtually any subject discussed by a public body could eventually be the topic of litigation. Further, in my view, the purpose behind the "litigation" exception for executive session is to permit a public body to discuss its litigation strategy in private without baring that strategy to its adversary [see Concerned Citizens to Review the Jefferson Mall, 84 AD 2d 612, appeal dismissed 54 NY 2d 957 (1981)]. Therefore, if indeed litigation strategy was discussed, an executive session could in my view justifiably have been held. However, on the other hand, if litigation strategy was not the topic of discussion, I do not believe that §100(1)(d) could properly have been cited to enter into 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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-909

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

July 7, 1983

The Honorable Frances D. Mac Eachron
Mayor
Village of Hastings-On-Hudson
Municipal Building at Fulton Park
Seven Maple Avenue
Hastings-On-Hudson, NY 10706-1497

The staff of the Committee On Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mayor Mac Eachron:

I have received your letter of June 27 in which you requested advice regarding the Open Meetings Law. Your interest in complying with the Law is much appreciated.

Your inquiry deals specifically with the Planning Board of the Village of Hastings-On-Hudson and its capacity to enter into an executive session to "discuss the financial history and viability of a corporation interested in developing property on the Hastings Waterfront".

In this regard, I would like to offer the following comments.

First, the coverage of the Open Meetings Law is determined in part by 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" [§97(2)].

Based upon the language quoted above, a village planning board is in my view clearly a "public body" subject to the requirements of the Open Meetings Law.

Second, the Law is based upon a presumption of openness. Section 98(a) states that:

> "[E]very meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred of this article."

Third, paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the topics that may appropriately be considered during an executive session. Relevant to your inquiry 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..."

To the extent that the Planning Board engages in discussions of the financial history of a particular corporation, or the "viability" of that corporation in relation to its credit history, §100(1)(f) could in my opinion properly be cited as a basis for entry into executive session.

Enclosed are copies of 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2978
OML-AO-910

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

July 8, 1983

Mr. Bruce H. Vail
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Vail:

I have received your letter of July 1 addressed to Ms. Baldasaro. Your inquiry concerns the status of the New York City Industrial Development Agency under both the Freedom of Information Law and the Open Meetings Law.

In my opinion, the records of the Industrial Development Agency are subject to the Freedom of Information Law, and the meetings of its Board of Directors fall within the requirements of the Open Meetings Law. To be more specific, I would like to provide the following comments.

First, the general provisions concerning industrial development agencies are found in Article 18-A of the General Municipal Law. Subdivision (2) of §856 of the General Municipal Law states that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation".

In terms of the Freedom of Information Law, the scope of the Law is determined in part by the definition of "agency". Section 86(3) 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."

The coverage of the Open Meetings Law is similarly determined by the definition of "public body". Section 97(2) defines that phrase 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."

Since the Freedom of Information Law includes municipal corporations, which are public corporations, and since §66 of the General Construction Law defines "public corporation" to include a public benefit corporation, an industrial development agency in my view is clearly an "agency" subject to the Freedom of Information Law and its board would constitute a "public body" subject to the Open Meetings Law.

It is also noted that §917 of the General Municipal Law deals specifically with the New York City Industrial Development Agency and makes reference to its powers and its composition.

Second, you have inquired with respect to minutes of meetings of the Board of Directors insofar as they relate to a loan to Bay Street Commercial, Ltd. In this regard, §101 of the Open Meetings Law pertains to minutes and requires that minutes of open meetings be made available within two weeks and that minutes reflective of action taken during an executive session must be made available in accordance with the Freedom of Information Law within one week. Therefore, the Board of Directors would be required to prepare minutes in accordance with the Open Meetings Law and subject to rights of access granted by the Freedom of Information Law.

Lastly, you asked about the "internal documents" concerning the loan in possession of the Industrial Development Agency. Without additional information, I could not provide specific direction. However, it is reiterated that the records in question would be available to the extent provided by the Freedom of Information Law.

Enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, and an explanatory pamphlet dealing with both subjects.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2979
OML-AO-911

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

July 8, 1983

Ms. Janet H. Secor
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Secor:

I have received your letter of June 28 in which you described a series of difficulties arising under the Freedom of Information and Open Meetings Laws relative to the Williamsville Central School District and its Board of Education.

Your first area of inquiry concerns a petition submitted to the Board to which reference is made in minutes that you have enclosed. In brief, the minutes indicate that Counsel to the Board recommended that the Board adopt three proposals regarding propositions. One of those proposals involves notification to a voter representative, in this instance, you, of action taken by the Board. You wrote that you have not yet been given an official notification of the Board's action.

Having reviewed the minutes, I believe that a motion was made to support Counsel's recommendations, but that the motion was withdrawn and substituted. Unless I am mistaken, the substituted motion does not include the recommendation to provide the notification to which you referred. Further, the minutes indicate that further discussion on that subject would occur. As such, it appears that the Board took no action. In addition, it is noted that the use of the Freedom of Information Law is triggered by a request made under the Law. In this regard, it does not appear that any request for notification was made. Consequently, I do not believe that the Freedom of Information Law was clearly applicable to the situation.

The second area of inquiry pertains to an incident in which the Board of Education conducted an executive session, but "failed to notify the members of the audience upon reconvening the meeting". As a consequence, you wrote that people who had waited "to attend the complete meeting were denied this right". Without more specific information concerning the situation, I cannot provide specific comments. Nevertheless, I would like to offer the following general comments regarding the Open Meetings Law.

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. Second, as you are likely aware, a public body may conduct an executive session only to the extent that one or more of the topics appropriate for discussion in executive session are under discussion [see §100(1)(a) through (h)]. When a discussion during an executive session ends, presumably an open meeting is continued and members of the public in attendance should be so informed.

The third problem that you described concerns a request for information submitted to the President of the Board of Education, Mr. Ursitti, on March 18, 1982. A response dated June 15, 1982, was sent to you in which it was stated that:

> "[T]he delay in responding to your letter was a conscious decision on my part influenced by the fact that we at that time involved in the preparation of an subsequently the presentation to the public of figures for the 1982-83 budget, and in my view rehashing the 1980-81 budget might have served to create some confusion which I consider to be unnecessary."

Mr. Ursitti also suggested that:

> "...for future questions you might go to the School District Offices and raise such questions with assistant superintendent for business or directly with the superintendent, inasmuch as those individuals are closer to the accounting process which produces specific figures.

Based upon a review of your request for information and Mr. Ursitti's response, I would like to offer four points.

First, it is emphasized that the Freedom of Information Law is a statute that pertains to records and that enables members of the public to request records from government. In this regard, your letter of March 18 raises a series of questions regarding the District's audited financial statements. From my perspective, rather than requesting information by asking questions, it would have been more appropriate to request records reflective of the information sought. To provide guidance, I have enclosed a copy of a brochure that contains a sample letter of request.

Second, the Freedom of Information Law is applicable to existing records. Stated differently, §89(3) states that, as a general rule, an agency is not required to create a record in response to a request. Therefore, if, for example, responses to your questions involved the creation of new tabulations, such steps would not have been required to be taken by the District under the Freedom of Information Law.

Third, in conjunction with Mr. Ursitti's comments, each agency by means of its regulations required to be promulgated under §87(1) of the Freedom of Information Law is required to designate one or more records access officers who have the duty of responding to requests. As such, it is suggested that requests for records made under the Freedom of Information Law be directed to a designated records access officer.

And fourth, as you intimated, the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for responses to requests. Specifically, §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 not 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 requested 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. Moreover, 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 Open Meetings Law and an explanatory pamphlet dealing with both laws to which reference was made earlier.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Mr. Ursitti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-912

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

July 13, 1983

Ms. Bette Smith
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Smith:

I have received your letter of July 6 in which you requested advice under the Open Meetings Law.

Specifically, according to your letter, you requested that the City Council of the City of Newburgh require that notices of all meetings conducted by public bodies operating within City government be posted on the bulletin board at City Hall. As of the date of your letter, the City Council apparently had not taken action with respect to your request.

In this regard, I would like to offer the following comments.

As you are likely aware, §99 of the Open Meetings Law requires that a public body provide notice of the time and place of all meetings to the news media and to the public by means of posting. With respect to posting, the cited provision states that notice "shall be conspicuously posted in one or more designated public locations..." As such, it is clear that the Open Meetings Law requires that a public body act by designating one or more conspicuous public locations for the purpose of posting notices of meetings.

If the City Council and other public bodies have not designated locations for the purpose of posting notice in conjunction with the Open Meetings Law, I believe that they should do so as required by the Law. While there is no provision in the Law concerning the exact location where notice must be posted, a bulletin board in City Hall would in my view likely be a reasonable location.

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: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOML-AO-913

July 15, 1983

Hon. Philip E. Zegarelli
Mayor
Village of North Tarrytown
28 Beekman Avenue
North Tarrytown, NY 10591

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mayor Zegarelli:

As you are aware, I have received your letter of July 1, in which you requested an advisory opinion under the Open Meetings Law. Please note that your letter reached this office on July 14, and that the new name and address of the Committee appear above on the letterhead.

According to your letter and the materials attached to it, the Board of Trustees of the Village of North Tarrytown resolved at its organizational meeting held on April 4 to conduct its meetings on "the second and fourth Mondays each month and at the Call of the Chair (Mayor)". Notwithstanding the resolution adopted at the organizational meeting, you wrote that:

> "[F]our members of the Board of Trustees (Board consists of the Mayor and six trustees) called a special "emergency" meeting for Tuesday, June 26th at 8 P.M. The meeting was not requested by the Mayor and was announced via telephone at approximately 3 P.M. the same day. No notice was given to the newspaper or the general public for this meeting."

At the "emergency" meeting, which as attended only by the four persons who called the meeting, action was taken to remove Village employees that you appointed as Mayor.

Your inquiry involves the validity of the action taken by the four members of the Board of Trustees.

In this regard, I would like to offer the following comments.

First, the Committee is authorized to provide advice under the Open Meetings and Freedom of Information Laws. As such, it is not within the jurisdiction to advise with respect to the validity of the action in question.

Second, the only aspect of the situation that falls within the Committee's jurisdiction involves the absence of notice regarding the meeting to which you made reference. Here I direct your attention to §99 of the Open Meetings Law (see attached).

Section 99(1) concerns meetings scheduled at least a week in advance and states that notice of the time and place of such meetings 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, such as the "emergency" meeting to which you referred, §99(2) requires that notice be given to the news media and the public by means of posting in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, even though the meeting in question may have been characterized as an emergency meeting, the notice requirements of the Open Meetings Law were applicable in my opinion.

Further, having reviewed the Village Law, I do not believe that any statute within that Chapter provides specific direction or requirements concerning notice of a special or emergency meeting.

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:

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 914

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

August 11, 1983

Mr. Norman W. Rockow
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rockow:

As you are aware, I have received your letter of July 12. Please accept my apologies for the delay in response.

According to your letter, the Town Board of the Town of Hamlin "has a habit of holding meetings not open to the public at which Town business has been discussed and decisions have been made". You indicated that the closed gatherings have been characterized as "work sessions".

In my opinion, assuming that a quorum of the Town Board convenes to discuss public business at a work session, such a gathering constitutes a "meeting" that falls within the requirements of the Open Meetings Law.

It is emphasized that the courts have broadly interpreted the definition of "meeting" [see attached, Open Meetings Law, §97(1)]. In a landmark decision rendered in 1978 that dealt specifically with "work sessions", the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting 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)]. Based upon the decision cited above, it has been suggested that public bodies avoid the use of the phrase "work session", for under the Open Meetings Law, a "work session" and a "meeting" are one in the same and are equally subject to the Open Meetings Law.

Further, the Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings of a public body, including a Town Board, must be conducted open to the public unless and until a ground for executive session arises.

It is noted, too, 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. In addition, §100(1) prescribes a procedure that must be followed by a public body before it may enter into a closed or "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 in my opinion that an executive session is not separate and distinct from a meeting, but rather that it is a portion of an open meeting. Moreover, as indicated previously, a public body may not enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss one or more of the topics listed in paragraphs (a) through (h) of §100(1) of the Law.

As requested, a copy of this opinion as well as the Open Meetings Law and an explanatory on the subject will be sent to Mr. Charles Maier, the Town Supervisory. Enclosed for your consideration are copies of the same materials.

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: Charles Maier

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2994
OML-AO-915

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

August 12, 1983

Alan J. Azzara
Azzara & Baram
210 Old Country Road
Mineola, NY 11501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Azzara:

As you are aware, I have received your letter of July 15 in which you requested advisory opinions under the Freedom of Information and Open Meetings Laws. I hope that you will accept my apologies for the delay in response.

According to your letter, you are a member of the Locust Valley Volunteer Fire Department. You indicated that the Board of Fire Commissioners of your Department was sued by one of its members. You and others in the Community are interested in knowing "just how much money the Board of Fire Commissioners paid in attorneys' fees in defending this suit and in prosecuting the appeal".

In conjunction with the foregoing, your question is whether, under the Freedom of Information Law, you have the right to inspect and copy "any attorneys' bills submitted to the Board of Fire Commissioners in connection with this lawsuit". You have specified that you are not interested in viewing "any correspondence, communications, or memoranda which could conceivably be construed as privileged information."

I would like to offer the following comments regarding the question.

First, the Board of Fire Commissioners of a fire district is in my view an "agency" subject to the requirements of the Freedom of Information Law. Section 174(6) of the Town Law states that a "fire district is a political subdivision of the state and a district corporation..." Since a district corporation is a public corporation (see General Construction Law, §166) and since the definition of "agency" in §86(3) of the Freedom of Information Law includes a "governmental entity performing a governmental function", such as a public corporation, the records of a fire district and its board of commissioners are in my view subject to the Freedom of Information Law.

Second, §86(4) of the Freedom of Information Law defines "record" expansively to include:

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

Due to the breadth of the definition, I believe that the bills in which you are interested constitute "records".

Third, 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) of the Law.

Fourth, while a board of fire commissioners may engage in an attorney-client relationship with its attorney, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. If, however, portions of the bills in question contain information that is confidential under the attorney-client relationship, those portions could in my view be deleted under §87(2)(a) of the Freedom of Information Law, which permits

an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute" (see Civil Practice Law and Rules, §4503). Therefore, while some identifying details in the bills might justifiably be withheld, numbers indicating the amounts expended are in my view accessible under the Freedom of Information Law.

It is also noted that in a decision rendered under the Freedom of Information Law, it was held that checks indicating payment by a village to its attorney were available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., August 20, 1981].

Your second question involves meetings of the Board of Fire Commissioners and "whether or not it is permissible under the Law...to bring a portable tape recorder to these meetings and tape the proceedings".

It is noted that the Open Meetings Law is silent with respect to the use of tape recorders and other broadcasting or televising devices at open meetings. As such, the issue has been dealt with judicially in relation to rules adopted by public bodies, and whether or not such rules are reasonable.

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 advised that the use of tape recorders should not be prohibited in situations in which the devices 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 in Suffolk County. 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."

Due to 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.

It is important to point out that an 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 that 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 opinions quoted above, I believe that you may use a portable tape recorder at an open 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
Executive Director

RJF:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3003
OML-AO-916

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

August 17, 1983

The Honorable Norman J. Levy
Member of the Senate
30 South Ocean Avenue
Room 305
Freeport, NY 11520

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Senator Levy:

I have received your letter of August 2 and appreciate your interest in compliance with the Open Meetings Law. Please accept my apologies for the delay in response.

You have asked for my views with respect to a series of questions raised by three of your constituents. Most of the questions arise under or relate to the Open Meetings Law. Others involve provisions of the Education Law over which the Committee has no jurisdiction. Consequently, my responses will consist of legal advice rendered only in connection with the Open Meetings Law or, where appropriate, the Freedom of Information Law.

The first question involves the responsibilities of a board of education. In this regard, although the question does not fall within the scope of the Committee's jurisdiction, a review of the Education Law indicates that the duties of boards of education are described generally in §1709 of the Education Law.

The second question involves "what business should transpire during a public session", and whether "all questions broached by members of the community [must] be answered."

Here I direct your attention to §97(1) of the Open Meetings Law, which defines "meeting" to include any convening of a public body for the purpose of conducting public business. It is emphasized that the Court of Appeals, the state's highest court, has expansively interpreted the definition to include work sessions, agenda sessions and similar gatherings during which there is no intent to take action, but rather only an intent to discuss public business [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Consequently, any gathering of a quorum of a school board held for the purpose of conducting public business constitutes a "meeting" subject to the requirements of the Open Meetings Law in all respects.

The second part of the question involves public participation. While the Open Meetings Law permits the public to attend and listen to the deliberations of a public body, the Law is silent with regard to public participation. Consequently, it has been advised that a public body may permit public participation, but there is no requirement that members of the public be given an opportunity to speak at a meeting. However, in situations in which a board permits members of the public to speak, it has been recommended that the capacity to participate should be based upon reasonable rules that treat all members of the public in like manner.

The third question involves the circumstances under which a board of education may enter into an executive session, who is permitted to attend an executive session, and whether final decisions may be made during an executive session.

The Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings and deliberations of a public body must be held open to the public except to the extent that an executive or closed session may be convened. Paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the areas of discussion that may appropriately be considered during an executive session. Rather than listing the eight grounds for executive session, I have enclosed a copy of the Open Meetings Law.

With respect to attendance at an executive session, §100(2) 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, members of a school board and others authorized by the board may attend an executive session.

With regard to the capacity to make decisions during an executive session, as a general rule, a public body may take action, i.e., vote, during a properly convened executive session, unless the vote is to appropriate public monies. Nevertheless, various interpretations of the Education Law, §1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd __ NY 2d __ (1982)].

The fourth area of inquiry involves minutes and whether minutes of a public session are "binding" upon a board of education, whether minutes of executive sessions must be kept and whether approved minutes must be made available to the public.

With respect to whether the minutes are binding upon a board of education, it is suggested that an appropriate response could be provided by the Office of Counsel at the State Education Department.

With regard to minutes of executive sessions, as noted earlier, since a school board cannot generally take action during an executive session, and since §101(2) of the Open Meetings Law requires that minutes of executive session be prepared only when action is taken, as a general rule, there need not be minutes of executive sessions.

Approved minutes must in my view be made available under both the Open Meetings Law and the Freedom of Information Law. Section 101(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available

within two weeks of those meetings. Moreover, since action taken by a school board would be reflective of a final agency policy or determination, I believe that such records would also be accessible under §87(2)(g)(iii) of the Freedom of Information Law (see attached).

Since minutes of open meetings must be prepared and made available to the public within two weeks, it has been advised that such minutes, even though unapproved, must be made available within the requisite time limit. In situations in which minutes have not been approved within two weeks, it has been recommended that they be made available after having been marked as "draft", "non-final", or "unapproved", for instance. By so doing, the public can learn generally what transpired at a meeting; concurrently, a board of education is given a measure of protection by signifying that the minutes are subject to change.

I would also like to point out that §87(3)(a) of the Freedom of Information Law requires that each agency, including a school board, shall maintain:

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

Therefore, in any instance in which a board of education votes, a record must be prepared which indicates the manner in which each member voted.

The remaining questions involve the legality of action taken by a superintendent and a board of education, as well as rights of a teacher under the Taylor Law. Since those questions do not involve the statutes within the scope of the Committee's purview, it is suggested that a response should be sought from the Education Department.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 917

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

August 17, 1983

Mr. Charles J. Theophil
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Theophil:

I have received your letter of August 2 in which you raised questions regarding proceedings of the New York City Tax Commission.

According to your letter, you were involved in a hearing before the Commission on March 17 concerning an application for review of a tentative assessment of real property. You wrote, however, that "these hearings were not open to the public" and that it did not appear that any minutes were kept. Your question is whether the practice violates the Open Meetings Law.

In conjunction with your question, I have reviewed Chapter 7 of the New York City Charter concerning the proceedings to which you made reference and have contacted the New York City Tax Commission on your behalf. In this regard, I do not believe that there is any specific direction in the Charter concerning the proceedings in terms of whether they must be open or closed. Further, based upon my discussion with officials of the Commission, the hearings are open to the public. I was informed that the hearing in which you participated was likely conducted in Queens and that the hearing roon is relatively small. Nevertheless, I was also informed that any person may attend the hearings and that, very simply, no members of the public were likely interested in attending on the day of your hearing.

As such, it appears that the capacity of the public to attend grievance hearings would be the same in the City of New York with respect to the Tax Commission as is the case of proceedings conducted by boards of assessment review in municipalities outside New York City.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO- 918

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

August 18, 1983

Mr. Anthony Di Cintio
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Di Cintio:

I have received your letter of August 3 and apologize for the delay in response.

As a newly elected member of the Millbrook Central School District Board of Education, you have raised a series of questions regarding the Board's implementation of the Open Meetings Law.

For instance, you wrote that on August 1, the Board "had a meeting that was not advertised because it was to be an executive session". Although you objected, a closed meeting was nonetheless held. You also questioned whether various topics discussed by the Board could properly have been considered during executive sessions. Specifically, you referred to discussions of the "ways and means of hiring a superintendent", the purchase of computers, and hiring a business manager.

I would like to offer the following comments regarding the situations that you described.

First, it is emphasized that the courts have broadly construed the definition of "meeting" [see attached, Open Meetings Law, §97(1)]. In brief, in a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that the term "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 might be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Consequently, assuming that a quorum of the Board met to conduct public business on August 1, that gathering in my view constituted a "meeting" subject to the Open Meetings Law in all respects.

Second, §99 of the Law requires that notice be given prior to all meetings. Specifically, if a meeting is scheduled at least a week in advance, 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 the meeting [see §99(1)]. If a meeting is scheduled less than a week in advance, notice must be given to the news media and to the public by means of posting in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such a meeting [see §99(2)].

Third, §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) 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..."

Based upon the language quoted above, it is clear in my view that an executive session is not separate and distinct from an open meeting, but rather it is a portion of an open meeting. Therefore, with reference to the gathering of August 1, I believe that an open meeting should have been convened, preceded by notice given in accordance with §99, prior to entry into an executive session.

Fourth, paragraphs (a) through (h) of §100 of the Open Meetings Law specify and limit the topics that may properly be considered during an executive session. Therefore, unless and until one or more of those topics arise, and until the procedure for entry into executive session is accomplished, a public body must in my opinion conduct its business in full view of the public.

Having reviewed the grounds for executive session, I do not believe that a discussion of the "ways and means of hiring a superintendent" could properly have been considered during an executive session. Similarly, it does not appear that the discussion of the purchase of computers could have been discussed during an executive session. In short, none of the grounds for executive session could in my opinion have been invoked.

With respect to the discussion of the appointment of a business manager, it appears that one of the grounds for executive session might justifiably have been cited. 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..."

Since the language quoted above permits a public body to conduct an executive session to discuss the employment history of a particular person, as well as matters leading to the appointment of a particular person, a discussion during an executive session would likely have been proper under §100(1)(f).

To distinguish that situation from the discussion relative to hiring a superintendent, the matter regarding the superintendent apparently did not deal with any particular person, but rather with the methods and policy considerations involved in a search for any individual who might serve as superintendent. Once again, since that type of discussion would not pertain to a particular person, but rather to policy considerations, no ground for executive session could in my opinion have been invoked.

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: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-919

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

August 19, 1983

Mr. Thomas J. Bruner
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bruner:

I have received your letter of July 28 and hope that you will accept my apologies for the delay in response.

According to your letter, on July 26, the Elmira City School District Board of Education held an executive session to discuss "administrative assignments". You wrote further that:

> "...the executive session was recommended by the superintendent of the school district for the purposes of discussing with the Board of Education various transfers that he was recommending regarding administrative assignments for the upcoming school year. After outlining his recommendations to the school board, the superintendent asked the board members if they had any particular objections to any of his recommended assignments. Insofar as all of the individuals referenced by the superintendent were already holding administrative assignments, the reassignments were simply movements by the superintendent of these individuals."

You have requested an advisory opinion "as to whether or not the general discussion of administrative assignments is considered proper material for an executive session of a public body."

In my opinion, the propriety of the executive session was dependent upon the specific nature of the discussion.

It appears that only one of the grounds for executive session could conceivably have been applicable to the situation. 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..."

It is emphasized that the language quoted above may in my view be invoked only when a discussion involves a "particular person" in conjunction with one or more of the topics indicated in the provision.

Therefore, if the discussion of administrative assignments was general in nature and involved, for example, the number of administrators or the nature of administrative workloads, I do not believe that any ground for executive session could justifiably have been cited. On the other hand, if the discussion involved a review of the performance or employment history of a particular administrator or administrators, an executive session would in my opinion have been proper under §100(1)(f).

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 920

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

August 23, 1983

George Craig Hebert
2nd Ward Alderman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Alderman Hebert:

I have received your letter of August 4 and hope that you will accept my apologies for the delay in response.

In your letter, you cited the so-called "personnel" exception for executive session [§100(1)(f)] and explained that it was invoked at a recent meeting of the Little Falls Common Council. You indicated, however, that the motion to enter into the executive session did not specify which matters would be discussed,

> "...but instead the person calling for the executive session merely stated that the board would be going into executive session 'to discuss one or more of the following matters- the medical, financial, credit, or employment history of a particular person, or matters leading to the appointment, employment, demotion, promotion, discipline, suspension, dismissal, or removal of a particular person'. In other words the person called the session by simply repeating the wording of the law."

You apparently objected, for, in your words "[S]uch practice makes the real purpose of the session extremely vague" and in your view "defeats the purpose of the Law".

In response to your request for clarification, I would like to offer the following comments.

First, as you are aware, §100(1) of the Open Meetings Law prescribes a procedure to be followed by a public body, during an open meeting, 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..."

Second, in my opinion, based upon the language quoted above, as well as judicial interpretations of the Open Meetings Law, a recitation of one of more of the grounds for executive session would be inadequate. As stated in Daily Gazette v. Town Board, Town of Cobleskill, "any motion to go into executive session must 'identify the general area' to be considered. It is insufficient to merely regurgitate the statutory language...The boilerplate recitation does not comply with the intent of the statute [444 NYS 2d 44, 46 (1981)].

With respect to "personnel", it has been consistently advised that a motion to enter into an executive session under §100(1)(f) should indicate that the discussion pertains to a "particular person" (Doolittle v. Board of Education of Odessa-Montour Central School District, Supreme Court, Chemung Cty., August 31, 1981], in conjunction with one or more of the topics listed in that provision. While I do not believe that the motion must identify the person who may be subject of the discussion (see Doolittle, supra, it is my view that the term "particular" and the area of of the discussion must be included in the motion. For example, a motion to enter into an executive session might refer to "the employment history of a particular person", or a matter leading to the "dismissal of a particular person".

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-921

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

August 29, 1983

Mr. Warren Jay Grossman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Grossman:

I have received your letter of August 15 and the materials attached to it.

According to your letter, the Scarsdale Board of Architectural Review recently "heard and voted on a re-application without placing this matter on the agenda." As a consequence, you wrote that the public could not know that the matter was before the Board prior to the meeting. In conjunction with the situation, you enclosed and referred to sections of the rules of the Board that require that the matter be placed upon a calendar or agenda prior to review.

You have asked wether, since the matter was not placed on the agenda, the Open Meetings Law was violated.

I would like to offer the following comments in response to your question.

First, the requirements concerning the notice of minutes under the Open Meetings Law are found in §99 of that statute. Although the cited provision makes reference to notice of the time and place of all meetings, no additional notice is required.

Second, although many public bodies by policy, rule, or tradition, for example, prepare agendas prior to their meetings, the Open Meetings Law does not require or refer to the preparation of an agenda.

Third, in view of the foregoing, it does not appear that any violation of the Open Meetings Law occurred. As such, the only question regarding the propriety of the Board's action would arise under its rules and the extent to which the Board complied with those rules.

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 Sims
Howard Blitman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-922

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

August 29, 1983

Ms. Donna M. Stebbins
Clerk
Town of Macedon
30 Main Street
Macedon, NY 14502

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Stebbins:

Your letter of August 18 addressed to the Bureau of Legal Services has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

You made reference in your letter to an article concerning an amendment to the Open Meetings Law pertaining to zoning boards of appeals. In this regard, you wrote that it was assumed that meetings of such boards were open to the public. However, having read the article, questions apparently arose regarding the requirements concerning meetings of zoning boards of appeals.

An amendment dealing with zoning boards of appeals was indeed recently signed into law (Chapter 80, Laws of 1983). The amendment essentially brings all zoning boards of appeals within the scope of the Open Meetings Law in the same manner as all other public bodies. As such, meetings of zoning boards of appeals are presumed to be open, and closed or executive sessions may be called only in accordance with the grounds for executive session listed in §100(1) of the Law.

In terms of the background of the amendment, §103(1) of the Open Meetings Law stated that the provisions of that Law were not applicable to quasi-judicial proceedings. Since the deliberations of zoning boards of appeals might be considered "quasi-judicial", the deliberations of some zoning boards of appeals fell outside the requirements of the Open Meetings Law. It is noted that there was confusion on the subject, because no specific provision of law dealt with meetings of city zoning boards of appeals. As such, their quasi-judicial deliberations legally fell outside the scope of the Open Meetings Law and could be closed. However, long-standing provisions of the Town Law [§267(1)] and the Village Law [§7-712(1)] required that all meetings of such boards be open to the public. As such, in some instances, certain aspects of meetings of some zoning boards of appeals could legally be closed, while the same aspects of meetings of other zoning boards of appeals were likely required to be open.

By providing that the exemption for quasi-judicial proceedings does not apply to zoning boards of appeals, the amendment requires all zoning boards of appeals to be treated in like manner under the Open Meetings Law.

To supply you with additional information on the subject, enclosed are copies of a memorandum sent to zoning boards of appeals shortly after approval of the amendment, and the Committee's most recent annual report on the Open Meetings Law, which on pages seven through eleven describes the issue and recommended the legislation that was signed into 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3023
OML-AO-923

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

August 30, 1983

Ms. Jane Wiercioch
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Wiercioch:

I have received your letter of August 18, which concerns your capacity to obtain information from the Depew Union Free School District.

You referred to a series of issues, and I will attempt to address those pertaining to the Freedom of Information Law or the Open Meetings Law.

First, you indicated that on May 18, you requested copies of certain records. Mr. Raymond Morningstar, Assistant Superintendent, informed you that you would have to fill out the District's "Application for Public Access to Records". In my opinion, although an agency may require that a request be made in writing, an applicant is not required to complete a form prescribed by an agency. Section 89(3) of the Freedom of Information Law provides that an applicant should submit a request in writing for records "reasonably described"; the Law makes no reference to a form to be completed. As such, it has been consistently advised that any written request that reasonably describes the records sought should suffice.

Second, you wrote that Mr. Morningstar stated that you could "get the information desired for the sum of $.50 a copy..." In this regard, as you may be aware, the Freedom of Information Law limits the fees that may be assessed for photocopies to a maximum of twenty-five cents per photocopy.

Third, you made several reference to your unsuccessful attempts to gain access to records "pertaining to school finances, salaries, expenditures..." From my perspective, virtually all statistical or factual information concerning school finances or expenditures should likely be made available. It is noted that 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) of the Law. Since records regarding finances and expenditures would likely constitute "statistical or factual tabulations or data", I believe that they would be available under §87(2)(g)(i) of the Freedom of Information Law.

There are specific other provisions of law that may be cited for the purpose of obtaining the type of information that you want. For instance, §170.2 of the regulations promulgated by the Commissioner of Education sets forth rules regarding financial recordkeeping of union free school districts. One among several provisions that may be relevant to your request indicates that a board of education has the duty:

> "[T]o require the treasurer to render a report, at least quarterly (monthly in the event that budget transfers have been made since the last report), for each fund including no less than the revenue and appropriation accounts required in the annual State budget form. This report shall show the status of these accounts in at least the following detail:
>
> (1) Revenue accounts.
>
> (i) Estimated revenues.
>
> (ii) Amounts received to date of report.
>
> (iii) Revenues estimated to be received during balance of the fiscal year.

(2) Appropriation accounts.

(i) Original appropriations.

(ii) Transfers and adjustments.

(iii) Revised appropriations.

(iv) Expenditures to date.

(v) Outstanding encumbrances.

(vi) Unencumbered balances."

Further, §1721 of the Education Law states that:

> "[I]t shall be the duty of the board of education of a union free school district to keep an accurate record of all its proceedings in books provided for that purpose. It shall also be the duty of said board to cause to be published once in each year, during the month of July or during the month of August, in at least one public newspaper, published in such district or, if one public newspaper is not published in such district, then a public newspaper having general circulation within such district, a full and detailed account of all moneys received by the board or the treasurer of said district, for its account and use, and of all the moneys expended therefor, giving the itmes of expenditure in full, should there be no paper published in or having general circulation within said district said board shall publish such account by notice to the taxpayers, by posting copies thereof in five public places in said district."

In view of the foregoing, it would appear that the District is required to maintain various types of records concerning its finances.

With respect to salaries, one of the few instances in the Freedom of Information Law in which an agency is required to prepare a record involves payroll information. Section 87(3)(b) of the Law states that each agency shall maintain:

> "a record setting for the name, public office address, title and salary of every officer or employee of the agency..."

Consequently, I believe that you have the right to learn of the salaries of every employee of the School District.

Fourth, you referred to a "special emergency meeting" held on July 19 "which was not posted or publicized in any of the three papers designated for legal notices..." Here I direct your attention to the Open Meetings Law. Section 99(1) pertains to meetings scheduled at least a week in advance and requires that notice of the time and place of such meetings 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 meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, in my view, notice must be given to the news media and posted for the public prior to all meetings, whether regularly scheduled or otherwise.

If the emergency meeting to which you referred was convened under §2008 of the Education Law, I believe that a legal notice would likely have been required. However, to obtain more information concerning the requirements of the Education Law, it is suggested that you contact the State Education Department.

Fifth, you referred to a limitation of three minutes for the purpose of enabling members of the public to speak at meetings. In this regard, although the Open Meetings Law requires that meetings be conducted open to the public, the Law is silent with respect to public participation. Consequently, it has been advised that a public body is not required to permit members of the public to speak or participate at meetings. However, 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.

Lastly, you stated the belief that an "investigation" should be made regarding the District's policies. It is noted in this regard that the Committee on Open Government is authorized only to advise. The Committee does not have the authority to compel an agency to comply with either the Freedom of Information or the Open Meetings Laws. However, in an effort to enhance compliance, copies of this opinions, both laws, and an explanatory brochure on the subject will be sent to you, Mr. Morningstar 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

Encs.

cc: Raymond Morningstar
School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3027
OML-AO-924

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

August 31, 1983

Mr. Robert M. Dearing
Buffalo News
Tonawanda Bureau
3491 Delaware Avenue
Kenmore, NY 14217

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dearing:

I have received your letter of August 25 in which you requested an advisory opinion.

According to your letter, you are interested in attending "meetings of the community advisory board that will be considering the sex education curriculum in the Kenmore - Town of Tonawanda school district". You wrote, however, that the Superintendent, John E. Helfrich, has indicated that you cannot attend those meetings.

You also raised a question regarding rights of access to a "draft curriculum guide prior to its approval by the school board". Dr. Helfrich has apparently contended that the draft curriculum does not become public until after the Board has acted upon it.

I would like to offer the following comments regarding the situation.

First, if the Community Advisory Board was created by the School District or its Board of Education, for example, I believe that it is a "public body" required to comply with the Open Meetings Law. In this regard, it is noted that there was substantial controversy under the Open Meetings Law as originally enacted regarding the

status of committees, subcommittees and similar advisory bodies that have only the capacity to advise and no authority to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 97(2) of the 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."

The original definition referred to entities that "transact" public business; the current definition refers to entities that "conduct" public business. Moreover, there was no reference in the original definition to committees or subcommittees, for example.

Based upon the changes in the Law, the specific language of the current definition of "public body" and its judicial interpretation, I believe that an advisory body designated by the district or its board of education would constitute a "public body" subject to the Open Meetings Law.

In my view, such a conclusion can also be reached by viewing the definition of "public body" in terms of its components. First, the Community Advisory Board, under the circumstances, would be an entity consisting of at least two members. Second, even though there may have been no specific direction that it must act by means of a quorum, §41 of the General Construction Law has long required that any entity consisting of three or more public officers or persons can perform their duties only by means of a quorum, a majority of its total membership. Third, the Board in question clearly conducts public business and performs a governmental function for a public corporation, in this instance, a school district. As such, I believe that all the conditions required to find that the entity in question is a public body can be met.

I would also like to point out that a recent decision of the Appellate Division indicates that advisory committees, including a committee designated by the executive head of a municipality, are considered to be public bodies subject to the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1980)].

Second, §105(2) of the Open Meetings Law states that:

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

Here I direct your attention to §414 of the Education Law, which describes the permitted uses of a "schoolhouse and grounds" belonging to a school district, and which might be considered less restrictive with respect to public access than the Open Meetings Law. Among the uses permitted, according to §414(1)(c) is:

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

Under the language quoted above, even if the Advisory Board is not a public body subject to the Open Meetings Law, if it is engaged in a function "pertaining to the welfare of the community", it would appear that its meetings held on school property "shall be open to the general public".

Third, assuming that the Community Advisory Board is a "public body" subject to the Open Meetings Law, it is required to conduct its business in public, unless and until one or more of the grounds for executive session may be asserted to exclude the public. The grounds for executive session appear in paragraphs (a) through (h) of §100(1). Based upon a review of those provisions, I do not believe that a discussion of the curriculum of a school district would fall within any ground for executive session. If that is so, the discussion of the curriculum by the Advisory Board would in my view be required to occur in public at an open meeting.

Fourth, with respect to a record reflective of the draft curriculum, such a record might in my view be accessible or deniable, depending upon the process by which it is reviewed and adopted or rejected.

The only ground for denial of relevance under the Freedom of Information Law 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..."

Under the circumstances, a proposal would likely constitute advice or a recommendation to the Board of Education. As such, it might be deniable.

However, once again assuming that the Community Advisory Board is subject to the Open Meetings Law, and if the proposal is prepared during one or more open meetings, its contents would effectively be disclosed at open meetings. Further, if the Board of Education itself discusses the Advisory Board's recommendation during an open meeting, the contents of the recommendation would also effectively be disclosed.

Lastly, I would like to point out that the decision cited earlier, Syracuse United Neighbors, supra, found that advisory boards subject to the Open Meetings Law are required to prepare minutes. If the Advisory Board is subject to the Open Meetings Law and conducts its business in public, minutes would have to be prepared pursuant to §101(1) of the Open Meetings Law. That 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."

As such, even though the recommendation of the Community Advisory Board might not be final, for it would not at that stage have been approved by the Board of Education, it might nonetheless be contained in minutes required to be prepared by the Advisory 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: Dr. John E. Helfrich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3028
OML-AO-925

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

August 31, 1983

Mr. Charles J. Theophil
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Theophil:

I have received your letter of August 26, in which you raised questions regarding proceedings conducted by the New York City Tax Commission.

According to your letter, you were informed by Phyllis Davies, Records Access Officer for the Tax Commission, that minutes are not taken at proceedings of the Tax Commission and that transcripts are not prepared. Further, you made reference to records examined by Tax Commissioners at your hearing that were "relied upon for their decision". Upon request for those records, you indicated that the records were not made available.

You have asked whether the failure to take minutes constitutes a violation of the Open Meetings Law and whether the failure to provide you with copies of the records to which you referred constitutes a violation of the Freedom of Information Law.

First, with respect to the hearing, it is noted that there is often a distinction between a meeting of a public body during which an entity deliberates toward a decision, and a hearing during which a member of the public is given an opportunity to speak. Under the circumstances, it is possible that the proceeding in question was not a "meeting" subject to the Open Meetings Law, even though members of the public had a right to attend.

Second, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Section 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."

It does not appear that those who conducted the hearing made motions, proposals or resolutions. I would conjecture, however, that any determination made was made available to you.

With respect to your request under the Freedom of Information Law, I have contacted Ms. Davies of the Tax Commission on your behalf. She informed me that the records examined and relied upon by the Tax Commissioners involved materials that you submitted prior to the hearing. Ms. Davies indicated that she responded to your request to that effect.

In sum, if my understanding of the situation is accurate, it does not appear that a violation of either the Open Meetings Law or the Freedom of Information Law occurred.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-926

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

September 19, 1983

Mrs. Jacqueline W. Murray
Chairman
City of Rye
Zoning Board of Appeals
59 Central Avenue
Rye, New York 10580

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Murray:

I have received your letter of August 29 and apologize for the delay in response.

As Chairman of the Zoning Board of Appeals of the City of Rye, you have raised questions regarding the Open Meetings Law. Specifically, with respect to §100(1)(d), which permits a public body to conduct an executive session to discuss "proposed, pending or current litigation", you have asked:

> "...whether this language authorizes a Board of Zoning Appeals to hold an executive session to discuss an application for a variance or special exception or other relief within its jurisdiction when a majority of the Board believes that it is highly likely that an appeal from its decision will be made to the courts."

From my perspective, possible litigation would not constitute a valid basis for entry into an executive session, for virtually any subject discussed or determined by a public body could eventually be the subject of litigation.

"Proposed" litigation would in my view involve a situation in which there is a real threat or imminence of litigation, coupled with a consideration by a public body of its litigation strategy in relation to the situation. As stated in Concerned Citizens to Review Jefferson County Mall, Matter of v. Town Board of the Town of Yorktown [84 AD 2d 612, appeal dismissed 54 NY 2d 957 (1981)], the purpose of §100(1)(d) is to enable a public body to enter into an executive session to discuss proposed or pending litigation "without baring its strategy to its adversary through mandatory public meetings". Therefore, if a discussion involves a consideration of legal strategy should litigation be initiated, I believe that an executive session would be appropriate under those circumstances.

Your second area of inquiry concerns a practice of the Board in which a member drafts and circulates a written decision on each application. The question is whether a "work session, at which members discuss suggestions for alternate wordings or other modifications of the draft, have to satisfy the requirements of the Law?"

In this regard, it is emphasized that the definition of "meeting" appearing in §97(1) of the Open Meetings Law has been interpreted expansively by the courts. In a landmark decision in which it was held that a "work session" is subject to the Open Meetings Law, it was found that any convening of a quorum of a public body for the purpose of discussing public business falls within the requirements 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, I believe that a "work session" is a "meeting" required to be open to the public except to the extent that an executive session may be convened in accordance with §100(1)(a) through (h) of the Open Meetings Law.

Enclosed for your consideration are copies of 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-927

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

September 20, 1983

Mr. Robert L. Pardy
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pardy:

I have received your letter of August 29 as well as the news article attached to it.

According to the article, you were told to leave a meeting of the Highland Board of Fire Commissioners so that the Board could discuss its budget during an executive session. The Chairman of the Board apparently excluded you in order that the discussion could be held without "interference". The Chairman also indicated that the Board "with a majority vote, can bar the public to discuss any topic". The article quoted Chairman Roberts stating that "We can call any executive session any time we want".

You have asked for assistance regarding the situation.

In this regard, I would like to offer the following comments.

First, as you may be aware, §174(6) of the Town Law states that "[A] fire district is a political subdivision of the state and a district corporation..." Consequently, it is clear in my view that a board of fire commissioners is a "public body" required to comply with the Open Meetings Law in all respects.

Second, I disagree with Chairman Roberts' statement to the effect that the Board may enter into an executive session at any time to discuss the subject of its choice. Section 100(1) of the Law states in 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 ensuing provisions, paragraphs (a) through (h) of §100(1), specify and limit the areas of discussion that may properly be considered during executive sessions. As such, a public body cannot convene an executive session to discuss the subject of its choice; on the contrary, an executive session may not be held unless and until one or more of the topics described in paragraphs (a) through (h) arise, and only after the procedure for entry into executive session described above has been completed during an open meeting.

Third, with regard to the enforcement of the Law, §102(1) states in part 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."

It is noted that one of the vehicles described in §102 involves injunctive relief. I believe that an injunction may be obtained relatively quickly and cheaply, depending upon the circumstances involved. An injunction might effectively preclude the Board from engaging in future or continuous violations of the Open Meetings Law. It is suggested that you might want to discuss the matter with an attorney.

Lastly, §102(2) states that:

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

Therefore, should a successful suit be brought by a member of the public, it is possible that a court might award reasonable attorney fees to that 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:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-928

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

September 22, 1983

Ms. C. Dominique van de Stadt
Mr. William C. Matthes
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. van de Stadt and Mr. Matthes:

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

According to your letter, on the evening of September 6:

> "the Beekman Town Board, during a meeting at which a quorum was present, retired from the public meeting room to discuss business privately in a room to the rear of the Town Hall and away from public hearing (see agenda enclosed). No reason was given and no vote to go into executive session was taken. When asked if the Board should not outline the nature of the subject matter it planned to discuss and enter into executive session by polling its membership in accordance with Article 7 of the Public Officers Law, Supervisor Richardson and Town Councilmen continued to move to the rear of the building without comment."

I would like to offer the following remarks regarding the situation that you described.

First, §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. As such, an executive session is not separate and distinct from a meeting, but rather is a portion thereof.

Second, the Open Meetings Law prescribes a procedure that must be accomplished by a public body, during an open meeting, before an executive session may be held. 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 of 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 in my opinion that three steps must be accomplished by a public body prior to entry into an executive session. First, a motion to go into executive session must be made in public; second, the motion must indicate in general terms the subject or subjects to be considered during the executive session; and third, the motion must be carried by a majority vote of the total membership of the public body.

Third, a public body may not enter into an executive session to consider the subject of its choice. On the contrary, paragraphs (a) through (h) of §100(1) of the Law specify and limit the subjects that may properly be considered during an executive session.

Fourth, even if a closed session held to discuss public business is characterized as informal, or as a "work session" during which no vote would be taken, it would nonetheless in my view have been subject to the Open Meetings Law. It is noted in this regard that the state's highest court has 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 the 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)].

Lastly, in an effort to enhance compliance with the Open Meetings Law, copies of this opinion, the Open Meetings Law and an explanatory brochure on the subject will be sent to the Town Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Beekman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-929

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

September 22, 1983

Peter R. Mends, Clerk
Essex County Board of Supervisors
Office of the Clerk
Elizabethtown, NY 12932

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mends:

I have received your letter of September 8 in which you requested an advisory opinion under the Open Meetings Law.

Specifically, you raised the following question:

> "Is it possible for two political parties to hold a conference once a month, to settle differences of opinions, behind closed doors without the press being present?"

Since you are writing in your capacity as Clerk of the Essex County Board of Supervisors, I assume that your inquiry would pertain to members of the Board who represent two political parties and who seek to confer. Based upon that assumption, I would like to offer the following comments.

First, as you may be aware, §103(2) of the Open Meetings Law states that the provisions of the Law do not apply to "deliberations of political parties, conferences and caucuses". The key word in the quoted provision in my view is "political". In essence, a "political" caucus by definition is restricted to members of a single political party. Further, Webster's Seventh New Collegiate Dictionary defines "caucus" as:

> "a closed meeting of a group of persons belonging to the same political party or faction usu. to select candidates or to decide on policy."

If a conference as described in your letter is attended by members of the County Board who represent two political parties, the conference could not in my view be characterized as a "caucus".

Second, notwithstanding the exemption regarding political caucuses, it has been held judicially that some gatherings denominated as political caucuses are "meetings" subject to the Open Meetings Law in all respects.

The leading decision on the subject is Sciolino v. Ryan [103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 Ad 2d 475, 440 NYS 2d 795 (1981)], which dealt with a situation in which the majority members of a public body met to consider matters of public business in closed political caucuses during which both the lone minority member of the public body and the public were excluded. The Appellate Division, however, found that the exemption for political caucuses includes only discussions of purely political party business. It was also found that discussions of public business by a majority of the members of a public body, even though those individuals might represent a single political party, would constitute a "meeting" subject to the Open Meetings Law. More specifically, the Court found that:

> "[A]n expansive definition of a political caucus, as urged by respondents, would defeat the purpose of the Open Meetings Law that public business be performed in an open and public manner (Public Officers Law, §95), for such a definition could apply to exempt regular meetings of the Council from the statute. 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 479).

Based upon the Sciolino decision, if a "caucus" held to discuss public business consists of a majority of the County Board of Supervisors, I believe that such a gathering would constitute a "meeting" 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-930

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

September 22, 1983

Ms. Vivian H. Evans, Clerk
Village of Speculator
P.O. Box 396
Elm Lake Road
Speculator, NY 12164

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Evans:

As you may be aware, your letter of May 24 addressed to the Division of Local Government Services at the Department of State has been forwarded to the Committee on Open Government. The Committee, which received your letter on September 21, is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

The question raised in your letter involving the Open Meetings Law is whether a village board of trustees is "able to ratify, by Resolution, items during an Executive Session, held on a date other than the date of the regular meeting".

In all honesty, I am not sure that I understand your question. Nevertheless, I would like to offer the following comments.

First, it is emphasized that an executive session is not separate and distinct from an open meeting of a public body. Section 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.

I would like to point out, too, that the definition of "meeting" [see Open Meetings Law, §97(1)] has been interpreted broadly by the courts. In brief, the state's highest court construed the term "meeting" to include any gathering of a quorum of a public body for the purpose of discussing public business, whether ot nor 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)].

Therefore, even if the subject matter of a meeting could be considered during an executive session, notice must be given prior to the meeting to the news media and to the public by means of posting in accordance with §99 of the Open Meetings Law. Moreover, §100(1) 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..."

Second, an executive session may be held only to discuss those topics listed in paragraphs (a) through (h) of §100(1) of the Open Meetings Law.

Third, as indicated by §100(1), a public body may generally vote during an appropriate executive session, unless the vote is to appropriate public monies.

Fourth, in situations in which action is taken during an executive session, minutes must be prepared. Section 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."

Lastly, with respect to the event in which action is taken, a "regular meeting" or otherwise, the Open Meetings Law does not prescribe or restrict when a public body can hold a meeting. In short, the Open Meetings Law provides that all meetings must be preceded by notice, convened open to the public, and that meetings must be open, except when an executive session may appropriately be held.

Enclosed for your consideration are copies of 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
Encs.
cc: Harry Willis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOML-AO-931

September 26, 1983

Mr. Isidore Gerber
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gerber:

I have received your letter of September 12 in which you raised a question that apparently deals with the Open Meetings Law.

Specifically, you asked "how the state defines an 'abstain' vote by a governing body". You have indicated that "a claim has been made that such a vote is a 'yes' vote".

In my opinion, which is based upon statutory provision and their judicial interpretation, an abstention could not be construed as an affirmative or "yes" vote. On the contrary, while an abstention indicates neither an affirmative nor a negative vote, its effect in my view is the same as a negative vote.

First, as you may be aware, §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."

As such, a quorum must convene for an entity, such as a governing body", to conduct public business.

Second, §41 of the General Consturction Law, which has been in effect for decades, describes quorum requirements 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."

Since "not less than a majority of the whole number may perform and exercise" the "power, authority or duty" conferred upon a public body, I believe that a majority of the total membership of a public body must cast an affirmative vote as a condition precedent to the adoption of any measure.

It is noted, too, that §41 of the General Construction Law has been interpreted by the courts on various occasions regarding abstentions. In short, it has consistently been found that an abstention cannot be counted as an affirmative vote and that action may be taken only by means of an affirmative vote of the majority of the total membership of a public body [see e.g., Rockland Woods, Inc. v. Suffern, 40 AD 2d 385 (1973); Walt Whitman Game Room, Inc. v. Zoning Board of Appeals, 54 AD 764 (1975); Giuliano v. Entress, 4 Misc. 2d 546 (1957); and Downing v. Gaynor, 47 Misc. 2d 535 (1965)].

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3050
OML-AO-932

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

September 27, 1983

Mr. Leonard J. Hansel
Ms. Charlotte Hansel
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. and Ms. Hansel:

I have received your letter of September 12 in which you raised a series of questions under the Freedom of Information and Open Meetings Laws.

The first series of questions concerns meetings of town boards and their committees in conjunction with posting requirements. 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 of the time and place of such meetings 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. 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 to the public in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. As such, notice must be given to the news media and to the public by means of posting prior to all meetings.

It is noted, too, that §97(2) of the Open Meetings Law includes committees, subcommittees and similar bodies within the definition of "public body". Therefore, the notice requirements described in the preceding paragraph are applicable to governing bodies, such as town boards, as well as committees and similar bodies.

In a related area, you asked whether notice should be posted with respect to meetings that represent a continuation of subject matter previously discussed. From my perspective, as a general matter, if a meeting is adjourned on one date and other meetings are scheduled to continue discussions of issues considered at an earlier meeting, each successive meeting should be preceded by notice given in accordance with §99.

The next question is whether meetings may be held during which the public is not permitted to speak, "even though the subject matter involves the person and/or his property." I would like to point out that the Open Meetings Law is silent with respect to public participation. Although the Law permits members of the public to attend and listen to the deliberations of public bodies, there is nothing in the Law that confers a right on the public to speak or otherwise participate at a meeting. Consequently, a public body need not permit members of the public to speak at meetings. However, if a public body chooses to do so, all members of the public should in my view have an equal opportunity to speak or otherwise participate.

You have asked whether minutes should be taken with respect to all meetings. Here I direct your attention to §101 of the Open Meetings Law. Subdivision (1) of the cited provision concerns 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."

Therefore, in any meeting during which motions, proposals, resolutions are offered or during which votes are taken, I believe that minutes must be prepared.

The next question is whether a town clerk may:

> "...during normal working hours, for any reason refuse information about meetings, studies, surveys and etc., pertaining to a person's property owned in said township, or the adjoining property?"

Your question arises in this instance under the Freedom of Information Law. Here I would like to point out that the Freedom of Information Law, §89(1)(b)(iii), requires the Committee to adopt general regulations concerning the procedural aspects of the Law. In turn, §87(1) requires the governing body of a town to adopt regulations consistent with those of the Committee and the Freedom of Information Law. Enclosed for your consideration is a copy of the Committee's regulations, which in §1401.4(a) state that:

> "[E]ach agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

It is noted, however, that agency officials are not required to respond immediately to requests. Section 89(3) of the Freedom of Information Law states that an agency must respond to a request within five business days of its receipt. Therefore, while requests may be made during regular business hours, an agency need not in my opinion respond to or fulfill a request at the time when the request is made.

Lastly, you have asked whether most towns "have local representatives for 'open meetings Laws and Freedom of Information Act'". The Committee is the only agency involved in an advisory role under the two laws. However, in conjunction with the enclosed regulations, each agency, including a town, is required to designate one or more "records access officers" for the purpose of coordinating the agency's response to requests for records.

As requested, enclosed are five copies of the pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-933,

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

October 3, 1983

Mr. Richard L. Scott
Director of Personnel
Chemung County Personnel Department
John H. Hazlett Building
205 Lake Street
Elmira, NY 14901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scott:

I have received your letter of September 21 in which you requested an advisory opinion under the Open Meetings Law.

Specifically, the issue is whether the Chemung County Legislature may appropriately enter into an executive session pursuant to §100(1)(e) of the Open Meetings Law. In terms of background, the question has arisen in conjunction with §209 of the Civil Service Law, which pertains to the "resolution of disputes in the course of collective negotiations". You have indicated that an impasse exists and that a public hearing held pursuant to subdivision (3)(e) of §209 has been or will soon be conducted by the County Legislature. As such, the question is whether the Legislature may enter into an executive session following the public hearing to consider the resolution of the impasse.

In this regard, I would like to offer the following remarks.

First, as you are aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings of a public body must be conducted open to the public unless and until one or more topics listed as appropriate for consideration in an executive session arise.

Second, §100(1) of the Open Meetings 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... (e) collective negotiations pursuant to article fourteen of the civil service law..."

From my perspective, although I am not completely familiar with the negotiations that arise under Article 14 of the Civil Service Law, it appears that the County Legislature in its efforts to resolve the impasse is involved in collective negotiations pursuant to Article 14 of the Civil Service Law. If that is so, I believe that the County Legislature may enter into an executive session pursuant to §100(1)(e) of the Open Meetings Law to discuss the issues following the public hearing.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-934

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

October 4, 1983

Mrs. Rayella Grant
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Grant:

I have received your letter of September 20, which concerns the status of a so-called "work shop" under the Open Meetings Law.

According to your letter, the Board of Education of the Hendrick Hudson School District intends to hold a workshop to discuss "items they cannot discuss at public Wednesday nite (sic) School Board meetings". Further, although the date of the proposed workshop has apparently not been determined, you wrote that you were told that "the public is not invited".

Attached to your letter are copies of minutes of meetings, which in part describe the topics to be considered at the workshop. The minutes of a meeting held on August 31 indicate that the Board at its workshop will consider "assessment of last years direction", as well as "Futuristic View - emphasis on enrollments, financial standing, program organization, and curriculum".

Based upon the information that you have provided, I would like to offer the following remarks.

First, and perhaps most importantly, the Open Meetings Law contains a definition of "meeting" [see attached, Open Meetings Law, §97(1)] that has been interpreted expansively by the courts. In a landmark decision rendered by the Court of Appeals, the state's highest court, it

was determined that the term "meeting" includes any gathering of a quorum of a public body 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 gathermay be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. It is noted that the Orange County decision dealt specifically with "work sessions" and similar gatherings held solely for the purpose of discussion.

Second, from my perspective, the description of topics to be considered at the workshop constitute matters of public business that fall within the scope of the Board's responsibilities. Consequently, I believe that the nature of the subject matter to be discussed indicates that the workshop is a "meeting" as defined by the Open Meetings Law.

Third, as you may be aware, every meeting must be preceded by notice of the time and place that it is to be held. It is suggested that you review provisions of §99 of the Open Meetings Law concerning notice. Moreover, all meetings are presumed to be open, unless and until one or more of the grounds for executive session arise under §100(1) of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Superintendent Charles V. Eible
School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-935

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

October 5, 1983

Ms. Susan E. Martin, Editor
The Express
P.O. Box 608
106 Park Avenue
Mechanicville, NY 12118

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Martin:

I have received your letter of September 21 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry pertains to a meeting of the Schaghticoke Youth Commission held on September 13. According to your letter, the Commission was scheduled to convene at 7:30 p.m. However, when you arrived at 7:25, the meeting was apparently in progress, and you were asked to leave "because it was an executive session to discuss personnel."

It is your contention that the Open Meetings Law requires that an open, public meeting must be convened before an executive session may be held. As such, you asked whether you should have been permitted to attend that portion of the meeting from which you were excluded.

I would like to offer the following comments regarding the situation described in your letter.

First, it appears that the Youth Commission is a "public body" subject to 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."

The language quoted above specifically refers to committees, subcommittees and similar bodies. Therefore, if the Youth Commission has been established by the Town, in my opinion, it is required to comply with the Open Meetings Law in all respects.

Second, it is emphasized that 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) prescribes a procedure that must be accomplished by a public body, during an open meeting, before it may conduct 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..."

In view of the direction provided in §100(1), it is clear that an executive session cannot be conducted prior to an open meeting, that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof, and that a motion to enter into an executive session must be carried during an open meeting prior to entry into an executive session.

As such, in my opinion, even though the subject matter under consideration may have constituted an appropriate subject for discussion in an executive session, an open meeting should nonetheless have been convened before the Youth Commission entered into an executive session.

Enclosed for your consideration are copies of the Open Meetings Law and an explanatory pamphlet on the subject. To enhance compliance with the Law, those materials and a copy of this opinion will be forwarded to the Town Supervisor.

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: Mark Zaretzki, Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 936

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

October 6, 1983

Mr. C. Francis Giaccone
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Giaccone:

I have received your letter of September 19 in which you raised questions and requested an advisory opinion under the Open Meetings Law.

The first question pertains to the capacity of a school board to hold meetings "outside the territorial jurisdiction of a school district". It is your view that a meeting held outside district boundaries would be "illegal", since the site of such a meeting "would tend to frustrate and subvert the intent of the Open Meetings Law".

In this regard, as you indicated, there is nothing in the Open Meetings Law, or any provision of the Education Law of which I am aware, that deals specifically with the location of a school board meeting, other than §98(b) of the Open Meetings Law pertaining to barrier-free access to the physically handicapped. Consequently, in my view, the question should be dealt with from the perspective of reasonableness. If, for example, a school board sought to conduct a meeting or a "retreat" a hundred miles from the school district, certainly I would agree that the site of such a meeting would be unreasonable. Under those circumstances, an interested member of the public likely

would not have the capacity to attend. On the other hand, if, for instance, there is a special reason for holding a meeting close to but outside the bounds of the school district, such a gathering might not be unreasonable. Situation have been described in the past involving school board meetings held at the headquarters of a BOCES outside but nonetheless near a school district. Perhaps the special facilities of a BOCES building might be necessary to the conduct of particular business of the board. Under those circumstances, even though a school board might hold a meeting outside school boundaries, the site might nonetheless be considered reasonable, if it is reasonably accessible to school district residents who seek to attend.

Your second question involves "work sessions" and "planning sessions" that are "held in executive session". You indicated that you are aware of a determination rendered by the Appellate Division, Second Department, which held that the gatherings in question must be open to the public. You added, however, that "there is some controversy about this question", and that you would like to know if there has been any change in the Second Department ruling.

It is assumed that the determination to which you referred is Orange County Publications v. Council of the City of Newburgh. Please note that the Court of Appeals unanimously upheld the decision of the Second Department in 1978 at 45 NY 2d 947. As such, it is clear in my view that a work session is considered 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 might be characterized.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3059
OML-AO-937

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

October 6, 1983

Ms. Judy Patrick
Schenectady Gazette
332-334 State Street
Schenectady, NY 12301

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Patrick:

I have received your letter of September 26, which reached this office on October 5, and the materials attached to it.

You have requested an advisory opinion under the Freedom of Information Law concerning a denial of a request by the Amsterdam Industrial Development Agency for "records regarding the expenditure of §238,303 for 'economic development' in 1982". Specifically, in connection with the expenditures, your letter to the Amsterdam Industrial Development Agency (hereafter "AIDA") involved a request for vouchers and checks and minutes of meetings at which the expenditures were discussed. Following your appeal, AIDA determined that "such denial is in accordance with Public Officer's Law, Article 6, Section 87, Subsection 2, Paragraphs b & d."

In this regard, I would like to offer the following comments.

First, §856(2) of the General Municipal Law states that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation." Therefore, it is clear in my view that an industrial development agency is an "agency" subject to the Freedom of Information Law [see Freedom of Information Law, §86(3)], as well as a "public body" subject to the Open Meetings Law [see Open Meetings Law, §97(2); also subdivision (3) of Gneral Municipal Law, §856].

Second, the Freedom of Information Law applies to all records of an agency. Further, §86(4) of that statute 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."

Therefore, to the extent that the information sought exists in the form of a record or records, the Freedom of Information Law would govern rights of access.

Third, 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) though (h) of the Law.

Fourth, neither of the two grounds for denial cited by AIDA could in my view justify a denial of access to the records sought.

Section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Mr. Bray alluded to §87(2)(b) based on the contention that "disclosure of information regarding particular private companies would result in an unwarranted invasion of their privacy".

I believe that reliance upon the privacy provisions of the Freedom of Information Law by AIDA is misplaced and improper, for those provisions in my view are intended to be applicable to records that identify people, rather than corporate entities.

Section 87(2)(d) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

> "are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my view, neither records prepared by AIDA regarding the expenditures in question, nor vouchers, checks contracts or similar records could be characterized as "trade secrets". Similarly, I do not believe that AIDA regulates commercial enterprise. As such, §87(2)(d) could not in my view justifiably be asserted to withhold the records sought.

Fifth, §89(6) of the Freedom of Information Law states that:

> "[N]othing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records."

Therefore, if another provision of law grants access to the records sought, nothing in the Freedom of Information Law could be cited to deny access to those records.

Under the circumstances, of potential significance is §51 of the General Municipal Law. That provision states in part that:

> "[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 or any body corporate or other unit of local government in this state which possesses the power to levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments or for which taxes or benefit assessments upon real estate may be required pursuant to law to be levied, including the Albany port district commission, are hereby declared to be public records, and shall be open during all regular business hours."

Assuming that §51 of the General Municipal Law applies to the records sought, I believe that virtually all of them would be accessible.

Lastly, since the denial included minutes of meetings, I direct your attention to the Open Meetings Law. As indicated earlier, an industrial development agency is in my view a public body required to comply with that statute.

Section 101 of the Open Meetings Law requires that minutes must be prepared and made available within specified time periods.

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 Bray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3065
OML-AO-938

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

October 12, 1983

Mr. Charles Hager
Chairman
St. Lawrence County
Environmental Management Council
Courthouse
Canton, New York 13617

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hager:

I have received your letter of September 27 in which you raised a series of questions regarding the Freedom of Information Law.

According to your letter, the St. Lawrence County Environmental Management Council recently received a request "for routine access to all materials provided to members of the Council by staff and/or committees at the time that these materials are made available to Council members (i.e.: 10 days before Council meetings)." As a consequence of the request, the Council agreed that a policy regarding access to records should be developed.

In this regard, your first question involves "who is given the responsibility for promulgation of guidelines under Section 87.1."

As you may be aware, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government (formerly the Committee on Public Access to Records) to promulgate regulations dealing with specified aspects of the Law. It is emphasized that the regulations deal solely with the procedural aspects of the Law; they do not deal with substance, i.e., the extent to which records are acccessible or deniable. In conjunction with the general regulations promulgated by the Committee, §87(1)(a) states that:

> "[W]ithin sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

As such, the governing body of the public corporation, in this instance, the St. Lawrence County Legislature, should have adopted the appropriate regulations applicable to all agencies in County government within sixty days of January 1, 1978, the effective date of the current Freedom of Information Law. Assuming that the County Legislature indeed promulgated uniform regulations, the Council is subject to those regulations, and there would be no need or capacity to adopt additional regulations or guidelines.

The remaining question involves rights of access to "materials prepared by staff or committees for distribution to Council members prior to each meeting". It is apparently your view that those materials generally need not be made available, except to the extent that they consist of "statistical or factual tabulations of data".

I would like to offer several comments regarding the issue.

First, as you intimated, certain aspects of inter-agency and intra-agency materials may generally be withheld. Specifically, §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. Although 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.

It is unclear whether your statement regarding "statistical or factual tabulations of data" represents an interpretation or a typographical error. In either event, the language of §87(2)(g)(i) requires that statistical or factual information found within inter-agency or intra-agency materials be made available, whether it appears in tabular form or narrative format. However, those portions of inter-agency or intra-agency materials consisting of advice, recommendation or opinion, for example, may in my view be withheld or deleted.

Second, you alluded to materials prepared by committees. Here I direct your attention to the Open Meetings Law. Of possible relevance to your question is the inclusion of committees within the requirements of the Open Meetings Law. Section 97(2) of the Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to 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, a committee designated by the Council or the County Legislature, for instance, would in my view clearly be subject to the Open Meetings Law. Therefore, it is possible that material prepared by committees for presentation before the Council might have been developed in the course of open meetings during which any person could have been present. Further, the materials might be referenced in minutes of those committees. In those situations, there might be no valid reason for withholding such materials prior to a meeting of the Council.

Lastly, it is noted that the Freedom of Information Law is permissive. Stated differently, as a general rule, an agency may withhold certain records in accordance with grounds for denial listed in §87(2) of the Law; nevertheless, there is no requirement that such materials must be withheld. Therefore, while analyses or recommendations might justifiably be withheld, it may be desireable in some instances to disclose prior to a meeting. In those cases, the materials may be disclosed, for there would be no provision that would prohibit disclosure.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3069
OML-AO-939

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

October 13, 1983

Ms. Barbara Wyatt
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Wyatt:

I have received your letter of October 7 as well as various materials attached to it or forwarded separately.

Your inquiry concerns "Non-Compliance of the Freedom of Information and Open Meetings Laws, City of Utica". In conjunction with the attachments to your letter, you have requested an opinion from this office.

Based upon a review of the materials, it appears that three issues have been raised. One involves the subject matter list required to be prepared by the City of Utica; the second pertains to the posting of notice of meetings; and the third involves a request for a list of "the 9th year entitlement of approved applicants, names, addresses, and approved dollar amounts" in relation to a housing revitalization grant program.

In this regard, I would like to offer the following comments.

It is noted at the outset that, on your behalf and in an effort to assist you, I have contacted various officials of the City of Utica.

With regard to the subject matter list, Joseph Talarico, the City's Records Access Officer, informed me that he is in the process of preparing an updated and complete subject matter list. Although he is currently awaiting information from various City agencies, he indicated that the list will likely be completed and available by October 19.

Mr. Talarico also informed me that bulletin boards have been ordered to be placed in City Hall for the purpose of posting notices of meetings in compliance with §99 of the Open Meetings Law. Mr. Talarico pointed out that notices of meetings are currently posted in the lobby of City Hall. From my perspective, if notice of the time and place of meetings is posted in accordance with the requirements imposed by §99 of the Open Meetings Law, the posting of notice in the lobby is likely reflective of compliance with those requirements. The use of bulletin boards would in my view serve to enhance compliance.

The remaining issue involves a request for the identities, addresses, and amounts of grants made under a federal housing rehabilitation program. Attached to your letter are news articles containing the names and addresses of people who were approved for grants by the City from 1978 through 1982-1983, which was apparently the eighth year entitlement. Your request involves the same information in conjunction with the "9th year entitlement".

In my opinion, although the City disclosed personal information regarding grants in the past, a review of the Freedom of Information Law indicates that the names and addresses of grant recipients might justifiably have been withheld.

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

Relevant under the circumstances is §87(2)(b) of the Freedom of Information Law, which provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy".

While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view seek to enable government to prevent disclosures concerning the personal details of individuals' lives. As such, the central question involves the extent in which disclosure would constitute an unwarranted as opposed to a permissible invasion of personal privacy.

From my perspective, a disclosure that permits the public to determine the general income level of a participant in the program would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., §697, Tax Law). In another area, §136 of the Social Service Law requires that records identifying applicants for or recipients of public assistance be kept confidential. As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted invasion of personal privacy".

It is emphasized that when dealing with privacy, attempts to balance interests and subjective judgments must of necessity be made. Therefore, although I might believe that disclosure of particular information would be offensive and result in an unwarranted invasion of personal privacy, another person might feel that disclosure would be innocuous, thereby resultingin a permissible invasion of personal privacy. In short, I do not feel that there are specific rules that one may follow in determining issues relative to personal privacy. However, based upon the Freedom of Information Law and the direction provided by other laws, such as the Tax Law and the Social Services Law, it would appear that the records reflective of the identities of individuals who receive grants under the program in question could justifiably be withheld.

Lastly, although the information that you are now seeking has been disclosed in the past, previous disclosures would not in my opinion establish a right to analogous information now. In dealing with a similar situation

involving the disclosure of records over a period of years that were denied due to privacy considerations when the Freedom of Information Law became effective, it was held that "neither the state nor its agencies may be estopped by acts done in prior years" [Person - Wolinski Associates v. Nyquist, 377 NYS 2d 897, 899]. Therefore, if indeed disclosure of the identities of persons receiving grants would constitute an unwarranted invasion of personal privacy, disclosure of the same information regarding grants awarded in previous years would not in my view require that this year's information be made available.

I hope the 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: Charles Brown
Joseph Talarico

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3074
OML-AO-940

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

October 18, 1983

Mr. John B. Schamel
National Education Association
of New York
Elmira Service Center
Mark Twain Building #200
North Main and West Gray
Elmira, New York 14901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondece.

Dear Mr. Schamel:

I have received your letter of October 6 concerning a denial of access to records by the Superintendent of the Odessa-Montour Central School District.

According to your letter and the correspondence attached to it, on September 12 you requested copies of a report submitted by the Superintendent to the Board of Education regarding the Superintendent's investigation of a named employee's personal file. You also requested documents used in the preparation of the Superintendent's report. Following a constructive denial of access due to a failure to respond, you appealed to the Superintendent, who denied access, stating that:

> "[T]he report and related documents you are requesting were delivered to the Odessa-Montour Central School Board of Education as a confidential memo and discussed in executive session as a specific personnel matter concerning a particular individual. As such, these papers cannot be released as public records."

In this regard, I would like to offer the following comments.

First, as you are aware, 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) of the Law.

Under the circumstances, without knowing more of the contents of the materials that you requested, I cannot provide specific direction regarding rights of access. However, it appears that two of the grounds for denial might be applicable, at least in part.

One of the grounds for denial of relevance 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..."

While some aspects of intra-agency materials are accessible, others reflective of advice, recommendation, opinion, suggestion and the like may in my view be withheld.

A second basis for withholding might be §87(2)(b), which permits an agency to withhold records or portions of records when disclosure would constitute "an unwarranted invasion of personal privacy". Once again, without knowledge of the contents of the records, specific advice cannot be offered.

In short, to the extent that either §87(2)(g) or §87(2)(b) could appropriately be cited to deny access, the records in question may in my view be withheld.

Second, the specific basis for denial offered by the Superintendent was that the report made by the Superintendent was a "confidential memo and discussed in executive session as a specific personnel matter concerning a particular individual". Here I would like to point out that the Superintendent apparently alluded to one of the grounds for enty into executive session appearing in the Open Meetings Law [see §100(1)(f)]. Nevertheless, the grounds for entry into executive session in the Open Meetings Law are not necessarily consistent with the grounds for denial of access to records appearing in the Freedom of Information Law.

By means of example, if the Superintendent forwarded a memorandum to the School District offering recommendations regarding changes in curriculum, that document might justifiably be withheld under §87(2)(g) of the Freedom of Information Law. However, when the Board sought to discuss the issue, no ground for executive session would in my opinion exist. Therefore, while a record involving a particular issue might be withheld under the Freedom of Information Law, a discussion of that issue by a public body might nonetheless be required to be conducted during an open meeting.

The reverse of that situation might exist under the facts that you described. While an executive session might justifiably have been held under §100(1)(f) of the Open Meetings Law, it is possible that the records or portions thereof might be accessible under the Freedom of Information Law.

Further, you wrote that "the Board accepted the report, but never took any action in an open meeting". In this regard, if a public body discusses an issue during an executive session but takes no action or vote, §101 of the Open Meetings Law concerning minutes would not in my opinion require that minutes be taken. If, however, action was taken by the Board, minutes reflective of the Board's determination, the date and the vote must in my view be recorded in the form of minutes and made available in accordance with the Freedom of Information Law.

Lastly, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law, §100 (1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §101(2). Nevertheless, various interpretations of the Education Law, §1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd __ NY 2d __ (1982)]. As such, if the Board took action, based upon the judicial decisions cited above and the facts that you have provided, it would appear that such action should have been accomplished by means of a vote taken 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:jm

cc: Superintendent John F. Dowd

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-941

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

October 26, 1983

Ms. Eleanor G. Campbell
Member, Board of Education
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Campbell:

I have received your letter of October 7 which concerns executive sessions conducted by the Lindenhurst Board of Education. Please note that, having discussed the matter with Anthony J. Pecorale, Superintendent of Schools, he forwarded to me his opinions regarding the propriety of the executive sessions. As you requested, a copy of this opinion will be sent to both Superintendent Pecorale and Mrs. Jane Russo, President of the Board.

Attached to your letter is an agenda relative to an "Executive Board Meeting" scheduled for October 5. The agenda for that meeting is as follows:

> "1. ASSESSED VALUATION/TAX RATE - (To be brought to open session.) (See enclosed back-up)
>
> 2. REFERENDUM FOR SALE OF SCHOOL STREET - (To be brought to open Session) (See enclosed back-up)
>
> 3. BRIDGING THE GAP (Possible contract to employ a consultant to prepare a telephone system.)
>
> 4. SET DATE FOR PUBLIC HEARING - HARDING AVENUE SCHOOL (Recommend - November 16, 1983.)"

In conjunction with your comments, I would like to offer the following remarks.

First, it appears that the "Executive Board Meeting" alludes to topics scheduled for discussion in an executive session prior to the convening of a meeting. In a technical sense, I do not believe that an executive session may be scheduled prior to a meeting.

Section 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 Open Meetings Law prescribes a procedure to be followed by a public body during an open meeting before it may enter into an executive session. Specifically, §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 in my view that an executive session may be convened only after a motion to enter into an executive session is made during an open meeting and carried by a majority vote of the total membership of a public body. Since it cannot be known in advance of a meeting whether such a motion will be carried, once again, I do not believe that an executive session may be scheduled in advance of a meeting.

Second, while it is possible that the subjects discussed might appropriately have been considered during an executive session, as indicated earlier, a motion to enter into an executive session must identify in general terms the subject or subjects to be considered.

Part of the problem in my opinion is that the agenda does not refer to any of the grounds for executive session. As a consequence, without additional description, neither yourself as a member of the Board of Education, nor members

of the public in attendance at the meeting, had the capacity to determine whether any grounds for executive session listed in the Open Meetings Law could appropriately have been cited.

For example, by identifying a topic as "assessed valuation/tax rate" or "set date for public hearing", neither a member of the Board nor a member of the public could learn of any specific ground for entry into executive session that might have been applicable.

In the future, it is suggested that a motion to enter into an executive session should indicate in part which specific ground for entry into executive session would apply. For instance, if indeed a discussion of a referendum for the sale of property involved a consideration of pending litigation, the motion to enter into executive session should in my view clearly so state.

According to your letter, Dr. Pecorale indicated that the item identified as "assessed valuation/tax rate" could have been considered during an executive session "because the final decision we would make from three alternatives would be influenced by the cost of unconcluded labor negotiations".

Although the Open Meetings Law permits a public body to enter into an executive session for "collective negotiations pursuant to article fourteen of the civil service law", it is questionable in my view whether the discussion consisted of "collective negotiations" under the Taylor Law. It is possible that status of negotiations might have related to the discussion; nevertheless, it is not clear that discussion pertained directly to collective bargaining negotiations.

The second item for discussion in executive session involved a referendum for the sale of school property. In this regard, you wrote that:

> "The final price of the school had been agreed upon and the binder of $8000 had exchanged hands. The discussion in executive session was about the wording of the legal notice and about some minor changes in the contract requested by the buyer."

It appears that the most relevant ground for executive session in relation to the issue is §100(1)(h). That provision permits a public body to conduct an executive session to discuss:

> "...the proposed acquisition, sale or lease of real property of the 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."

The question, therefore, is whether disclosure would "substantially" affect the value of the property. An answer to the question in my view is dependent upon the specific factual circumstances present. For instance, if a significant amount of information had already been disclosed regarding the proposed transaction, it is possible that publicity would not at this juncture substantailly affect the value of the property.

Dr. Pecorale alluded to litigation relating to the sale of the property. In this regard, §100(1)(d) of the Law permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". It is unclear whether litigation is pending, or whether it has been concluded; it is also unclear whether the discussion involved a consideration of "litigation strategy" [see Concerned Citizens to Review the Jefferson Mall, Matter of v. Town Board of the Town of Yorktown, 84 AD 2d 612, appeal dismissed 54 NY 2d 957 (1981)]. If indeed the discussion pertained to pending litigation or litigation strategy relative to a proposed lawsuit, I believe that an executive session could justifiably have been held.

The third topic for discussion in executive session was entitled "bridging the gap". From my perspective, the only relevant basis for entry into an executive session would have been §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..."

Based upon a review of the agenda, there is no indication that any particular person or corporation might be discussed in terms of credit or financial history, for example. If the motion to enter into an executive session had been clearer, perhaps a problem could have been avoided.

The last item involving setting the date for a public hearing would not without greater description indicate any basis for entry into executive session. Dr. Pecorale indicated that the issue related to a proposed sale of real property. Therefore, the capacity to enter into an executive session would, once again, be based upon a question of fact, i.e., whether the publicity would substantially affect the value of the property.

In sum, it is possible that executive sessions might appropriately have been held to discuss some of the issues identified in the agenda. However, it is reiterated that problems and controversies might be avoided in the future if motions made to enter into executive sessions more clearly indicate the subject matter to be considered.

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: Dr. Pecorale
Mrs. Russo
Gilbert P. Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-942

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

October 27, 1983

Ms. Barbara Bernstein
Executive Director
New York Civil Liberties Union
Nassau County Chapter
210 Old Country Road
Mineola, NY 11501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Bernstein:

I have received your recent letter in which you explained that the Garden City School Board has adopted a resolution prohibiting the use of tape recorders at its open meetings.

You have requested an advisory opinion regarding the propriety of the prohibition of the use of tape recorders.

I would like to offer the following comments regarding your inquiry.

It is noted at the outset that the Open Meetings Law is silent with respect to the use of tape recorders at open meetings of public bodies. Nevertheless, it has been advised that a public body cannot restrict the use of portable, battery-operated tape recorders at such meetings.

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 Open Government 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, 413 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 happended 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 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 (see attached opinion of May 13, 1980). 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, such as a school board, can prohibit the use of portable, battery-operated tape recorders at open 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

Enc.

cc: School Board
Thomas Lamberti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-943

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

October 27, 1983

Mr. Dennis Kipp
Poughkeepsie Journal
P.O. Box 1231
85 Civic Center Plaza
Poughkeepsie, NY 12602

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kipp:

I have received your letter of October 12 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, the Town of Red Hook "established a so-called steering committee to handle issues related to a planned power plant site proposed in the town by Consolidated Edison Corp. of New York City." While notices of meetings of the Committee had been posted, during the past year, you indicated that "the posting stopped and the committee now claims that they are not subject to the state's Open Meetings Law." Further, you wrote that the Chairwoman of the Committee has stated that since "the committee does not take official action and is 'only' an advisory group, its meetings do not have to be public."

In this regard, I would like to offer the following comments.

It is noted at the outset that there was substantial controversy under the Open Meetings Law as originally enacted regarding the status of committees, subcommittees and similar advisory bodies that may have had only the

capacity to advise and no authority to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 97(2) of the 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."

The original definition referred to entities that "transact" public business; the current definition refers to entities that "conduct" public business. Moreover, there was no reference in the original definition to committees or subcommittees, for example.

Based upon the changes in the Law, the specific language of the current definition of "public body" and its judicial interpretation, I believe that a committee, such as that which you described, would constitute a "public body" subject to the Open Meetings Law.

In my view, such a conclusion can also be reached by viewing the definition of "public body" in terms of its components. First, a committee would, under the circumstances, be an entity consisting of at least two members. Second, even though there may have been no specific direction that a committee must act by means of a quorum, §41 of the General Construction Law has long required that any entity consisting of three or more public officers or persons can perform their duties only by means of a quorum, a majority of its total membership. Third, the committee in question clearly conducts public business and performs a governmental function for a public corporation, in this instance, the Town of Red Hook. As such, I believe that all the conditions required to find that the entity in question is a public body can be met.

I would also like to point out that a decision of the Appellate Division indicates that advisory committees, even those designated by the executive head of a municipality, are considered to be public bodies subject to the Open Meetings Law [Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

With regard to notice, since a committee is apparently a public body, it would in my view be required to comply with §99 of the 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) concerns meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed 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: Town Board, Town of Red Hook
Joan Armour, Chairwoman, Steering Committee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 944

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

October 28, 1983

William Rowen, Chairperson
New York State Tenant and
Neighborhood Coalition
198 Broadway
New York, NY 10038

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rowen:

I have received your letter of October 11 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, for the past six years, you and your associates have attended meetings of the New York City Conciliation and Appeals Board (CAB). You wrote, however, that:

> "[D]uring all that time, the CAB always entered executive session at least once at their regular meetings. The chairman merely announced that the board was going into executive session to discuss, usually, 'litigation,' or sometimes 'staff,' and asked the public in attendance to leave."

Although you have left the room when the CAB enters into executive sessions, you wrote that you "have become aware of evidence of misuse of the CAB's right to exclude the public". Apparently minutes of CAB meetings:

> "show that discussions of concluded litigation and its effect on CAB policy, budget considerations, meetings with outside advocacy groups, and public hearing schedules, as well as other matters, are frequently discussed in executive session."

In conjunction with a meeting held on September 15, while the minutes indicated that a vote to enter into an executive session was taken, you wrote that "no vote was actually taken". Moreover, when the open session resumed after the executive session, you indicated that "the chairman announced that the board had agreed to promulgate a supplemental budget to address increased expenses" imposed by the recent enactment of legislation.

Most recently, at the CAB's meeting of October 6, motions to enter into executive session were made "without identifying subject matters and areas to be discussed."

Based upon your letter and the materials attached to it, I would like to offer the following comments.

First, as you are awre, the Open Meetings Law prescribes a procedure that must be accomplished by a public body during an open meeting before it may enter into an executive session. Specifically, §100(1) of the Open Meetings 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 twken to appropriate public moneys..."

Consequently, prior to entry into an executive session, the three steps described above must be taken. Those steps include a motion made during an open meeting to enter into an executive session; an indication in the motion of the subject or subjects to be considered; and passage of the motion by a majority vote of the total membership of the CAB.

Second, a public body may not enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §100(1) specify and limit the subjects that may appropriately be discussed during an executive session.

Under the circumstances, you referred to several topics considered in executive session that were likely inconsistent with any of the bases for entry into an executive session listed in the Open Meetings Law. For instance, while §100(1)(d) of the Law permits a public body to enter into an executive session to discuss "proposed, pending or current litigation", a discussion of concluded litigation and its effect upon CAB policy would not in my view fall within the scope of §100(1)(d) or any other basis for entry into an executive session. Similarly, discussions of budget considerations or "staff" without greater description would not apparently qualify for discussion during an executive session.

While certain matters relating to "personnel" or "staff" may be considered during an executive session, the capacity to enter into an executive session to discuss those issues is in my view limited. 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 hisotyr 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, if, for example, the CAB is involved in a discussion relative to the performance of a particular staff member, perhaps an executive session would be appropriate, for the discussion might involve a review of the "employment history" of a "particular person". Nevertheless, if the CAB seeks to discuss staff in general terms, plans for lay-offs due to budgetary constraints, or perhaps the means by which it seeks to expend public monies, I do not believe that any ground for entry into executive session could appropriately be cited.

Third, there are judicial determinations which indicate that the identification of an issue as "personnel", "legal matters" or "litigation" without greater specificity would not meet the requirements of the Law. As stated in Doolittle v. Board of Education [Sup. Ct., Chemung Cty., July 21, 1981] in a discussion of meetings held by a Board of Education:

> "[A]t the February 26, 1981 and March 12, 1981 meetings, no reasons were given by the Board for adjourning to an executive session. This clearly violates Public Officers Law §100[1]. The minutes of the March 26, 1981 meeting indicate that the Board voted on two separate occasions to enter into executive session to discuss 'personnel' and 'negotiations' without further amplification. On May 28, 1981 the Board again entered into executive session on two occasions. The reasons given for doing so were to discuss a 'legal problem' concerning the gymnasium floor replacement and for 'personnel items'. Again, on June 11, 1981, the Board voted to enter executive session for 'personnel matters'.
>
> "We believe that merely identifying the general areas of the subjects to be considered in executive session as 'personnel', 'negotiations', or 'legal problems' without more is insufficient to comply with Public Officers Law §100[1]."

Further, with respect to a discussion of "litigation", it was held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation.' This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity, the pending, proposed or current litigation to be discussed during the execu-

> tive session. Only through such an identification will the purposes of the Open Meetings Law be realized" [Daily Gazette v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981)].

Consequently, assuming that your representation of the facts is accurate, the CAB in my view did not fulfill the requirements of §100 of the Open Meetings Law.

Lastly, of significance under the circumstances is §1155 of the New York City Charter, which became effective as amended on January 1, 1978, one year after the effective date of the Open Meetings Law. Section 1155, entitled "Public attendance at executive sessions", states in subdivision (a) in relevant part that:

> "[E]xcept as otherwise provided pursuant to subdivision b of this section, the public may attend all sessions or meetings of the following agencies whenever items on the calendar of such agencies are to be considered and acted upon in a preliminary or final manner:...conciliation and appeals board..."

Subdivision (b) of §1155 states that:

> "[A]ny agency specified pursuant to subdivision a of this section may convene an executive session closed to the public by a three-fourths vote of all of its members, but shall not take final action at any such meeting."

In my view, the provisions of §1155 of the New York City Charter should be read in conjunction with the Open Meetings Law, particularly §105 entitled "Construction with other laws". The cited provision states in part that:

> "1. Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article.

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

Subdivision (b) of §1155 of the City Charter might on its face be construed to permit the CAB to conduct an executive session to discuss any matter if a motion to enter into an executive session is approved by a three-fourths vote of all of its members. Nevertheless, I believe that the Open Meetings Law restricts the capacity to enter into an executive session to those grounds listed in §100(1) of that statute, for §105(1) states that a charter provision more restrictive with respect to public access than the Open Meetings Law is superseded by the Open Meetings Law.

It is also noted that, as a general rule, if a public body has appropriately convened an executive session, it may take action during an executive session, unless the action involves the appropriation of public monies [see §100(1) and §101(2) concerning minutes]. However, §1155 (b) would appear to be less restrictive with respect to public access than the Open Meetings Law, for it appears to preclude the CAB from taking final action during an executive session.

Further, §1155(b) apparently permits an executive session to be held only upon an affirmative vote of three-fourths of the CAB's members. Since the Open Meetings Law permits an executive session to be held following passage of a motion by a majority of the membership of a public body, §1155(b) would in my view be "less restrictive with respect to public access" and, therefore, be preserved.

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: Emanuel P. Popolizio, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3086
OML-AO-945

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

November 2, 1983

Ms. Loretta Prisco
PACE
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Prisco:

I have received your letter of October 12, which reached this office on October 25.

According to your letter:

> "[O]n August 29, 1983, Community School Board #31 voted on the Superintendent's recommendations to eliminate positions in this district in order to present a balanced budget to the Central Board of Education. Each budget item was voted upon separately by the members of the Board during a closed executive session. The original recommendations of the Superintendent were changed by this vote."

You have asked for an advisory opinion regarding the propriety of voting on the elimination of positions during an executive session as well as a denial by the Board of your request "that the votes of each member of the School Board by made public."

In this regard, I would like to offer the following comments.

First, as you are aware, the Open Meeitngs Law is based upon a presumption of openness. Stated differently, all meetings of a public body, such as a school board, must be conducted open to the public, except to the extent that an executive session may be convened pursuant to §100(1) of the Open Meetings Law.

Second, from my perspective, the only ground for entry into executive session relevant to the issue described is §100(1)(f). The cited provision 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 my opinion, the capacity to enter into an executive session under §100(1)(f) is restricted to those situations in which a "particular person" is the subject of a discussion in relation to one or more of the topics appearing in that provision. Since the issues determined by the Board behind closed doors involved the manner in which public monies would be expended, it appears that questions of policy were determined, rather than issues involving a "particular person". If my assumptions are accurate, I do not believe that a discussion of the addition to or elimination from the budget of positions would constitute an appropriate topic for discussion during an executive session.

Third, as a general rule, a public body that has properly convened an executive session may vote during an executive session. Nevertheless, various interpretations of the Education Law, §1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd __ NY 2d __ (1982)].

Fourth, with respect to your request and the ensuing denial relative to the votes of each member of the Board, I direct your attention to the Freedom of Information Law. Specifically, §89(3) of the Freedom of Information Law states in part that nothing in the Freedom of Information Law "shall be construed to require an entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven..." Relevant to the issue, subdivision (3) of §87 states that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Consequently, the cited provision represents one of the few instances in the Freedom of Information Law in which an agency, including a school board, must prepare a record. Further, I believe that §87(3)(a) requires that a record be prepared in every instance in which a final vote is taken which identifies each member who voted and the manner in which he or she cast a vote. Therefore, the denial of your request was in my opinion inappropriate and constitutes a failure to comply with the requirements of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Community School Board
Frank Murphy, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3091
OML-AO-946

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

November 3, 1983

Mr. Edward L. Cuddihy
Asst. Managing Editor
The Buffalo News
One News Plaza
P.O. Box 100
Buffalo, NY 14240

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cuddihy:

I have received your letter of October 21 in which you requested an advisory opinion.

Specifically, your questions are whether the "Stadium Committee" designated by Mayor Griffin of the City of Buffalo "is subject to the provisions of the state's Open Meetings Law and if the minutes of this group's meetings are subject to the state's Freedom of Information Law."

In terms of background, you wrote that:

> "[T]he 11-member Stadium Committee was formed by Buffalo Mayor James Griffin in June 1982, meets irregularly on the call of Mayor Griffin, who is an ex officio member, to discuss and plan a possible domed baseball stadium in downtown Buffalo. The committee already has discussed architectural plans and financing with the help of state aid for such a stadium, and in the words of Mayor Griffin, has as its purposes: 'To make things happen in construction of a downtown stadium.'

> "The committee is made up of Buffalo businessmen, sports media personalities, the majority leader of the Buffalo Common Council, and the chairman of the Erie County Legislature."

You wrote further that:

> "[N]ews Reporter Franklyn Buell was told at the group's most recent meeting that the meeting was closed to the press and the public and that all meetings of this committee were so closed. Upon requesting information on the meeting, Reporter Buell was told that once the committee gets all its information and turns it over to the governor, The News can get its information from the governor's office."

It is the view of the Buffalo News that the Committee is subject to the Open Meetings Law and that the materials generated by the Committee should be subject to the Freedom of Information Law.

I agree with those contentions for the following reasons.

First, with respect to the application of the Open Meetings Law, the issue is whether the Stadium Committee is a "public body" subject to the Open Meetings Law. In this regard, it is noted that there was substantial controversy under the Open Meetings Law as originally enacted regarding the status of committees, subcommittees and similar advisory bodies that have only the capacity to advise and no authority to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 97(2) of the 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."

The original definition referred to entities that "transact" public business; the current definition refers to entities that "conduct" public business. Moreover, there was no reference in the original definition to committees and subcommittees, for example.

Based upon the changes in the Law, the specific language of the current definition of "public body" and its judicial interpretation, I believe that a committee, such as that which you described, would constitute a "public body" subject to the Open Meetings Law.

In my view, such a conclusion can also be reached by viewing the definition of "public body" in terms of its components. First, a committee would, under the circumstances, be an entity consisting of at least two members. Second, even though there may have been no specific direction that a committee must act by means of a quorum, §41 of the General Construction Law has long required that any entity consisting of three or more public officers or persons can perform their duties only by means of a quorum, a majority vote of its total membership. Third, the Committee in question clearly conducts public business and performs a governmental function for a public corporation, in this instance, the City of Buffalo. As such, I believe that all the conditions required to find that the entity in question is a public body can be met.

I would also like to point out that a recent decision of the Appellate Division, Fourth Department, indicates that advisory committees, including a committee designated by the executive head of a municipality, in that case, the Mayor of Syracuse, are considered to be public bodies subject to the Open Meetings Law [Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Second, with regard to minutes, I direct your attention to §101 of the Open Meetings Law. Subdivision (1) pertains to 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."

Subdivision (2) of §101 concerns minutes of executive session and requires that such minutes make reference only to the nature of action taken during an executive session, the date and the vote.

Subdivision (3) of §101 provides that:

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

As such, minutes of meetings of a public body are in my opinion accessible in accordance with the provisions of the Freedom of Information Law.

Third, in terms of "material generated by this Committee", I believe that all such materials fall within the scope of rights of access granted by the Freedom of Information Law.

It is emphasized that the Freedom of Information Law defines the term "record" broadly 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."

Under the circumstances, I believe that any materials generated by the Stadium Committee would be produced for an agency, the City of Buffalo, and, therefore, would fall within the scope of the Freedom of Information Law.

I would like to point out, too, that a decision cited earlier, Syracuse United Neighbors, supra, also found that minutes of advisory task forces designated by the Mayor of the City of Syracuse "must be disclosed" (id. at 985). With respect to records other than minutes that may be generated by the Stadium Committee, it is noted that 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) of the Law.

In sum, it is my opinion that the Stadium Committee designated by Mayor Griffin is, based upon the provisions of the Open Meetings Law and its judicial interpretation, a "public body" subject to the Open Meetings Law in all respects, and that any records generated by or in possession of the Committee are subject to the provisions of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor Griffin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3092
OML-AO-947

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

November 3, 1983

Mr. John B. Boyhan
President
Alert Engine, Hook, Ladder
and Hose Co., No. 1, Inc.
555 Middle Neck Road
Great Neck, NY 11023

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Boyhan:

I have received your letter of October 14 and appreciate your interest in the Open Meetings Law.

As President of a volunteer fire company, you indicated that the Board of Trustees of the Company holds monthly meetings, as well as special meetings on occasion. Your question involves "who may or may not attend such meetings." It is your view that the meetings are subject to the Open Meetings Law.

In my opinion, any person may attend meetings of the Board of Trustees, for I believe that the Board is a "public body" subject to the Open Meetings Law.

It is noted at the outset that 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."

I believe that each of the conditions necessary to a finding that the board of a volunteer fire company is a public body can be met.

The board of 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, in a landmark decision, 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.

I would like to point out, too, that both the Open Meetings and Freedom of Information Laws are based upon presumptions of openness. In the case of the Open Meetings Law, all meetings must be conducted open to the public, except to the extent that an executive session may be held

in accordance with §100(1) of the Law. Similarly, under the Freedom of Information Law, all records of a volunteer fire company are available, except to the extent that they fall within one or more of the grounds for denial of access appearing in §87(2) of that Law.

As you requested, enclosed are copies of the Open Meetings and Freedom of Information Laws, as well as an explanatory pamphlet dealing with both subjects.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3099
OML-AO-948

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

November 4, 1983

Mrs. Sherry Marano
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Marano:

I have received your letter of October 18 and the materials attached to it.

The correspondence describes your efforts to gain access to records in possession of the Keshequa Central School District pertaining to your son. You wrote that "school officials kept 'saying' [you] could get the requested records but every time [you] went to the school to see them they asked [you] to see someone else or make [your] request to someone else". Since you have not yet been provided access to your son's file, you have asked whether your rights had been violated.

In my opinion, you do have the right to inspect and/or copy the records in which you are interested that pertain to your son.

Although the Freedom of Information Law applies generally to records of units of state and local government, including school districts, I believe that various other provisions of law would be more directly relevant. Specifically, the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) provides rights of access to "education records" identifiable to a student under the age of eighteen to parents of the students, while concur-

It has been recognized that, in some instances, a public body might not reconvene during a period of one or two weeks, as the case may be, to approve minutes. Consequently, it has been suggested that, to comply with the Law, minutes should be prepared within the required time limits, but that they might be marked "non-final", "unapproved", "draft", for example. By so doing, the public can learn generally of what transpired at a meeting, and at the same time, notice is effectively given that the minutes are subject to change.

Mr. Coon also referred to minutes of meetings of a committee on the handicapped. In this regard, I believe that a committee on the handicapped is a "public body" subject to the Open Meetings Law. "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."

A committee on the handicapped is an entity consisting of more than two members that is required to act by means of a quorum under §51 of the General Construction Law. In addition, the description of duties of a committee on the handicapped appearing in §4402 of the Education Law indicates that such a committee transacts public business and performs a governmental function for a public corporation, a school district. Therefore, I believe that the Committee is subject to the Open Meetings Law in all respects.

Nevertheless, it is likely that portions of the meetings of the committee on the handicapped fall outside the scope of the Open Meetings Law. Specifically, §103(3) of the Law states that its provisions shall not apply to "matters made confidential by federal or state law." In this regard, the federal Family Educational Rigths and Privacy Act provides that "education records" identifiable to particular students are confidential to all but the parents of the students. Since education records are generally confidential, a discussion of such records would

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a) (1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall given the parent, on request, a copy of the individualized education programs."

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3095
OML-AO-949

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

November 4, 1983

Jack Rossman, President
Worcester Concerned Citizens
P.O. Box 115
Worcester, NY 12197

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rossman:

I have received your letter of October 10 as well as an attachment signed by Ms. Mary Ives.

Your letter and the statement by Ms. Ives pertain to the implementation of the Freedom of Information and Open Meetings Laws by the Town of Worcester.

According to your letter a major issue facing the Town pertains to a water system improvement project. Following the public hearings on the subject, you wrote that approval of the project by the Town Board was "accomplished in a 'Secret Meeting' of the Town Board Members in early July, '83."

In this regard, it is noted that the Open Meetings Law has been given a broad construction by the courts. Specifically, it has been held that any convening of a quorum of a public body constitutes a "meeting" subject to the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)] that must be preceded by notice in accordance with §99 of the Law (see attached).

With respect to notice, §99(1) of the Open Meetings Law concerns meetings scheduled at least a week in advance and requires that notice of such meetings be given to the news media and to the public by means of posting in one or more designated locations not less than seventy-two hours prior to such meetings. Section 99(2) pertains to meetings scheduled less than a week in advancy 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, although the Open Meetings Law requires that notice of the time and place of all meetings must be provided, there is nothing in the Open Meetings Law that would prohibit a public body from calling a special or emergency meeting on short notice. Further, §99(3) states that the Open Meetings Law does not require the publication of legal notice. Consequently, situations often arise in which notice may be given to a newspaper, for example, but in which the newspaper does not publish the notice due to time or space constraints.

Whether the project in question was approved at a "secret meeting" in my view involves a question of fact. It is suggested that you review the Town Board's minutes of its July meetings to obtain more information relative to the allegation.

It is noted, too, that this office has been contacted several times by various Town officials during the past few weeks in order to raise questions regarding compliance with the Freedom of Information and Open Meetings Laws. Based upon those conversations, it appears that good faith efforts are being made to comply with both statutes.

In terms of the enforcement of the Open Meetings Law, §102(1) of the Law states in relevant part that:

> "[A]ny aggrieved person shall having 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.

> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

Please be advised that the statute of limitations regarding an Article 78 proceeding is four months. Therefore, if, for example, a violation of the Open Meetings Law occurred at the beginning of July, the statute of limitations may have run.

With regard to Ms. Ives' statement, it does not appear that the Freedom of Information Law was violated.

Ms. Ives wrote that a request for records was made on September 18, that a response was given in three days and that the records were made available on September 23. Section 89(3) of the Freedom of Information Law requires that an agency must respond to a request within five business days of its receipt. Therefore, a response was given within the time period prescribed by the Law.

It is also noted that §87(1)(b)(iii) permits an agency to charge up to twenty-five cents per photocopy up to nine by fourteen inches. Further, an agency is required to provide copies of records accessible under the Law. However, I believe that an agency may require payment prior to making copies, for §89(3) states in part that copies shall be made "upon payment of, or offer to pay" the requisite fees for copies.

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: Town Board
Catherine Clark, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-950

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

November 9, 1983

Mr. David L. Clark
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Clark:

I have received your letter of October 12, which reached this office on October 27, as well as enclosures, which consist of minutes of a meeting of the Pittsford Planning Board, a news article that appeared in the Rochester Times-Union, and editorials published by the Times-Union and the Brighton Pittsford Post.

You have requested an advisory opinion regarding various portions of a meeting of the Planning Board held on October 10 that were closed to the public.

Having reviewed the materials attached to your letter, I would like to offer the following comments.

First, throughout the minutes references are made to various instances in which the Planning Board considered issues that were determined "following an executive session". Based upon my reading of the minutes, there is no indication that motions were made to enter into executive session. In this regard, I direct your attention to §100(1) of the Open Meetings Law, which prescribes the 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 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 in my view that in order to enter into an executive session, a motion to do so 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 a public body. It does not appear that those steps were taken.

Second, a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of the Open Meetings Law specify and limit the topics that may appropriately be considered during an executive session. Having reviewed the minutes, it does not appear that any ground for executive session could have been cited appropriately with respect to the majority of references to executive sessions conducted by the Board.

Third, with respect to one aspect of the minutes, the basis for closing the meeting was apparently a contention that the Board was engaging in quasi-judicial proceedings. Based upon the facts described in the materials, although the Open Meetings Law exempts quasi-judicial proceedings from its provisions [see §103(1)], I do not believe that the proceedings in question could properly have been characterized as "quasi-judicial". From my perspective, one of the elements that must be present in order to find that a proceeding may be quasi-judicial is the capacity of a board to make a final and binding determination. Under the circumstances, I believe that the Planning Board was involved in making determinations which later could be accepted, rejected or modified by the Town Board. If that is so, the exemption in the Open Meetings Law regarding quasi-judicial proceedings would not in my opinion have been applicable. As such, it does not appear that any basis for closing the meeting would have been present.

Fourth, a news article and the minutes indicate that one of the grounds for executive session involved "pending litigation". Relevant would be §100(1)(d) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In my opinion, if indeed the Board was involved in such a discussion, a motion to consider "pending litigation" without greater specificity would likely have been inadequate. As stated in Daily Gazette v. Town Board, Town of Cobleskill:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation.' This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity, the pending, proposed or current litigation to be discussed during the executive session. Only through such an identification will the purposes of the Open Meetings Law be realized" [emphasis added by court, 444 NYS 2d 44, 46 (1981)].

In addition, it has also been held that the purpose of §100(1)(d) is to enable a public body to discuss its litigation strategy behind closed doors in order that its adversary cannot learn of that strategy to the detriment of a public body and, therefore, the public generally [Concerned Citizens to Review the Jefferson Mall, Matter of v. Town Board of the Town of Yorktown, 84 AD 2d 612, appeal dismissed 54 NY 2d 957 (1981)]. If litigation strategy was not considered, I do not believe that §100(1)(d) of the Open Meetings Law could justifiably have been cited as a basis for entry into an executive session.

As requested, in order to enhance compliance with the Open Meetings Law, copies of this opinion and the Law itself will be sent to the members of the Town Board and the Planning Board 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
Executive Director

RJF:jm

cc: Members of the Town Board
Members of the Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-951

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

November 10, 1983

Mr. Rae Tyson
Staff Writer
Niagara Gazette
310 Niagara Street
Niagara Falls, NY 14303

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tyson:

I have received your letter of October 28 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, the Niagara Falls Board of Education "regularly votes to go into executive session without stating the reasons. Following the vote, the board president instructs the clerk to recite the entire list of reasons for legitmate executive session." You wrote further that when a member of your staff challenged the procedure, "the board attorney insisted the procedure was in compliance with the law."

In my view, based upon the language of the Open Meetings Law and its judicial interpretation, the procedure that you described fails to comply with the requirements of the Law.

First, the Open Meetings Law sets forth a procedure that must be carried out during an open meeting before a public body may enter into an executive session. Specifically, §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..."

The provision quoted above indicates that a motion to enter into an executive session must include reference to the "general area or areas of the subject or subjects" to be considered. If indeed a motion is carried without a specification of the topic to be considered, neither the members of the public body, nor members of the public in attendance, have the capacity to know what the subject matter to be discussed might be.

Second, there are judicial determinations that indicate that a reiteration of one or more of the grounds for executive session, without more, is inadequate and fails to comply with the Law. For instance, in a situation in which a public body merely recited one of the grounds for executive session, it was held that:

> "...any motion to go into executive session must 'identify the general area' to be considered. It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation.' This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity, the pending, proposed or current litigation to be discussed during the executive session. Only through such an identification will the purposes of the Open Meetings Law be realized. Democracy, like a precious jewel, shines most brilliantly in the light of an open government. The Open Meetings Law seeks to preserve this light." [emphasis added by court; Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981)].

In another decision, a court reviewed minutes containing motions for entry into executive sessions and found that:

> "[T]h minutes of the March 26, 1981 meeting indicate that the Board voted on two separate occasions to enter executive session to discuss 'personnel' and 'negotiations' without further amplification. On May 28, 1981 the Board again entered into executive session on two occasions. The reasons given for doing so were to discuss a 'legal problem' concerning the gymnasium floor replacement and for 'personnel items'. Again, on June 11, 1981, the Board voted to enter executive session of 'personnel matters'.
>
> "We believe that merely identifying the general areas of the subjects to be considered in executive session as 'personnel', 'negotiations', or 'legal problems' without more is insufficient to comply with Public Officers Law §100[1]" [Doolittle v. Board of Education, Sup. Ct., Chemung Cty., Oct. 20, 1981].

Both of the decisions cited above dealt with situations in which reference was made to a particular ground for executive session which, without more, was insufficient to comply with the Law. Based upon the direction given in those cases, a recital of every ground for entry into executive session would in my view clearly fail to comply 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:jm

cc: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3104
OML-AO-952

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

November 10, 1983

Ms. Cecily Bailey
Press-Republican
170 Margaret Street
Plattsburgh, NY 12901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Bailey:

I have received your letter of October 26 in which you requested an advisory opinion regarding the implementation of the Freedom of Information and Open Meetings Laws by the Board of Trustees of the Village of Saranac Lake.

According to your letter, you have unsuccessfully sought tape recordings of meetings of the Board. You wrote that you were informed by Village officials "that the tapes are not public record because they are used merely as tools for minutes of the meetings." Further, although you requested to listen only to those aspects of the tape involving the open meeting, your capacity to do so was denied because the tape includes a recording of the Board's executive session.

The other matters to which you referred pertain to a special meeting held without notice and a "personnel appointment" approved during an executive session.

I would like to offer the following comments regarding the issues presented in your letter.

With respect to the tape recording, I believe that the portion of the tape reflective of an open meeting, and perhaps portions reflective of the discussion in executive session, are, based upon the language of the Freedom of Information Law and its judicial interpretation, accessible to you.

Section 86(4) of the Freedom of Information Law defines the term "record" expansively 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 language quoted above, a tape recording prepared by or in possession of the Village constitutes a "record" subject to rights of access granted by the Freedom of Information Law.

In construing the definition in relation to records of a volunteer fire company that involved a lottery, the Court of Appeals, the state's highest court, held that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which a document was produced or the function to which it relates. This conclusion accords with the spirit as well as the letter of the statute" [Westchester-Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)].

As such, if the Village maintains a tape recording or any document, regardless of physical form, in my view, it would constitute a "record" that falls within the scope of the Freedom of Information Law.

With regard to rights of access, 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law. Since the portion of the tape involving the open meeting was publicly disclosed, and since an person could have been present at the open meeting, that aspect of the tape would in my view clearly be available. Moreover, it has been held judicially that a tape recording of an open meeting is accessible under the Freedom of Information Law [Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978].

It is noted, too, that the introductory language of §87(2) refers to the capacity to withhold records or "portions thereof" that fall within one or more of the grounds for denial that follow. Therefore, I believe that the Legislature envisioned situations in which a record might be available and deniable in part. Under the circumstances, since you requested only that portion of the tape recording that pertains to the open meeting, I believe that the Village would be obliged to make that aspect of the tape available to you, either by means of listening or by permitting a copy to be made of that portion of the tape.

The remaining issues described in your letter pertain to the Open Meetings Law.

With regard to notice of meetings, I direct your attention to §99 of the Law. Section 99(1) pertains to meetings scheduled at least a week in advance and requires that notice of the time and place 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 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 in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. Consequently, I believe that notice must be given prior to all meetings, whether regularly scheduled or otherwise.

Finally, you referred to a situation in which a personnel appointment was made and voted upon during an executive session. In my view, there may have been no requirement that the vote be made in public. As a general rule, if a public body has properly convened an executive session, it may vote during the executive session, unless the vote is to appropriate public monies. Therefore, if, for example, an appointment is made to fill a vacancy for which funds had previously been appropriated, it is unlikely that the Open Meetings Law was violated.

It is noted that if action is taken in executive session, §101(2) requires that minutes of the action taken, the date and vote must be prepared. Further, §101 (3) requires that minutes of an executive session must be made available within one week. The minutes should include a record of votes that identifies the manner in which each member voted pursuant to §87(3)(a) of the Freedom of Information Law.

Enclosed are copies of the Freedom of Information and Open Meetings Laws. Copies of those statutes and this opinion will be sent to the persons 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
Executive Director

RJF:jm

Encs.

cc: Rick Meyer
Marilyn Clement

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-953.

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

November 17, 1983

Mr. Thomas H. Lamberti
Cullen and Dykman
1010 Franklin Avenue
Garden City, NY 11530-0418

Dear Mr. Lamberti:

I have received your letter of November 3 as well as the correspondence attached to it.

You have asked that I review an advisory opinion rendered at the request of Ms. Barbara Bernstein of the New York Civil Liberties Union after having read your letter addressed to Mr. Alan Azzara, who is also associated with the Civil Liberties Union.

The issue pertains to the use of tape recorders at open meetings of a public body.

According to your letter to Mr. Azzara, his correspondence with you failed to cite Davidson v. Common Council of City of White Plains, [40 Misc. 2d 1053 (1963)], but rather relied upon the decision rendered in People v. Ystueta [99 Misc. 2d 1105, 418 NYS 2d 508 (1979)]. In this regard, you expressed the view that Ystueta, a District Court decision, would not overrule Davidson, a Supreme Court decision. You also cited decisions from other states which upheld prohibitions regarding the use of tape recorders at open meetings.

While I appreciate your comments and analysis, I am not persuaded that my opinion sent to Ms. Bernstein should be altered. As you are aware, that opinion cited both Davidson and Ystueta, as well as an opinion of the Attorney General. From my perspective, Davidson, Ystueta, the Attorney General's opinion and my opinion are based upon reasonableness. In short, due to the nature of tape recorders used in 1963, I believe that Davidson represented an appropriate view, for the mere presence of a large machine may have been distracting, and a rule prohibiting its use would, under the circumstances, likely have been

reasonable. The ensuing opinions, each of which was rendered in 1979 or later, in my view represent a recognition of advances in technology and the goals expressed in the Open Meetings Law and, therefore, findings that those factors may have changed what might be characterized as reasonable in 1983.

With respect to decisions rendered in other jurisdictions, I do not feel that I could comment knowledgeably, for I am unaware of the state statutes or the facts upon which those decisions were based.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Barbara Bernstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-954

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

November 17, 1983

Ms. Catherine Goldsmith
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Goldsmith:

I have received your letter of October 25 addressed to Gilbert Smith, Chairman of the Committee on Open Government. As indicated above, the staff is authorized to prepare advisory opinions on behalf of the Committee. Please note, too, that your letter reached this office on November 15.

Your inquiry concerns the Islip Board of Education and its implementation of the Open Meetings Law. Specifically, you wrote that on October 20, the Board "scheduled what it refers to as a work session, to define the parameters to be used in the screening process in the search for a new superintendent". You indicated further that you and other District residents sought to attend the meeting but that you "were told by the superintendent and by several board members that the meeting was a work session, and [you] were not entitled to attend". Moreover, according to your letter:

> "[T]his is not an unusual procedure. Certain board meetings are labeled work sessions and are neither publicized nor open to community residents. Major decisions are made at such sessions with only the formal votes being taken at the monthly public meetings."

In this regard, I would like to offer the following remarks.

First, it is emphasized that the term "meeting" [see attached Open Meetings Law, §97(1)] has been expansively interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" required to be convened open to the public, whether or not there is an intent to take action, and regardless of the manner in which the 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)]. Consequently, a so-called "work session" is in my view clearly a "meeting" subject to the Open Meetings Law in all respects.

Second, §99 of the Open Meetings Law requires that all meetings be preceded by notice. Section 99(1) pertains to meetings scheduled at least a week in advance and requires that notice of the time and place 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 meetings scheduled less than a week an advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. As such, I believe that notice must be given prior to all meetings, whether they are characterized as "official", as "work sessions",or otherwise.

Third, with respect to the specific issue considered by the Board at its meeting on October 20, I direct your attention to §100 of the Open Meetings Law. The cited provision contains a procedure that must be accomplished by a public body during an open meeting before it may enter into a closed or "executive" session. Moreover, paragraphs (a) through (h) of §100(1) specify and limit the topics that may appropriately be discussed during an executive session.

You wrote that you are aware "that the public may be rightfully excluded from meetings dealing with particular personnel matters". While the discussion relative to the "parameters to be used in the screening process in the search for a new superintendent" might be related to a personnel matter, as you intimated, the discussion would not have dealt with any particular person.

The "personnel" ground for executive session [see §100(1)(f)] permits a public body to close its doors 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, if the discussion involved the procedures and qualifications that the Board might develop in its search for any person who might hold the position of superintendent, neither §100(1)(f) nor any other ground for executive session could have justifiably been asserted to exclude the public from the Board's discussion of the issue.

Lastly, you asked "what recourse" you might have in terms of ensuring compliance with the Law. Section 102(1) of the Open Meetings Law states in relevant part 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."

In the alternative, in an effort to attempt to educate the members of the Board and the administration, copies of this opinion and the Open Meetings Law will be sent to the Board and the Superintendent. Perhaps a review of the Open Meetings Law and its judicial interpretation will serve to change current practices and enhance compliance with the Law 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: School Board
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-955

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

December 5, 1983

Ms. Phyllis R. Palmer
Town Clerk
Town of Huron
10880 Lummisville Road
Wolcott, NY 14590

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Palmer:

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

According to your letter, "[W]hen a meeting is scheduled less than a week in advance, notice must be given to the public and the news media 'to the extent practicable' at a reasonable time prior to the meeting" (emphasis yours). You wrote that the Town Board of the Town of Huron "would like a clear and broader explanation" regarding the language that you underlined.

The question arises under §99 of the Open Meetings Law pertaining to notice of meetings. The cited provision states in relevant part 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."

While the requirements of §99(1) pertaining to meetings scheduled at least a week in advance are clear, I agree that §99(2) pertaining to meetings scheduled less than a week in advance contains somewhat vague direction. However, due to the vagueness, I believe that §99(2) also provides flexibility to the public body.

While the specific methods of complying with §99(2) are not detailed, from my perspective the language in question is intended to permit or require a public body to take reasonable action in giving notice. For instance, if it is determined now that a meeting must be held tomorrow morning, obviously, providing notice by mail to the news media would be unreasonable, for it would not likely reach them prior to the meeting. Under those circumstances, it is suggested that notice be given to the news media by telephone, for that might be the only means by which notice might appropriately be given.

With respect to the other notice requirement, posting, it is suggested that notice be posted in the designated locations as soon as a meeting has been scheduled.

In short, to comply with §99(2), all that can be suggested is that notice be communicated to the news media, perhaps by telephone, and posted for the public as soon as possible after it is known when a meeting will be held.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-956

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

December 6, 1983

Mr. Edward J. Conley
Regional Representative
NYS Department of State
600 College Avenue
Montour Falls, NY 14865

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Conley:

I have received your recent letter in which you raised a series of questions regarding the location of meetings held by the Town Board of the Town of Hector.

Specifically, you wrote that the Town of Hector does not have a municipal office and that the Town Supervisor and Town Clerk maintain offices in their homes. The problem is that the Town Board holds its official meetings in the home of the Town Clerk. As such, it is your view that "[T]his seems to have a negative effect on constituents and media wishing to attend or speak out at a public meeting...One would feel more like a guest than a constituent..." You added that it is your understanding that "the residence is not necessarily handicap accessible."

The question is whether there are any state laws or rules that may have a bearing upon an issue involving the site of meetings.

In this regard, I would like to offer the following comments.

First, there is a section of the Town Law that deals with the location of meetings of town boards. Specifically, subdivision (2) of §62 of the Town Law states in relevant part that:

> "All meetings of the town board shall be held within the town at such place as the town board shall determine by resolution, except that where provision is made by law for joint meetings of two or more town boards such joint meetings may be held in any of the towns to be represented thereat."

Consequently, it appears that the Town Board is required to designate a location within the Town where all of its meetings will be held, except joint meetings conducted with other town boards.

Second, §98 of the Open Meetings Law provides that:

> "(a) Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred of this article.
>
> (b) 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 provisions of the Open Meetings Law quoted above clearly indicate that all meetings of public bodies must be open to the general public and that a public body must make reasonable efforts to conudt its meetings in facilities that permit barrier-free access to physically handicapped persons. This is not to suggest that a municipality is required to construct or renovate a facility in order to ensure barrier-free access to the physically handicapped, but rather that a public body should attempt to choose a site for its meetings that permits such access.

Third, in terms of the intent of the Open Meetings Law, the first sentence of §95, the legislative declaration, 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."

Each of the provisions of the Open Meetings Law cited in the preceding paragraphs in my opinion evidences an intent to enable those members of the public who want to attend meetings of public bodies to do so. Holding a meeting at the home of the clerk, for example, would in my view pose several potential infringements upon the desire or capacity of interested members of the public to attend meetings of the Town Board. For instance, as you suggested, a member of the public who seeks to attend a meeting held at the clerk's home might feel more like a "guest" than an observer of a governmental activity. Some might choose not to attend for that reason. In addition, there may be situations in which issues cause significant public concern. In those cases, it is possible that more people would want to attend than the home of the clerk could accommodate. Moreover, you suggested that the residence in question might not be accessible to handicapped persons, thereby precluding a segment of the public from attending or seeking to attend.

Also relevant with respect to handicapped persons is §74(a) of the Public Officers Law, which states that:

> "[I]t shall be the duty of each public officer responsible for the scheduling or siting of any public hearing to make reasonable efforts to ensure that such hearings 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."

There may be situations in which the Town Board, or perhaps a zoning board of appeals or planning board is required to conduct a public hearing. Once again, it does not appear that the clerk's residence would serve as an appropriate location or that such a location would comply with the requirements of §74(a) of the Public Officers Law.

Lastly, you wrote that the Town of Hector has three fire stations owned by volunteer fire companies. In this regard, it is suggested that the Town Board might seek an arrangement with a volunteer fire company, a school, or some other facility within the boundaries of the Town whereby it could use such a facility for the purpose of conducting its meetings. Such an agreement might be readily arranged and be mutually beneficial to both Town officials and members of the public within the Town of Hector.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-957

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

December 6, 1983

The Honorable Jose E. Serrano
Chairman
Committee on Education
322 E. 149th Street
Bronx, NY 10451

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Assemblyman Serrano:

I have received your letter of November 22 in which you requested an opinion under the Open Meetings Law.

Specifically, you wrote that "the Board of Regents is charging a registration fee for the Regents Action Plan regional conferences". Your question is "whether the imposition of the fee is in violation of the Open Meetings Law".

In my view, while the assessment of a fee to attend the conferences may be contrary to the intent of the Open Meetings Law and other provisions, the Open Meetings Law would not have applied to the conferences.

Relevant to your inquiry is §97(1) of the Open Meetings Law, which defines "meeting" to mean "the official convening of a public body for the purpose of conducting public business". If, as you indicated in your letter, only one or two members of the Board of Regents attended the conferences, there would be no "meeting", for less than a quorum of the Board would be present. If, on the other hand, a quorum, seven members (see Education Law, §205) conduct a conference, the Open Meetings Law would apply and any member of the public would have the right to attend at no cost [see Open Meetings Law, §98(a)].

Notwithstanding the absence of the application of the Open Meetings Law to the conferences, it appears that the assessment of a fee as a condition precedent to entry is contrary to the spirit of the Open Meetings Law. As stated earlier, §98(a) of the Open Meetings Law provides that "[E]very meeting of a public body shall be open to the general public..." Moreover, §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 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. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Under the circumstances, it appears that the conferences were held for the purpose of describing proposals that would affect millions of people and to seek the comments of those who might be affected. Although the Open Meetings Law might not have applied to the conferences, it appears that the conferences were held to enhance the decision-making process.

Another provision of law that evidences an intent to ensure that similar gatherings should be open to the public at no cost is §74(a) of the Public Officers Law. That provision states that:

> "[I]t shall be the duty of each public officer responsible for the scheduling or siting of any public hearing to make reasonable efforts to ensure that such hearings 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 do not believe that the conferences could be characterized as "public hearings". Nevertheless, the language quoted above in my view evidences an intent that all members of the public should have the capacity to attend public hearings.

In sum, I do not believe that the assessment of a fee to attend the Regents Action Plan regional conferences constituted a violation of law. However, the imposition of a fee in my opinion was contrary to the spirit of the statutory provisions to which reference was made in the preceding paragraphs.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3120
OML-AO-958

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

December 6, 1983

Mr. Stephen Polowe-Aldersley
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Polowe-Aldersley:

I have received your letter of November 8, as well as the materials attached to it. Please accept my apologies of the delay in response.

Your inquiry concerns the development of a master plan by the Town of Irondequoit. In brief, in terms of the decision-making process, the Town Planning Board appointed a Master Plan Review Committee, which, in turn, appointed a series of "citizen" subcommittees. You indicated further that seven subcommittees consisting of eight members each were appointed by the Review Committee to prepare recommendations relative to eight "strategy areas". Having spoken with a member of the Planning Board, you were informed that meetings of the Review Committee, and apparently those of the subcommittees, would not be open to the public, and that their minutes would not be available.

Your question involves the status of the Review Committee and the subcommittees under the Open Meetings Law.

In this regard, I would like to offer the following comments.

It is noted at the outset that there was substantial controversy under the Open Meetings Law as originally enacted regarding the status of committees, subcommittees, and similar advisory bodies that have only the capacity to advise and no authority to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 97(2) of the 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."

The original definition referred to entities that "transact" public business; the current definition refers to entities that "conduct" public business. Moreover, there was no reference in the original definition to committees or subcommittees, for example.

Based upon the changes in the Law, the specific language of the current definition of "public body" and its judicial interpretation, I believe that the committee and subcommittees that you described would each constitute a "public body" subject to the Open Meetings Law.

In my view, such a conclusion can also be reached by viewing the definition of "public body" in terms of its components. First, a committee or subcommittee would, under the circumstances, be an entity consisting of at least two members. Second, even though there may have been no specific direction that a committee or subcommittee **must** act by means of a quorum, §41 of the General Construction Law has long required that any entity consisting of three or more public officers of persons can perform their duties only by means of a quorum, a majority of its total membership. Third, the entities in question clearly conduct public business and perform a governmental function for a public corporation, in this instance, the Town of Irondequoit. As such, I believe that all the conditions required to find that the entities in question are public bodies can be met.

I would like to point out that a decision of the Appellate Division, Fourth Department, indicates that advisory committees, including a committee designated by the executive head of a municipality, are considered to be public bodies subject to the Open Meetings Law [Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Further, public bodies must provide public notice of the time and place of their meetings. Since committees and subcommittees are apparently public bodies, they would in my view be required to comply with §99 of the Law. Subdivision (1) of §99 pertains to meetings scheduled at least a week in advance and requires that notice by 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) concerns meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings.

With respect to minutes of open meetings, §101(1) of the Open Meetings Law 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 in my view represents what may be characterized as minimum requirements concerning the contents of minutes. Clearly §101 does not require that every comment made at a meeting be recorded or that a verbatim account of a meeting be prepared.

However, as noted earlier, it was held in Syracuse United Neighbors, supra, that advisory committees must prepare minutes. From my perspective, if the entities in question adopt a proposal, as a body, such a step is in my view reflective of action taken that must be recorded in minutes, even if the governing body has the authority to accept, reject or modify the recommendation.

Lastly, in a related area, I direct your attention to the Freedom of Information Law, Section 87(3)(a) states that each agency, including a committee, shall maintain:

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

In my opinion, the record of votes envisioned by §87(3)(a) should be included in minutes when action is taken by a committee or subcommittee. Once again, while action taken by an advisory body might not represent the final action, such a step would in my view represent its (i.e., the committee's) final action.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-959

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

December 14, 1983

Mr. Andy Leahy
News Editor
The Oswegonian
218 Hewett Union
SUNY/Oswego
Oswego, NY 13126

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Leahy:

I have received your letter of November 16, in which you requested an advisory opinion under the Open Meetings Law.

Specifically, you raised questions regarding the status under the Open Meetings Law of the boards of the SUNY Oswego Student Association and the Greek Student Association. According to your letter, the Student Association (the "SA") is the "governing student body financed by mandatory student dollars". The Greek Student Association (the "GSA") deals with fraternities and sororities and "has a partial judicial purpose in limited punishment of member organizations". You also wrote that fraternities and sororities pay dues to the GSA.

In my view, if a student association is financed by means of mandatory student fees and if it makes policy decisions by means of expending and distributing monies, it 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 SA falls within the coverage of the Law.

First, the SA 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 SA must conduct its business by means of a quorum, §41 of the General Construction Law imposes such a requirement upon the SA. 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 the SA conducts public business and performs a governmental function for SUNY, for the function of its board is in my opinion reflective of a governmental function. In essence, it appears that the SA performs a function for SUNY at Oswego that would, but for the existence of the SA, be performed by SUNY. If these assumptions are accurate, I believe that the SA is a public body which conducts public business and performs a governmental function for SUNY at Oswego.

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 decision in which it was found that a mayor's advisory task force is subject to the Open Meetings Law [see Matter of Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)].

While I am generally familiar with the functions of a student association and the fact that all students are assessed a fee for use by student associations, I do not have equivalent background information regarding the GSA. To offer a clear response, additional information is needed regarding the GSA in terms of the means by which it was created, its functions, duties and the membership of its board.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 960

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

December 15, 1983

David Greenberg, Esq.
Ingerman, Smith, Greenberg & Gross
67 Carleton Avenue
P.O. Box 237
Central Islip, NY 11722

Dear Mr. Greenberg:

I have received your thoughtful letter of November 21 pertaining to an advisory opinion of November 17 addressed to Ms. Catherine Goldsmith.

You have asked that I confirm our telephone conversation which pertains to a clarification and alteration of the opinion sent to Ms. Goldsmith.

Specifically, according to information presented to me by Ms. Goldsmith, a discussion held by the Islip Board of Education involved procedures and qualifications that might be used by the Board in its search for any person who might hold the position of superintendent. On the basis of that representation, it was advised that no ground for executive session could justifiably have been cited.

However, as you indicated by phone and in your letter, the Board in fact voted to hire a particular, named individual. Consequently, I would agree with your contention that the executive session in question was properly held, for it involved a discussion of the employment history of a particular person, and therefore, fell within the scope of §100(1)(f) of the Open Meetings Law.

Please accept my apologies for any inconvenience that might have been caused.

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: Catherine Goldsmith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-961

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

December 19, 1983

Ms. Marianne Long
Editor
Adirondack Mountain Times
P.O. Box 13
Pottersville, NY 12860

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Long:

As you are aware, I have received your letter of November 27 in which you requested an advisory opinion.

You indicated that you requested that the Chester Town Board permit the use of tape recorders at its meetings. You were apparently told, however, that the Board has passed a resolution prohibiting the tape recording ot meetings.

In this regard, I would like to offer the following comments.

It is noted at the outset that the Open Meetings Law is silent with respect to the use of tape recorders at open meetings of public bodies. Nevertheless, it has been advised that a public body cannot restrict the use of portable, battery-operated tape recorders at such meetings.

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 Open Government 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, 413 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 (see attached opinion of May 13, 1980). 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 town board by means of resolution may prohibit the use of portable, battery-operated tape recorders at its open 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3144
OML-AO-962

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

December 21, 1983

Mr. Mark Gesner
Editor in Chief
Albany Student Press
State University of New York at Albany
Campus Center 329
1400 Washington Avenue
Albany, New York 12222

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gesner:

I have received your letter of November 30 in which you requested an advisory opinion.

Specifically, your inquiry concerns the application of the Freedom of Information and Open Meetings Laws to the Advisory Task Forces on Alcohol Policy and Bus Fee Alternatives, both of which have been established by the State University at Albany. You indicated that meetings of the task forces have been closed and that their minutes have been withheld. You wrote further that in your capacity as editor in chief of the Albany Student Press, you contacted the Vice President for Student Affairs in order to ascertain his position on the matter, and that he informed you that Counsel to the State University believes that neither the Freedom of Information Law nor the Open Meetings Law would apply to the task forces. You also enclosed various memoranda containing the views of University officials.

In my opinion, meetings of the task forces are subject to the Open Meetings Law, and minutes prepared by the task forces are subject to rights of access granted by the Freedom of Information Law. In this regard, I would like to offer the following comments.

First, with respect to the Open Meetings Law, it is noted that there has been a long-standing disagreement between this office and the Office of Counsel at the State University regarding the scope of the Open Meetings Law. From my perspective, the position taken by Counsel fails to recognize changes in the Open Meetings Law, judicial determinations rendered under the Law, and other relevant provisions of law.

Second, the coverage of the Open Meetings Law is determined in part by the definition of "public body". 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."

In terms of background, it is important to note that the language quoted above differs from the original definition of "public body" as it appeared in the Open Meetings Law when the Law became effective in 1977.

At that time, questions arose regarding the status of committees, advisory bodies and similar entities which may have had the capacity only to advise, and no authority to take action. The problem arose in several instances because the definitions of "meeting" and "public body" referred to entities that "transact" public business. While the Committee consistently advised that the term "transact" should be accorded an ordinary dictionary definition, i.e., to carry on business [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d, which was later affirmed by the Court of Appeals at 45 NY 2d 947 (1978)], it was contended by many that the term "transact" referred only to those entities having the capacity to take final action.

To clarify the Law and clearly indicate that committees, subcommittees and other advisory bodies should be subject to requirements of the Open Meetings Law, the definition of "public body" was amended in 1979 to its current language. As such, even though an entity may have solely advisory authority or merely the capacity to recommend, I believe that it would fall within the requirements of the Open Meetings Law.

A review of the elements of the definition of "public body" in my opinion results in such a conclusion in the case of task forces.

The task forces consist of more than two members. Further, I believe that they are required to conduct their business by means of a quorum. In the latest memorandum on the subject from Counsel to the State University, the point was made that the Open Meetings Law is applicable "only to quorum-attended sessions" of various bodies that function within the State University of New York system. While neither the by-laws or acts creating the task forces in question might make specific reference to any quorum requirement, the task forces in my view can conduct their business only by means of a quorum. In this regard, I direct your attention to §41 of the General Construction Law, which has long stated 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."

Based upon the language quoted above, whether an entity consists of public officers or "persons" who are designated to carry out a duty collectively, as a body, such an entity would in my view be required to perform such a duty only by means of a quorum pursuant to §41 of the General Construction Law.

Further, as I understand the functions of the task forces, they conduct public business and perform a governmental function for an agency, in this instance the State University. The issues with which the task forces deal, alcohol policy and bus fee alternatives, likely impact not only upon students, but the community in which the University is situated. As such, policy determinations on the issues would appear to have an effect beyond the confines of the University.

I would also like to point out that judicial determinations rendered before and after the enactment of amendments to the definition of "public body" indicate that advisory bodies are subject to the Open Meetings Law. As early as 1977, it was found that an advisory committee was required to conduct its business by manes of a quorum and that it was subject to the Open Meetings Law even though the committee "has no power or authority to exercise, and its advice is not controlling" [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510, 512 (1977)]. Moreover, a more recent unanimous decision rendered by the Appellate Division pertained to advisory bodies that were not designated by a public body, but rather by an executive. The entities in question consisted of an advisory committee and a task force whose "recommendations may be characterized as advisory only", but which were nonetheless found to be "public bodies" subject to the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, 985 (1981)].

Based upon the preceding analysis of the definition of "public body", the definition of "quorum" and a review of judicial determinations rendered under the Open Meetings Law, it is my view that the task forces in question are "public bodies" subject to the Open Meetings Law.

With regard to the minutes that have been withheld, I direct your attention to the Freedom of Information Law. Whether or not the task forces are considered public bodies subject to the Open Meetings Law and, therefore, required to prepare and make minutes available [see Open Meetings Law, §101], the minutes would in my opinion nonetheless by subject to the requirements of the Freedom of Information Law.

The scope of the Freedom of Information Law is expansive, as evidenced by §86(4), which defines "record" to mean:

> "...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."

Due to the breadth of the language quoted above, "any information in any physical form whatsoever", such as minutes, in possession of the State University, which is clearly an agency, are in my opinion "records" that fall within the scope of the Freedom of Information Law. It is emphasized that several judicial interpretations of the Freedom of Information Law stress the broad application of the Law. For instance, in Warder v. Board of Regents, [410 NYS 2d 742 (1978)] it was found that notes taken at a meeting in order to prepare minutes were not "personal", but rather constituted "records" subject to rights of access. Moreover, in discussing the term "record", the Court of Appeals stated that:

> "[T]he statutory definition of 'record' makes nothing turn on the purpose for which a document was produced or the function to which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover

> between governmental and nongovernmental activities, especially where both are carred on by the same person or persons" [Westchester Rockland Newspapers v. Kimball, 50 NYS 2d 575, 581 (1980)].

Lastly, in Syracuse United Neighbors, supra, it was determined that the advisory bodies found to be public bodies under the Open Meetings Law were also required to prepare minutes and make them available pursuant to the Freedom of Information Law. In my opinion, the same requirements would be applicable to the task forces.

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: Lewis Welch
Carolyn Pasley
Frank Pogue

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3146
OML-AO-963

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

December 21, 1983

Mr. James E. Switzer
School District Clerk
Wayne Central School District
6076 Ontario Center Road
Ontario Center, NY 14520

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Switzer:

I have received your letter of December 2 and appreciate your continued interest in compliance with the Freedom of Information and Open Meetings Laws.

You have raised a series of questions pertaining to those statutes, and I will attempt to respond to each of them.

The first area of inquiry concerns the status under the Open Meetings Law of "an inservice workshop conducted for school board members by a guest speaker and held at the BOCES center outside of the district's boundaries". From my perspective, the answer is dependent upon specific facts that may be present. If, for example, a quorum of the board is present for the purpose of listening to and interacting with the speaker, as a body, such a gathering in my view would constitute a "meeting" subject to the Open Meetings Law. If, on the other hand, the board attends a convention or workshop conducted by the School Boards Association, and a majority is present to listen to a speaker, the members would not in my opinion be conducting business as a body, and, therefore, the Open Meetings would not apply.

The second question is whether it is necessary to record the names of members of a board who "make motions and/or vote aye or nay on votes conducted in executive session on Committee on the Handicapped placement/appeal matters, decisions to bring 3020-a charges and other 'allowable' executive session topics". Although others disagreed, you have contended that "names must be listed".

I agree with your contention, for §87(3)(a) of the Freedom of Information Law requires that:

> "[E]ach agency shall maintain:
>
> (a) a record of the final vote of each member in every proceeding in which the member votes..."

As such, the Freedom of Information Law requires that a record of votes be prepared that identifies the manner in which each member votes and effectively prohibits secret ballot voting by members of public bodies.

The third question involves the extent to which discussions on the removal of asbestos from school buildings may be held in executive session. You asked further whether that topic is considered "pending litigation". In this regard, as you are aware, a public body is required to conduct its business during an open meeting, unless and until one or more of the grounds for executive session may appropriately be cited to exclude the public. As a general matter, a discussion of the removal of asbestos would in my view likely have to be discussed during an open meeting.

The provision to which you referred permits a public body to enter into an executive session to discuss "proposed, pending or current litigation" [see Open Meetings Law, §100(1)(d)]. Therefore, if a lawsuit has been initiated, or if the board is discussing its litigation strategy with regard to a pending or proposed lawsuit, an executive session could in my opinion be justified. It is emphasized, however, that the possibility of litigation, or even the threat of litigation do not usually constitute appropriate topics for discussion in executive session. It has been held that the purpose of §100(1)(d) is to enable a public body to discuss privately its litigation strategy in order that its strategy is not bared to its adversary [see Concerned Citizens to Review the Jefferson Mall, v. Town Board of the Town of Yorktown, 84 AD 2d 612, appeal dismissed 54 NY 2d 957 (1981) and Weatherwax v. Town of Stony Point, __ AD 2d __, 2nd Dept., App. Div., NYLJ, Dec. 5, 1983].

Lastly, you asked whether it is "proper to withhold from public inspection any portion of a bid document which has been received and publicly opened, after public legal notice for invitation of bids and after final review and award of successful bidders by the Board of Education."

Like the Open Meetings Law, the Freedom of Information Law is based upon a presumption of openness. 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) of the Law.

It is likely that only one of the grounds for denial is relevant to the type of situation that you described. Specifically, §87(2)(c) provides that an agency may withhold records or portions thereof which:

> "if disclosed would impair present or imminent contract awards..."

Based upon the language quoted above, if the time for submission of bids has passed and the bids were opened publicly, I believe that the records would be available, for disclosure would not "impair" the agency's capacity to engage in a favorable and fair contractual agreement, nor would disclosure at that juncture place any bidder at a competitive disadvantage. Moreover, it has been held that once a contract is awarded, the types of documents to which you referred are clearly accessible under the Freedom of Information Law [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-964

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

December 27, 1983

Mr. Gregory J. Scammell
Town Councilman
Colonial Crest
Markland Road
LaFayette, NY 13084

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scammell:

I have received your note in which you requested an advisory opinion under the Open Meetings Law.

Specifically, you asked whether a town supervisor or town board may "prohibit the public from tape recording public town meetings".

In this regard, I would like to offer the following comments.

It is noted at the outset that the Open Meetings Law is silent with respect to the use of tape recorders at open meetings of public bodies. Nevertheless, it has been advised that a public body cannot restrict the use of portable, battery-operated tape recorders at such meetings.

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 Open Government 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 determiing the issues, the court in People v. Ystueta, 413 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 (see attached opinion of May 13, 1980). 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 befor Ystueta was decided."

In view of the foregoing, I do not believe that either a town supervisor or a town board may prohibit the use of a portable, battery-operated tape recorder at an open meeting of a town board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 965

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

December 27, 1983

Ms. Evelyn M. Short
Metro Editor
The Reporter Dispatch
Corporate Park II
One Gannett Drive
White Plains, NY 10604

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Short:

I have received your recent letter in which you requested in advisory opinion under the Open Meetings Law.

According to your letter, "White Plains Mayor Alfred Del Vecchio is considering a plan to hold regular conference call meetings of the Common Council. The plan would entail holding the meetings at 8:30 a.m. on the day of each regular council meeting, and the press would be invited."

It is your view that the proposed practice would violate the Open Meetings Law "because the public would not be able to watch the proceedings".

I agree with your contention for the following reasons.

First, §95 of the Open Meetings Law, its 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."

One of the elements present in the statement of legislative intent involves the capacity to "observe the performance of public officials" while they are engaged in deliberations. Conference calls in which a quorum of the Common Council participates would preclude the public from observing the performance of its members.

Second, the presence of the news media would not in my opinion validate or give legal effect to the proposed practice under the Open Meetings Law. A member of the news media has the same rights under the Open Meetings Law as any member of the public. Further, §98(a) of the Open Meetings Law states in part that "[E]very meeting of a public body shall be open to the general public..." According to your letter, the general public would be excluded from City offices during the conference calls. Consequently, neither the news media nor the general public would have the capacity to "observe" the members of the Council.

Third, although I am unaware of any judicial determination pertaining to the legality of a conference call under the Open Meetings Law, a landmark decision rendered in 1978 may in my opinion be relevant to the issue in terms of guidance with respect to a judicial view of the scope and intent of the Law.

As you may recall, when the Open Meetings Law became effective in 1977, the key question involved the definition of "meeting" [§97(1)]. As initially enacted, "meeting" was defined to mean "the formal convening of a public body for the purpose of officially transacting public business." Throughout the state, various public bodies held closed "work sessions" and similar gatherings solely for the purpose of discussion, and with no intent to take action. In Orange County Publications v. Council of the City Newburgh [60 AD 2d 409 (1978)], which was later affirmed by the Court of Appeals [45 NYS 2d 947 (1978)], the Appellative Division, Second Department, stated that:

> "[W]e believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal

> action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (id. at 415).

It was further stated that:

> "[W]e agree that no 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'" (id. at 416).

From my perspective, even though a meeting held by conference call would not involve the physical convening of a quorum of the Common Council, it represents the equivalent of the "work session" as described by the Court. Consequently, I believe that the proposed conference all meetings would violate the Open Meetings Law for, as noted earlier, neither the public nor the news media could observe the performance of the Council.

Lastly, viewing the matter from a somewhat different vantage point, it is possible that a court might consider meetings held by conference call as a violation of the Open Meetings Law, as well as a statutory definition of "quorum". Specifically, §41 of the General Construction Law has for decades stated 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 exercized 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."

The Common Council, as a public body, is in my opinion clearly required to carry out its duties by means of a quorum. Based upon the language quoted above, it appears that the Common Council may conduct its business, as a body, only at a meeting, a physical convening of a majority of its members.

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 Alfred Del Vecchio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3157
OML-AO-966

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

December 29, 1983

Ms. Mary Hilt
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Hilt:

I have received your letter of December 19 and the materials attached to it.

According to your letter, you submitted a request for rezoning to the Sand Lake Planning Board. The Board apparently determined to hold a "workshop" regarding the request. However, when you asked to attend that gathering, you were denied the opportunity to do so. Further, upon questioning other Town officials regarding the meeting of the Planning Board, none could inform you of the time and place of the meeting. In addition, although you have attempted to obtain notes pertaining to the meeting, no response to your request has been given.

In this regard, I would like to offer the following comments.

First, the Planning Board is in my opinion clearly a "public body" required to comply with the Open Meetings Law. Moreover, a so-called "workshop" or "work session" is in my view a meeting that must be convened open to the public and preceded by notice.

It is emphasized that the definition of "meeting" appearing in §97(1) of the Open Meetings Law has been expansively interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highes court, found that any gathering of a quorum of a

public body for the purpose of conducting public business is a "meeting" that falls within the framework of 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Consequently, a "workshop" or similar gathering is a "meeting" subject to the Open Meetings Law in all respects.

Second, as indicated earlier, every meeting must be preceded by notice given in accordance with §99 of the Open Meetings Law. Subdivision (1) of §99 pertains to meetings scheduled at least a week in advance and requires that notice of the time and place of such meetings must 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. 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 in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings.

Therefore, once again, a workshop conducted by a town planning board must be preceded by notice as described in §99 of the Open Meetings Law.

Third, the Open Meetings Law is based upon a presumption of openness. All meetings of a public body must be open to the public, except to the extent that one or more grounds for executive session may appropriately be cited to exclude the public [see Open Meetings Law, §100(1)(a) through (h)]. Consequently, a public body cannot exclude the public or conduct a closed meeting to discuss the subject of its choice.

With respect to your request for notes, I would like to point out that §101 of the Open Meetings Law contains what might be characterized as minimum requirements regarding the contents of minutes. In addition, however, if notes or similar records of a meeting were prepared, I believe that they would be subject to rights of access granted by the Freedom of Information Law.

Like the Open Meetings Law, 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) of the Law.

Further, §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..." Based upon the definition of "record", it has been held that notes taken at a meeting are subject to rights of access granted by the Law [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

In terms of procedure, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural implementation of the Law. In turn, §87(1)(a) states in part that:

> "...the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

As such, the Town Board of the Town of Sand Lake, the governing body of a public corporation, is in my view required to adopt uniform rules and regulations applicable to all agencies, including the planning board, that operate within Town government.

One requirement that should be included in the Town's regulations involves the designation of one or more records access officers who are responsible for coordinating the Town's response to requests for records.

In order to attempt to inform appropriate Town officials of the requirements of the Open Meetings Law and the Freedom of Information Law, copies of this opinion, both of those statutes, the Committee's regulations and model regulations will be sent to the Town Board and the Planning 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: Town Board
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-967

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

December 29, 1983

Mr. Bernard Kraft
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kraft:

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

Your inquiry pertains to attendance at executive sessions. Specifically, although you indicated that "it would seem obvious that any member of the legislative body involved is eligible for attendance", you inquired "as to what outsiders would be allowed and if a dispute arises how a decision would be made regarding the non-member attendance".

In this regard, I would like to offer the following comments.

First, §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, it is clear in my view that any member of a public body has a right to attend an executive session of that body.

Second, a public body may authorize others to attend an executive session. However, I believe that the Open Meetings Law, like all laws, should be given a reasonable interpretation. For example, in a situation in which approximately twenty-five members of the public attended a meeting, and all but two were permitted to attend an executive session, it was advised that the exclusion of the two was unreasonable. Further, persons other than members of a public body are often authorized to attend an executive session due to some special status or knowledge they might have with respect to the topic under discussion.

Lastly, if there is a dispute involving whether or not an "outsider" is permitted to attend an executive session, it is suggested that the dispute may be resolved by the public body by means of a motion. For instance, if a member of a public body seeks to permit the attendance of a non-member, a motion could be introduced to authorize the presence of the non-member. If the motion is carried by a majority vote of the total membership, the non-member could attend; if the motion fails, presumably the non-member would be excluded.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3156
OML-AO-968

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

December 29, 1983

Mr. Harvey M. Elentuck
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Elentuck:

In response to a note written on a copy of correspondence sent to this office, enclosed is the Committee's recently issued annual report on the Freedom of Information and Open Meetings Laws.

With respect to rights of access to the three types of records marked on the correspondence, I would like to offer the following comments.

The first type of record in question involves "scheduling information (dates, times, locations) of the next several public meetings of the Middle Island School Board". In my view, if such a schedule has been prepared, it would clearly be available for it would consist of factual data accessible under §87(2)(g)(i) of the Freedom of Information Law.

It is noted, too, that the Open Meetings Law requires that a public body give notice of the time and place of all meetings. Specifically, §99(1) of that statute provides that:

> "[P]ublic 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."

As such, notice of a meeting scheduled at least a week in advance must be given to the news media and posted for the public not less than seventy-two hours prior to the meeting. However, the Law does not require that a series of meetings must be scheduled.

The second area of information involves "[A] record which indicates the procedure whereby a member of the public may become a scheduled speaker at a public meeting". If such a record exists, I believe that it would be reflective of an agency policy and, therefore, accessible under §87 (2)(g)(iii).

It is emphasized, however, that the Open Meetings Law is silent with respect to public participation. Consequently, a public body, such as a school board, may but need not permit members of the public to speak or otherwise participate at meetings.

The final area involves "litigation files of all court cases filed since 1981" in which either the Superintendent, the District or the Board "are named as parties". You made specific reference to your interest in "petitions to the court, memoranda of law, verified answers and replies". Assuming that the records sought are filed with or in possession of a court clerk, I believe that they should be made available by the District. Under those circumstances, court records would generally be available to the public under §255 of the Judiciary Law. Consequently, they would in my view be equally available from the agency under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-969

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

December 27, 1983

Ms. Shirley L. Bachrach
League of Women Voters
Box 1054
Southold, NY 11971

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Bachrach:

I have received your letter of December 8, as well as the news articles attached to it.

You have requested my comments regarding executive sessions held to discuss "litigation" as described in the articles and suggested that more specific guidelines might be needed in order to enable the public to know when discussions of public bodies must be open.

According to one news article, at a meeting of the Southold Town Board during which an executive session was held, you stated that you did not believe that the Board could hold an executive session "just because there might be a suit". The same article quoted the Town Attroeny, who expressed the belief that "the Town Board has the authority to go into an executive session to discuss possible litigation". A second article, an editorial appearing in the Suffolk Times, questioned the validity of the executive session, and indicated that, although the topic appeared to pertain to "proposed litigation" against land developers, the developers' lawyer was apparently "invited to sit in on the closed session".

In my opinion, which is based upon judicial interpretations of the Open Meetings Law, the executive session in question was improperly held. Further, those decisions are consistent with your view of the law, and inconsistent with the statement made by the Town Attorney.

As you are aware, the Open Meetings Law in §100(1)(d) permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". The Committee has consistently advised that "possible litigation" does not constitute an adequate basis for entry into an executive session, for virtually any matter discussed by a public body might be the subject of "possible litigation".

More importantly, the Appellate Division, Second Department, in Matter of Concerned Citizens to Review Jefferson Valley Mall v. Town Board of Town of Yorktown, it was held that the purpose of §100(1)(d) is "to enable a public body to discuss pending litigation strategy privately, without baring its strategy to its adversary" [83 AD 2d 612, 613, appeal dismissed 54 NY 2d 957 (1981)]. While the situation described in the materials might not involve "pending" litigation, I believe that the principle is nonetheless applicable. Specifically, in my view, the provision in question is intended to permit a public body to discuss its litigation strategy in an executive session, in order that the public body need not be placed at a disadvantage vis a vis an adversary. Under the circumstances, if the developers' attorney represented the Town's "adversary", I do not believe that §100(1)(d) could justifiably have been cited.

In addition, another decision reported this month by the Appellate Division, Second Department, further clarified the scope of §100(1)(d). Specifically, the Court stated that:

> "[T]he belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply by expressing the fear that

> litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, __ AD 2d __, Second Dept., App. Div., NYLJ, December 5, 1983].

As such, the threat or possibility of litigation would not, based upon the decisions cited above, constitute a valid basis for entry into an executive session.

Although I am unaware of the nature of the motion carried by the Board to enter into the executive session, it is noted, too, that a judicial decision has also been rendered regarding the adequacy of a motion to enter into executive session under §100(1)(d). In its review of the issue, the Court in Daily Gazette Co. v. Town Board, Town of Cobleskill, found that:

> "any motion to go into executive session must 'identify the general area' to be considered. It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity, the pending, proposed or current litigation to be discussed during the executive session. Only through such an identification will the purposes of the Open Meetings Law be realized" [444 NYS 2d 44, 46 (1981), emphasis added by court].

Perhaps the foregoing will serve to clarify the parameters of §100(1)(d) of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board