STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-970

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

January 5, 1984

Mr. Richard M. Gardella
Village Attorney
Village of Scarsdale
Village Hall
Scarsdale, NY 10583

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. Gardella:

I have received your thoughtful letters of December 7 and December 20.

Your correspondence pertains to the scope of what may be characterized as a "quasi-judicial proceeding".

In terms of background, the Planning Board of the Village of Scarsdale has recently engaged in various proceedings and deliberations involving site plan approval, subdivision approval, a residential cluster plan and other matters. Your letter of December 20 described a situation in which:

> "a specific applicant made application for the Board to consider a residential cluster plan. In order for the Planning Board to proceed with such a plan, it must seek the power from the Village Board of Trustees to permit such clustering pursuant to Section 7-738 of the Village Law. The Board heard testimony and took evidence at a public hearing on the applicant's request for cluster treatment. It then discussed the case along with three others in a deliberative session."

You wrote further that much of the discussion involved legal advice that you provided concerning the requirement of the cited provision of the Village Law, and that later, during an open session, the Planning Board voted to proceed with the application. Under those circumstances, you have contended that the proceeding was "quasi-judicial in nature".

You have asked that I comment with respect to your memorandum of December 7, as well as the situation pertaining to the residential cluster plan.

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

First, as you are aware, §103(1) of the Open Meetings Law exempts "judicial or quasi-judicial proceedings" from its provisions. As such, if a public is engaged in a quasi-judicial proceeding, the requirements of the Open Meetings Law do not apply.

Second, in my view, it is often difficult to determine exactly when a public body is involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administractive functions.

Third, having reviewing provisions of the Village Law concerning planning boards, it appears that the authority of planning boards may vary, depending upon the nature of local laws or regulations developed by a governing body, that describe the powers of planning boards. Similarly, some provisions require that public hearings be held; others permit discretion to hold a public hearing.

In a related vein, the holding of public hearings and providing an opportunity to be heard does not in my view render a proceeding quasi-judicial in every instance. Those requirements may be present in a variety of contexts, many of which precede legislative action.

Fourth, with respect to the specific situation described in your second letter, you indicated that the Planning Board was considering a residential cluster plan, and that to proceed with the plan, "it must seek the power from the Village Board of Trustees to permit such clustering pursuant to Section 7-738 of the Village Law". The first sentence of §7-738 states that:

> "[T]he board of trustees is hereby empowered by resolution to authorize the planning board, simultaneously with the approval of a plat or plats pursuant to this article, to modify applicable provisions of the local laws subject to the conditions hereinafter set forth and such other reasonable conditions as that board of trustees may in its discretion add thereto."

If I interpret that language quoted above appropriately, §7-738 pertains to modification of existing local laws. If that is so, the proceeding in question in my view would be quasi-legislative, rather than quasi-judicial. Further, under those circumstances, I do not believe that the exemption from the Open Meetings Law regarding quasi-judicial proceedings would have been applicable as a basis for excluding the public from the Board's deliberations.

Fifth, I would like to reiterate the position that one of the elements of a quasi-judicial proceeding is the authority to take final action. While I am unaware of any judicial decision that specifically so states, there are various determinations that infer that a quasi-judicial proceeding results in a final determination reviewable only by a court. In a recent decision rendered under the Open Meetings Law, it was found that:

> "The test may be stated to be that action is judicial or quasi-judicial, when and only when, the body or officer is authorized and required to take evidence and all the parties interested are entitled to notice and a hearing, and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only when there is an opportunity to be heard, evidence presented, and a decision had thereon" [Johnson Newspaper Corporation v. Howland, Sup. Ct., Jefferson Cty., July 27, 1982; see also City of Albany v. McMorran, 34 Misc. 2d 316 (1962)].

Another decision that described a particular body found that "[T]he Board is a quasi-judicial agency with authority to make decisions reviewable only in the Courts" [New York State Labor Relations Board v. Holland Laundry, 42 NYS 2d 183, 188 (1943)]. Further, in a discussion of

quasi-judicial bodies and decisions pertaining to them, it was found that "[A]lthough these cases deal with differing statutes and rules and varying fact patterns they clearly recognize the need for finality in determinations of quasi-jducial bodies..." [200 West 79th St. Co. v. Galvin, 335 NYS 2d 715, 718 (1970)].

Based upon the decisions cited above, I believe that one of the conditions that must be present for a proceeding to be characterized as quasi-judicial is the requirement that a determination be final. Moreover, as I understand the facts presented relative to the 909 Post Road deliberations, the Planning Board deliberated in order to determine whether to seek authority from the Board of Trustees. If my contentions are accurate, the Planning Board would not have been engaged in a quasi-judicial proceeding.

Lastly, you indicated that a portion of the deliberations involved the Board seeking legal advice from you. In this regard, to the extent that the Board sought legal advice of its attorney, I believe that such communications would fall outside the scope of the Open Meetings Law.

Section 103(3) of the Open Meetings Law states that "any matter made confidential by federal or state law" is exempt from the Open Meetings Law. Therefore, to the extent that communications between yourself and the Board fell within the scope of the attorney-client privilege (see Civil Practice Law and Rules, §4503), such communications would in my view have been "confidential" under state law and outside 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3162
OML-AO- 971

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

January 6, 1984

Mr. Morton J. David
[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. David:

I have received your letter of December 23, in which you requested an advisory opinion.

According to your letter, the Mayor of the Village of Ardsley "contends that minutes may not be released to the public until they are approved." In response to your objection to that practice, the Village Attorney prepared a response, a copy of which is enclosed with your letter, in which he indicated that a short delay is excusable. The Village Attorney also wrote that "[R]ecording tapes are not public records, and are not available for public use."

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

First, the respect to access to minutes, as indicated in the response by the Village Attorney, §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..."

Based upon the language quoted above, in my view, 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" or "draft",for instance. By so doing, the requirements of the Open Meetings can be met; concurrently, members of the public who receive the minutes are aware that the contents may be changed.

Second, I believe that a tape recording of an open meeting is a "record" subject to rights of access granted by the Freedom of Information Law.

It is emphasized that §86(4) of the Freedom of Information Law defines 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."

Therefore, if the clerk uses a tape recording in the performance of her official duties, i.e., as an aid in preparing minutes, I believe that the tape recording constitutes a "record" that falls within the requirements of the Freedom of Informaton Law.

Moreover, it has been held judicially that a tape recording of an open meeting is accessible to the public under the Freedom of Information Law [see Zaleski v. Hicksville Union Free School District, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978].

In order to enhance compliance with the Freedom of Information and Open Meetings Laws, as you requested, copies of this opinion will be sent to Mayor Marie Stimpfl and the Village Attorney, Arthur T. Connick.

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: Marie Stimpfl, Mayor
Arthur T. Connick, Village Attorney

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

January 6, 1984

Mr. Gabriel Rosenfeld, Chairman
Zoning Board of Appeals
Town of New Castle
200 South Greeley Avenue
Chappaqua, New York 10514

Dear Mr. Rosenfeld:

Your letter of December 6 addressed to Gail S. Shaffer, Secretary of State, has been forwarded to the Committee on Open Government. The Committee, of which the Secretary is a member, is a unit of the Department of State responsible for advising with respect to the Freedom of Information and Open Meetings Laws. As such, Secretary Shaffer has asked that I respond to your inquiry.

In terms of background, as a long time member of the Zoning Board of Appeals of the Town of New Castle, you indicated that many hearings before the Board have been lengthy and complex. Further, prior to the enactment of legislation concerning meetings of zoning boards of appeals (Chapter 80, Laws of 1983), it was your understanding that a zoning board of appeals could, acting in its quasi-judicial capacity, deliberate in private. Since the legislation in your view "seems to prohibit a Zoning Board from conducting such executive sessions for the purpose of weighing evidence and discussing such evidence and the various application of laws to a particular case", you have raised a series of questions.

Your first area of inquiry involves "the circumstances or background that led to the passage of the May 10th amendment".

The legislation was precipitated by confusion on the part of zoning boards due to inconsistent laws and conflicting court decisions, as well as considerations of policy.

As you are aware, §103(1) of the Open Meetings Law prior to the amendment exempted "quasi-judicial proceedings" from the requirements of the Law. Therefore, if, for example, a zoning board was engaged in deliberations of a quasi-judicial nature, the Open Meetings Law would not apply. Nevertheless, inconsistencies in the treatment of zoning boards resulted in problems of interpretation.

For instance, in the case of a city zoning board of appeals, there was no direction given by any provision of law (other than the Open Meetings Law) which indicated the degree to which such boards must deliberate in public. Consequently, it was advised by the Committee and held judicially that the quasi-judicial proceedings of city zoning boards of appeals were exempt from the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409 at 419, aff'd 45 NY 2d 947].

There was, however, statutory direction regarding the openness of meetings of town and village zoning boards of appeals. Specifically, §§267(1) of the Town Law and 7-712(1) of the Village Law, which concern town and village zoning boards of appeals respectively, had long provided that "[A]ll meetings of such boards shall be open to the public". Based upon those provisions, the Committee advised that the exemption for quasi-judicial proceedings was inapplicable to town and village zoning boards of appeals and that the deliberations of such boards must be held open to the public.

Section 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."

Since the cited provisions of the Town and Village Laws were "less restrictive with respect to public access..." than the Open Meetings Law, those provisions remained in effect as the Supreme Court, Westchester County, in Matter of Katz concluded (NYLJ, June 25, 1979).

It is noted, however, that the opposite conclusion was reached in Capital Newspapers v. Town of Guilderland Zoning Board of Appeals [91 AD 2d 763 (1982)]. In that case, the court found that when a town zoning board of appeals acted in a quasi-judicial capacity, the proceedings could be closed. It was stated further that closed deliberative sessions "are based on tradition reaching back through many, many decades."

As such, the deliberations of city zoning boards of appeals could clearly be closed; in the case of a town zoning board, judicial determinations reached opposite conclusions.

In terms of policy, as stated in its annual reports to the Legislature, the Committee suggested that zoning boards play a crucial role in the development of their communities, and that, therefore, meetings of zoning boards should be conducted under the same presumption of openness as other public bodies.

The importance of deliberations of zoning boards of appeals was highlighted in an editorial of February 21, 1982 appearing in the Albany Times-Union. The editorial dealt with meetings of zoning boards of appeals and lent support to the recommendations made by the Committee. The editorial stated that:

> "[W]hat is at stake, in short, is nothing less than the principle of government of and by the people - the fundamental right of citizens in this society to know what their representatives are doing and how well they are doing it.
>
> "Some have objected to the proposal, arguing that it would inhibit the free deliberations of zoning boards of appeals. To that we can only reply that if government officials conduct their business without regard to the will and sentiments of the people, then the system of government in operation is something other than a democracy. At any rate, what would more likely be inhibited at open meetings would not be proposals fair, reasoned and in the general interest, but proposals small, narrow and for the benefit of a few.

> "The nature of the business conducted by zoning boards is necessarily of immediate concern to a city's residents, as their wealth and neighborhood may lie in balance. As Sen. Caesar Trunzo (R,C - Brentwood) has said, because of the importance and long-term effect of board decisions on individuals and communities, the public should have full knowledge of the reasons for board decisions.
>
> "Citizens in a democratic society clearly have the right to know of deliberations that can touch them even in their own backyard."

In short, although the legislation required for the first time that the deliberations of some zoning boards of appeals be open to the public, the Committee believes the impact of the deliberations of such boards on the public is significant and that such deliberations should generally be open to the public. I would like to add, too, that the legislation signed in 1983 by Governor Cuomo was twice vetoed by Governor Carey.

The result of the legislation is that it brings all zoning boards of appeals within the scope of the Open Meetings Law in the same manner as other public bodies. As such, town and village zoning boards of appeals subject to the Town and Village Laws which may have had no authority to enter into a closed or executive session may do so in accordance with §100(1) of the Open Meetings Law. Concurrently, the deliberative process of public bodies whose determinations may have a significant impact upon the public are generally open to the public.

Your second question concerns the effect of the legislation in view of zoning boards' inability to deliberate toward their decisions in private. In all honesty, I could not conjecture as to the impact of the amendment. It is noted, however, that many members of public bodies expressed similar misgivings when the Open Meetings Law became effective in 1977, and particularly when the Court of Appeals in 1978 determined that "work sessions" and similar gatherings fall within the requirements of the

Law (see Orange County Publications, supra). Most public bodies have in my opinion become accustomed to open meetings and some members have suggested that the Open Meetings Law is beneficial to their work. It is my hope that zoning boards of appeals will also become accustomed to the requirements of the Open Meetings Law.

Your final question is whether other questions or problems have been posed by other Chairmen of Zoning Boards of Appeals concerning the amendment.

Although a flurry of questions arose shortly after the effective date of the legislation, questions have arisen infrequently in recent months.

Perhaps the question raised most often deals with the capacity of zoning boards of appeals to seek the advice of an attorney in private. In this regard, it has been advised that when a public body seeks the advice of its attorney, the communications between the attorney and the client (i.e., the board) may be held in private, for they fall within the scope of the attorney-client privilege (see Civil Practice Law and Rules, §4503). Since §103(3) of the Open Meetings Law exempts from its provisions "any matter made confidential by federal or state law", and since the communications subject to the attorney-client privilege are confidential, a zoning board may in my view seek legal advice from its attorney in private and outside the scope of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3163
OML-AO-923

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

January 6, 1984

Mr. Robert Hoagland
Superintendent/Business Manager
Romulus Central School
Romulus, NY 14541-0080

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. Hoagland:

I have received your thoughtful letter of December 19, as well as the materials attached to it.

The focal point of your letter pertains to a recent meeting of the Board of Education of the Romulus Central School District. In brief, following an executive session, a member of the Board was about to state that certain requests for funding would be considered at a later meeting. However, during the statement, he was interrupted by a reporter who questioned whether the requests were discussed during the executive session. Due to an apparent misunderstanding, it was reported that the discussion of the funding requests behind closed doors violated the Open Meetings Law. Nevertheless, you wrote that, in fact, the Board did not discuss the requests.

Under the circumstances, assuming that the Board's discussion in executive session involved only personnel matters dealing with particular individuals [see attached, Open Meetings Law, §100(1)(f)] and collective bargaining negotiations [see §100(1)(e)], I do not believe that any violation of the Open Meetings Law occurred.

In the future, as I indicated via the news article, it is suggested that motions for entry into executive sessions be somewhat more specific. The "personnel" exception 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 view of the language quoted above, a statement that "personnel" will be discussed, without more, is in my opinion inadequate. I believe that reference should be made to the fact that the discussion pertains to a "particular person" and to one or more of the topics listed in the exception. For instance, in the context of the situation described in your letter, which involved the qualifications of a teacher, a motion should in my opinion have included a phrase to the effect that an executive session was sought to discuss "the employment history" of a "particular person". Similarly, with regard to a discussion of negotiations, reference to the union with which collective negotiations were being conducted should in my opinion have been included in the motion.

Finally, having reviewed the rules adopted by the Board under the Freedom of Information Law, I would like to offer the following brief comments.

The rules were apparently adopted pursuant to the Freedom of Information Law as originally enacted in 1974. That statute was repealed and replaced by a new Freedom of Information Law that became effective on January 1, 1978. As a consequence, the regulations promulgated by the Committee were modified to reflect changes in the Freedom of Information Law. It is noted, too, that §87(1) of the Freedom of Information Law requires the Board of Education to adopt rules and regulations consistent with the Law and the regulations pomulgated by the Committee.

Enclosed for your consideration are copies of the Open Meetings Law, the Freedom of Information Law, the Committee's regulations adopted under the Freedom of Information Law, and model regulations. As in the case of your existing regulations, the model enables the Board to comply by filling in the appropriate blanks. In addition, as requested, enclosed are five copies of an explanatory pamphlet that deals with the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-974

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

January 11, 1984

Mrs. Alice Knapik
[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. Knapik:

I have received your letter of January 3 in which you requested "a ruling or an opinion".

Please be aware that the Committee on Open Government has the authority to provide advice under the Open Meetings Law; it has no authority to render what might be characterized as a ruling that is binding.

According to your letter, you have in the past used a "battery operated tape recorder" at the meetings of the Town of Glen. At the last meeting held in 1983, however, you were apparently prohibited from using the tape recorder. Since a new Town Board has taken office, you have asked whether the Open Meetings Law (see enclosed) permits the use of a tape recorder at a meeting of the Town Board.

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 either a town supervisor or a town board may prohibit the use of portable, battery-operated tape recorders 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

Encs.

cc: Lawrence Coddington, Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-975

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

January 11, 1984

Ms. Hari Ellen Huff
[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. Huff:

I have received your thoughtful letter of December 26 in which you requested an advisory opinion.

According to your letter, you have been involved with the Board of Education of the Geneseo Central School District for some time, due to an incident that occurred with respect [redacted]. Based upon that involvement, it is your view that the Board often ignores the requirements of the Open Meetings Law.

Specifically, you indicated that minutes of meetings fail to indicate the nature of proceedings before the Board, that in some instances, minutes of action taken by the Board are not kept, and that executive sessions are held to discuss "personnel matters", even though the issues might have involved personnel in general. You wrote, too, that the Board:

> "tends to insist that names of personnel must be brought up in order to discuss whatever it chooses in executive session even though those matters do not fall within the limited allowable categories. The Board President, Mrs. Hammond, stated publically (sic) at the November 21, 1983 meeting that whenver the names of personnel are to be mentioned, even by members of the public at large, that executive session is the only proper forum."

Having reviewed the agendas attached to your letter, "executive meetings" are apparently scheduled and held prior to open meetings.

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

First, if as a matter practice, the Board holds closed "executive meetings" prior to its open meetings, such a practice in my view conflicts with and violates the Open Meetings Law and fundamental principles upon which the Law is based. Assuming that a quorum of the Board convenes to conduct an "executive meeting" before an open meeting, the executive meeting is itself subject to the Open Meetings Law and must in my opinion ben convened as an open meeting and preceded by notice given in accordance with §99 of the 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, 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 the Board is present at "executive meetings" to conduct public business, those gatherings in my view fall within the requirements of the Open Meetings Law.

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, as indicated earlier, an open meeting must be convened before a public body may enter into an executive session.

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.

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.

Fourth, although some matters pertaining to "personnel" might appropriately be considered during an executive session, not every discussion that relates to personnel could justifiably be discussed behind closed doors. The so-called "personnel" exception 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..." [see attached Open Meetings Law, §100 (1)(f)].

Based upon the language quoted above, I believe that the specific subject matter determines whether an executive session may properly be held; the mere mention of an employee's names does not in my view automatically or necessarily justify an executive session. Further, in the context of situations that your described, if, for example, the Board sought to review the employment history or a disciplinary matter pertaining to a particular teacher, an executive session could properly have been held. On the other hand, if the discussions involved matters of policy or administrative procedure that pertain to personnel generally, I do not believe that any ground for entry into executive session could have been cited, for no "particular person" would have been discussed in conjunction with the topics listed in §100(1)(f).

Fifth, because the topic "personnel matters" may include a broad variety of subjects, a motion to enter into an executive session to discuss "personnel matters" without greater description in my opinion is inadequate.

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.

Sixth, §101 of the Open Meetings Law contains what may be characterized as minimum requirements concerning the contents of minutes. As a general matter, the Law does not require that reference to every comment made at meetings by each person who may have participated must be included in 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, when the Board engages in any motions, proposals, resolutions, other formal actions or votes, those activities should be recorded in the form of minutes.

With regard to 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, __ NY 2d __ (1982)]. Since a school board cannot generally take action during an executive session, but rather only during open meetings, and since §101(2) requires that minutes of executive sessions be prepared only when action is taken, as a general rule, there need not be minutes of executive sessions.

Lastly in an effort to enhance compliance with the Open Meetings Law, copies of this opinion, the Law and an article that might be useful, will be sent to the Board and the Superintendent. Copies have also been enclosed for your consideration.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Board of Education
Robert E. McCarthy, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-976

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

January 18, 1984

Mr. Raymond S. Sant
County Attorney
Cayuga County Attorney
County Office Building
160 Genesee Street
Auburn, New York 13021

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. Sant:

I have received your letter of January 10 and appreciate your interest in complying with the Open Meetings Law.

Your letter concerns an inquiry relative to participation by members of the Cayuga County Legislature in political caucuses that occur during regular meetings. Consequently, you have asked whether there have been any recent court decisions or opinions rendered by this office "that prohibit members of a legislative body from caucusing", or whether there may be "any restrictions placed upon the subjects which may be discussed in a political caucus."

In this regard, as you are likely aware, §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 leading case pertaining to political caucuses is Sciolino v. Ryan [103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 AD 2d 745, 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, Fourth Department, 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 Meeitngs 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).

In view of the Sciolino decision, if the political caucuses that are the subject of your letter involve the consideration of public business of the County Legislature by a majority of the membership of the County Legislature, I believe that such gatherings would be subject to the Open Meetings Law and, therefore, required to be open to the public in accordance with the Law.

A copy of the Sciolino decision is enclosed for your consideration. To the best of my knowledge, Sciolino is the only Appellate Court decision regarding the issue. Further, there are Supreme Court decisions consistent with the holding in Sciolino.

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-977

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

January 19, 1984

Mr. Richard Castellane
Attorney at Law
26 Main Street
P.O. Box 1089
Liberty, NY 12754

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. Castellane:

I have received your letter of January 4 in which you raised a series of questions regarding the implementation of the Open Meetings Law by the Board of the Delaware Valley Central School District.

The first area of inquiry concerns regulation 7004.0 of the Board of Education, which, according to your letter, states that:

> "[A]ll official meetings of the Board shall be open to the press and to the public. However the Board reserves the right to meet privately for work sessions..."

The question is whether the provision quoted above is lawful.

In my opinion, a "work session" or similar gathering is a "meeting" subject to the Open Meetings Law in all respects.

As you are aware, in a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, held that the definition of "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 [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 decision dealt specifically with so-called "work sessions" that were held solely for the purpose of discussion and without an intent to take action. Based upon the Court of Appeals' decision, it appears that the regulation is inconsistent with the Open Meetings Law and its judicial interpretation.

Your second question involves a situation where a controversy arose regarding public participation at a meeting of the Board. Apparently, only one of the five members of the Board is critical of the Board's regulation regarding public participation. Following a meeting during which the matter was discussed, you wrote that the President of the Board, "without authorization and without convening a public meeting" telephoned all Board members except the member critical of the regulation. You wrote further that the telephone conversations with the remaining three Board members involved a possible amendment to the regulation. As a consequence, the President of the Board requested that the attorney for the Board prepare a revised regulation for consideration by the Board at an ensuing meeting.

You have asked whether the conduct described in the preceding paragraph is proper under the Open Meetings Law. In this regard, I would like to offer the following comments.

First, it is emphasized that the Open Meetings Law is silent with respect to public participation. Consequently, it has been advised that a public body may permit public participation, but that it is not required to do so. It has also been suggested that any rule pertaining to public participation should be reasonable and treat members of the public in like manner.

With respect to the series of telephone conversations with Board members that apparently led to action taken by the Board, while there is nothing in the Open Meetings Law that would preclude two members of the public body from conferring by telephone, a series of telephone calls by one member to the others upon which a decision might be based would in my opinion violate the spirit if not the letter of the Law.

From a technical point of view, it is noted that the definition of "public body" appearing in §97(2) of the Open Meetings Law refers to entities that are required to conduct public business by means of a quorum. In this regard, the term "quorum" is defined in §41 of the General Construction Law, which has existed for decades. The cited provision states that:

> "[W]henever three or more public officials are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board of similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such body, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body cannot carry out any of its powers or duties unless it conducts a meeting duly held upon reasonable notice to all of the members. As such, it is my view that a public body should deliberate and has the capacity to act only during duly convened meetings.

Moreover, §97(1) of the Open Meetings Law defines "meeting" to mean "the official convening of a public body for the purpose of conducting public business". In my opinion, the term "convening" means a physical coming together. Further based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to 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.

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

> "[I]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state by 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."

Lastly, from a philosophical perspective, I would conjecture that public bodies were created by the Legislature in an attempt to enable a group of individuals having different points of view to deliberate collectively in an effort to reach a better decision that could be reached by a single individual. As such, I believe that conducting public business by means of a series of ex parte telephone communications would not only violate the intent of the Open Meetings Law, but also the purpose for which public bodies were created.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-978

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

January 19, 1984

Mr. Richard Castellane
Attorney at Law
26 Main Street
P.O. Box 1089
Liberty, NY 12754

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. Castellane:

I have received your letter of January 4 in which you requested an advisory opinion regarding the activities of the Board of Education of the Delaware Valley Central School District relative to the Open Meetings Law.

The focal point of your inquiry is a resolution adopted by the Board of Education. Specifically, the following resolution was carried with one dissenting vote:

> "[I]T IS HEREBY RESOLVED that members of the Board of Education and school administration are authorized to conduct normal attorney-client contacts with the attorneys for the school district.....without prior specific authorization by a majority of the members of the school board. Any assignment by a board member shall be subject to ratification by the full membership of the board at the time that the attorneys' monthly fee statement is submitted reflecting the nature of the services rendered pursuant to such action by a school board member. The attorneys shall be free to require such ratification prior to the performance of such services, if they deem it appropriate, in their discretion."

In conjunction with the resolution quoted above, you have raised questions regarding its legality vis a vis the Open Meetings Law. As In interpret your statements, you have asked whether a Board member can unilaterally seek the services of the Board's attorney, whether the Board as a whole must do so during a meeting; whether a discussion of the retention of an attorney's services falls within the meaning of "conducting public business" as described in §95 of the Open Meetings Law; and whether the Open Meetings Law requires that a board member who seeks the services of the attorney must do so in accordance with the Open Meetings Law.

Your views regarding possible violations of the Open Meetings Law are apparently based in part upon advisory opinions rendered in the past by this office.

In this regard, I would like to point out that the opinions that you cited are in my view irrelevant to the situation described.

Both of the advisory opinions to which you referred involved the status of committees designated by a governing body. In those opinions, it was advised that, under the definition of "public body" [see Open Meetings Law, §97(2)], a committee designated by a governing body consisting of two or more members and authorized to perform a duty collectively falls within the requirements of the Open Meetings Law, even if such a committee is advisory in nature and has no capacity to take final action.

In the context of your letter, it is clear that the School Board consists of five members. No mention has been made of any designation of a committee of or by the Board to carry out any particular duty. From my perspective, the Open Meetings Law does not apply unless and until a quorum of the School Board, a majority of its total membership, convenes for the purpose of conducting public business. Consequently, while a Board member who seeks the services of the Board's attorney might be conducting public business, there would be no quorum of the Board present and the Open Meetings Law would not in my opinion be applicable.

It is noted, too, that I have contacted the Education Department and the New York State School Boards Association to discuss the resolution and whether the services of the attorney could be retained only after action is taken by the Board. It was explained that, in many instances, a school district attorney must be contacted quickly, and perhaps prior to the convening of a school board. For instance, if legal papers are served upon the superintendent or a board member, it may be necessary for the attorney to act immediately. In such situations, if an attorney could act only after being directed to do so by the board as a whole, the board or the district might be placed at a disadvantageous legal position. Further, in such a situation, the taxpayers of the district might similarly be placed in such a position.

I was also informed that resolutions or policies similar to that described in your correspondence are relatively common.

In view of the foregoing, the questions in my view are whether the policy is reasonable in terms of the requirements of the Education Law, and whether the Education Law enables the Board to implement the specific terms of the resolution. As such, it is suggested that you might want to seek advice from the State Education Department regarding the propriety of the resolution.

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-979

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

January 27, 1984

Ms. Cailin C. Brown
Staff Reporter
The Times Record
501 Broadway
Troy, NY 12181

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. Brown:

I have received your letter of January 23 and the materials attached to it, which include an agenda, minutes of a meeting and various news articles that pertain to the implementation of the Open Meetings Law by the Board of Education of the Hoosic Valley Central School District.

You have asked that I advise the Board of the requirements of the Open Meetings Law in conjunction with issues raised in the materials that you forwarded. Pursuant to your request, copies of this opinion and the Open Meetings Law will be sent to the Board and the Superintendent of Schools.

First, it is emphasized that the cornerstone of the Open Meetings Law, the definition of "meeting" [§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, 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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 Open Meetings Law requires that a public body complete a procedure 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 opinion that an executive session is not separate from an open meeting but rather is a portion of an open meeting that may be closed. I believe, too, that, in a technical sense, a public body cannot schedule an executive session in advance of a meeting, for it cannot be known in advance whether a motion to enter into an executive session will be carried by a majority vote of the total membership of a public body.

Third, a public body cannot convene an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §100(1) specify and limit the topics that may appropriately be considered during an executive session.

Fourth, the minutes enclosed with your letter indicate that the Board held an executive session to discuss "personnel". Notwithstanding that reference in the minutes, a news article pertaining to that executive session indicates that the Superintendent "said the board did not hold executive session for personnel or litigation matters". If that is so, I believe that the minutes, the motion for entry into executive session, or both, were misleading and inconsistent with the requirements of the Open Meetings Law.

It is noted that the Committee has advised and the courts have held that a motion to enter into an executive session to discuss "personnel" or "litigation", without greater description, is inadequate and fails to comply with the Law.

The so-called "personnel" exception 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..." [§100(1)(f)].

It has been held that a motion to enter into an executive session relative to the provision quoted above should contain reference to two elements. It should include the term "particular" to indicate that the discussion involves a specific person or corporation; and it should refer to one or more of the topics listed in §100(1)(f) [see Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; and Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981]. As such, a motion to discuss "the employment history of a particular person" or a "matter leading to the appointment of a particular person" would in my view be appropriate; a motion to discuss "personnel" without more would not.

With respect to litigation, §100(1)(d) permits a public body to enter into an executive session to discuss "proposed, pending, or current litigation". In this regard, it has been held that possible litigation or a threat of litigation would not constitute an appropriate basis for entry into an executive session, for the purpose of §100(1)(d) is to enable a public body to discuss its "litigation strategy" in private, without baring its strategy to an 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]. Moreover, in Daily Gazette v. Town Board, Town of Cobleskill, [444 NYS 2d 44 (1981)], it was found that a motion to discuss "litigation"alone one or that "regurgitates" the statutory language of §100(1)(d) is insufficient. It was determined that in the case of pending litigation, an inclusion of the name of suit should be included in the motion for entry into an executive session.

Lastly, since the minutes indicate that Board meetings are scheduled to begin at 7:30, but the meeting in question apparently began at 6:30, I would like to point out that §99 of the Open Meetings Law requires that notice be given prior to all meetings of public bodies.

In the case of meetings scheduled at least a week in advance, §99(1) requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings.

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 time prior to such meetings.

Perhaps the preceding comments will clarify the Open Meetings Law for the Board and enhance compliance with its provisions.

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 Education
Joseph Colistra, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3198
OML-AO-980

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

January 31, 1984

Mr. Michael N. Wright
[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. Wright:

I have received your letter of January 18, which again pertains to the deliberations of and investigation by the Grievance Committee for the Tenth Judicial District.

Without reiterating the provisions of §90(10) of the Judiciary Law, which was quoted in full in the opinion of January 11, it appears that the only way in which you can learn more of the grievance would involve an effort to seek disclosure through the Appellate Division. In this instance, I believe that the Appellate Division, Second Department, would have jurisdiction. Further, in view of the provisions of the Judiciary Law, the Freedom of Information Law in my view neither applies to nor can be cited as a vehicle for obtaining records of a grievance committee.

With respect to the deliberations of a grievance committee, I would also like to point out that the Open Meetings Law, which is generally applicable to public bodies, would not in my opinion apply to the deliberations of either a grievance committee or a court. Section 103(1) of the Open Meetings Law exempts from the provisions of the Law "judicial or quasi-judicial proceedings..." Consequently, the deliberations of the Grievance Committee and the Appellate Division would in my view fall outside the requirements of the Open Meetings Law.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-981

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

January 31, 1984

Ms. Lisa G. Eikenburg
Editorial Assistant
Evening Observer
10 East Second Street
Dunkirk, NY 14048

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. Eikenburg:

I have received your letter of January 20 in which you requested an advisory opinion regarding a "possible misinterpretation of the Open Meetings Law".

According to your letter, on January 16, at a meeting of a village board of trustees, a water treatment plant trainee informed the board that he might need a vehicle to transport water samples. During the discussion, it was found that the employee was currently using his private vehicle and was asked why he could not continue to use that vehicle. He apparently explained that he damaged his truck while on village business and that reimbursement for the damage was not covered by the village insurance carriers. You indicated that the board then entered into an executive session to discuss the matter as "personnel".

Your question is whether the executive session was properly held.

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

First, it is noted that the Committee has advised and the courts have held that a motion to enter into an executive session to discuss "personnel" or "litigation", without greater description, is inadequate and fails to comply with the Law.

The so-called "personnel" exception 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..." [§100(1)(f)].

It has been held that a motion to enter into an executive session relative to the provision quoted above should contain reference to two elements. It should include the term "particular" to indicate that the discussion involves a specific person or corporation; and it should refer to one or more of the topics listed in §100(1)(f) [see Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; and Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981]. As such, a motion to discuss "the employment history of a particuluar person" or a "matter leading to the appointment of a particular person" would in my view be appropriate; a motion to discuss "personnel" without more would not.

Second, it is questionable whether the issue discussed fell within the scope of §100(1)(f), which was quoted above in full. If, for example, the discussion involved the nature of the village insurance policy, procedures regarding the use of private vehicles on village business, the use of village owned vehicles, or perhaps related issues of policy regarding the use of vehicles for village business, I do not believe that any ground for executive session could validly have been cited to close the meeting.

If, however, on the other hand, the discussion focused upon the performance of the trainee's duties, §100(1)(f) of the Open Meetings Law in my opinion could properly have been cited to exclude the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-982

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

January 31, 1984

Mr. Paul A. Rickard, Chairman
Halfmoon Democratic Committee
[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. Rickard:

Secretary of State Shaffer has forwarded your letter of January 10 to the Committee on Open Government and asked that I respond on her behalf. The Secretary of State is a member of the Committee, which is a unit of the Department of State.

Your inquiry concerns the conduct of meetings of the Town Board of the Town of Halfmoon. Specifically, you wrote that the Town Supervisor:

> "...announced at the January board meeting that no townsperson would be allowed to speak more than once at each meeting. This new rule did not limit the length of time allotted to public comment, but rather, imposed a limitation prohibiting the right of citizens to comment on issues as they arise or to offer additional information as clarification is required."

Your questions are whether the Town Supervisor, acting as Chairman of the Town Board, has "the right to limit public comment to a single instance per person, per month", "the right to discourage individuals from commenting on issues

raised by other townspeople during a Town meeting", and whether he has the right to "suppress public comment on new or modified issues by individuals who may have previously spoken regarding another issue".

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

First, it is emphasized that the Open Meetings Law is silent with respect to public participation. Further, there is no other provision of law that confers a right upon the public to speak or otherwise participate at a meeting of a public body. Consequently, while the Open Meetings Law permits the general public to attend and listen to the deliberations of a public body, it has consistently been advised that a public body is not required to permit public participation at its meetings.

Second, it has also been advised that, in situations in which a public body chooses to permit public participation, it should do so by means of reasonable rules that treat all members of the public in like manner.

Third, I do not believe that the Town Supervisor, as presiding officer, has the capacity to impose or adopt rules of procedure unilaterally. Section 63 of the Town Law states in part that:

> "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board. The board may determine the rules of its procedure, and the supervisor may, from time to time, appoint one or more committees, consisting of members of the board, to aid and assist the board in the performance of its duties."

As such, pursuant to the Town Law, it is clear that the Board has the authority to determine the rules of its proceedings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-983

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

February 1, 1984

Ms. Sheila Swigert
[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. Swigert:

I have received your card in which you requested the Committee's booklet regarding the Freedom of Information and Open Meetings Laws. Enclosed is a copy of the booklet.

In addition, you asked whether, if your "co-op board is elected", it can "hold meetings behind closed doors". In all honesty, I do not believe that I can answer your question. It is noted, however, that the Open Meetings Law is applicable to public bodies. Section 97(2) of that 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."

Assuming that the co-op in which you reside is privately owned, I do not believe that the Open Meetings Law would apply to meetings of its board, for the board would not perform a governmental function.

It is possible that the "Condominium Act", Article 9-B of the Real Property Law, might be applicable to your residence. While I am unaware of any provision that deals specifically with an open meeting requirement, §339-q of the Real Property Law states that:

> "[T]rue copies of the floor plans, the declaration, the by-laws and any rules and regulations shall be kept on file in the office of the board of managers and shall be available for inspection at convenient hours of weekdays by persons having an interest."

Further, §339-w requires that:

> "[T]he manager or board of managers, as the case may be, shall keep detailed, accurate records, in chronological order, of the receipts and expenditures arising from the operation of the property. Such records and the vouchers authorizing the payments shall be available for examination by the unit owners at convenient hours of weekdays. A written report summarizing such receipts and expenditures shall be rendered by the board of managers to all unit owners at least once annually."

Therefore, if the Condominium Act applies to your residence, it is suggested that you review the by-laws kept by the Board of Managers to determine whether any reference is made to open meetings of the 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
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-984

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

February 2, 1984

Ms. Carol Bayard, President
Manhattan Plaza Tenants Association
[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. Bayard:

As you are aware, I have received your letter of January 18 and the materials attached to it.

You have requested an advisory opinion regarding the "applicability of the provisions of the Open Meeting Law to the Manhattan Plaza Management Policy Committee". You indicated that the Committee in question on December 7 "voted to exclude from attendance at their meetings the public, except those whom the committee invites, and further voted to invite two officials of [your] organization to observe their meetings".

Your question is whether the Manhattan Plaza Management Policy Committee is subject to the Open Meetings Law.

In this regard, the Open Meetings Law is applicable to public bodies. Section 97(2) of the Law (see attached) defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as

defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based upon a review of the materials that you provided, it does not appear that the Committee in question performs a governmental function for any agency. If that is so, I do not believe that the Committee is a "public body" subject to the Open Meetings Law, notwithstanding the receipt of funding from various entities of government.

If you could provide additional information that might lead to a different conclusion, please send the information to me.

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-985

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

February 2, 1984

Paul L. Wollman, Esq.
[redacted]

Dear Mr. Wollman:

I appreciate the receipt of a copy of the correspondence with Mr. Frank Gappa, Publisher of the Amsterdam Recorder, as well as copies of your letter to the editor and an editorial published on January 28.

The letter to the editor pertains to a meeting of the Board of Assessment Review of the Town of Amsterdam and makes reference to our telephone conversation in which I provided advice based upon the facts that you provided. Nevertheless, as I recall our conversation, the situation described differed from that presented in the materials that you forwarded.

As I remember our conversation, the issue that you raised involved the application of the Open Meetings Law to a board of assessment review. It was explained that in a situation in which a board, following the submission of a grievance regarding the assessment of real property, deliberates toward a decision regarding the appropriate assessment of the property, those deliberations may be considered "quasi-judicial". It was further explained that since §103(1) of the Open Meetings Law exempts quasi-judicial proceedings from the provisions of the Law, such deliberations need not be conducted open to the public.

The materials sent to me, however, indicate that the Board of Assessment Review was not involved in deliberations regarding the assessment of particular parcels of real property, but rather the resolution of problems that relate to litigation involving certain assessments. In addition, in our conversation as well as the editorial to which reference was made earlier, it was apparently suggested that the gathering was a "work session" that could have been closed.

In my view, if the deliberations did not involve steps leading to determinations regarding the assessment of particular parcels, the gathering would not have been quasi-judicial, but rather a "meeting" subject to the Open Meetings Law.

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

First, when the Open Meetings Law became effective in 1977, it was contended by many that "work sessions" held to discuss public business but with no intent to take action fell outside the requirements of the Open Meetings Law. Nevertheless, in a landmark decision rendered in 1978, the Court of Appeals held 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)]. Therefore, a "work session" is in my opinion a meeting subject to the Open Meetings Law.

Second, there are various topics that may be discussed by a public body during a closed or "executive session". Section 100(1)(a) through (h) specifies those topics that may appropriately be considered during an executive session. However, to enter into an executive session, a public body must complete a procedure prescribed by the Law during an open meeting before it may 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 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..."

Consequently, prior to entry into an executive session, a motion must be made during an open meeting that identifies in general terms the subject to be considered, and the motion must be carried by a majority vote of the total membership of a public body.

Third, since the issue under discussion apparently concerned litigation, it is noted 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". It has been held that the purpose behind §100(1)(d) is to enable a public body to discuss its litigation strategy behind closed doors, in order that its strategy will not be bared to its legal adversary [see Concerned Citizens to Review 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].

It is unclear whether the Board of Assessment Review is a party to the litigation to which reference was made. Based upon judicial interpretations of the Open Meetings Law, if the Board is not a party to the litigation, it does not appear that §100(1)(d) or any other ground for executive session could justifiably have been cited to close the meeting.

If my understanding of the facts is inaccurate, please do not hesitate to contact me.

I hope that the foregoing will serve to clarify the provisions of the Open Meetings Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank W. Gappa, Publisher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3206
OML-AO-986

162 WASHINGTON AVENUE, ALBANY, NEW Y. K, 12231
(518) 474-2. 2791

February 6, 1984

Mr. Carl Litt
[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. Litt:

I have received your letters of January 25 and January 28, as well as the materials attached to them. You have raised a series of issues with respect to the implementation of the Open Meetings Law by the Northport-East Northport School District Board of Education.

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

First, there appears to be fundamental misunderstanding of key aspects of the Open Meetings Law. The notices and agendas enclosed with your correspondence are reflective of the pattern whereby the Board of Education meets at 7 p.m., immediately enters into an executive session and at 8:15 schedules an adjournment of the executive session for the purpose of reconvening an open meeting.

It is emphasized that the term "meeting" as defined in §97(1) of the Open Meetings Law has been expansively construed by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that the term "meeting" includes any gathering of a quorum of the 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)]. Consequently, if the meetings are scheduled at 7 p.m., §99 of the Law would require that notices of the meetings indicate that they commence at 7 p.m. It would appear that no such notice is given, for a school lunch menu attached to your letters, which included an indication of "coming events at the Board level", stated that scheduled meetings of the Board would commence at 8:15 p.m. With respect to those meetings, executive sessions began at 7 p.m. and were followed by open meetings scheduled for 8:15.

Second, 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. Consequently, an open meeting must always be convened prior to entry into an executive session by a public body.

Third, the Open Meetings Law contains a procedure that must be accomplished during an open meeting before a public body may 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 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, before entry into an executive session, a motion for executive session must be made during an open meeting which identifies in general terms the topic or topics to be discussed, and the motion must be carried by a majority vote of the total membership.

Fourth, also in conjunction with the language of §100(1), in a technical sense, I do not believe that a public body can schedule an executive session in advance of a meeting. Since the Law requires that a motion be made during an open meeting prior to entry into an executive session, it cannot technically be known in advance of a meeting whether such a motion will indeed by carried by a majority of the total membership of a public body.

Fifth, it is reiterated that the motion for entry into an executive session must indicate generally the subject or subjects to be considered. Several of the agendas merely indicate that executive sessions were held; no mention is made of the subject matter discussed.

In a related vein, you enclosed a list of executive sessions held in the recent past to consider "personnel". While I could not conjecture as to the validity of those executive sessions without additional information regarding the specific topics that may have been discussed, judicial interpretations of the Open Meetings Law indicate that a motion to enter into an executive session to discuss "personnel", without additional information, is inadequate.

The so-called "personnel" exception 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..." [§100(1)(f)].

It has been held that a motion to enter into an executive session relative to the provision quoted above should contain reference to two elements. It should include the term "particular" to indicate that the discussion involves a specific person or corporation; and it should refer to one or more of the topics listed in §100(1)(f) [see Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; and Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981]. As such, a motion to discuss "the employment history of a particular person" or a "matter leading to the appointment of a particular person" would in my view be appropriate; a motion to discuss "personnel" without more would not.

One of the issues that you raised, the rotation of principals, in your view could not have been discussed under §100(1)(f) during an executive session. In my opinion, if the issue involved only a matter of policy, I would agree that no ground for executive session could justifiably have been cited. On the other hand, to the extent that the discussion focused upon the employment histories of incumbent principals, §100(1)(f) could in my view justifiably have been cited to enter into an executive session.

Sixth, the Board apparently convened executive sessions to discuss chemical analyses of contaminants that might be present at the schools. According to your letter, the basis for entry into executive session was "to discuss a matter affecting health, safety and welfare". Nevertheless, the Board and the Superintendent contended that public safety has not been "imperiled". In this regard, the first ground for executive session permits a public body to close its doors to discuss:

> "matters which will imperil the public safety if disclosed..."[§100(1)(a)].

If public discussion would not imperil the public safety, it would appear that no ground for executive session was present.

Seventh, you indicated that the District hired a testing laboratory and a medical consultant to prepare the analyses to which reference was made in the preceding paragraph. You also wrote that there was never a motion or formal action to expend public monies in public. When you questioned whether such action had been taken, you were informed that Counsel advised the Board that those "steps need not be taken due to the provisions of §103(4) of the General Municipal Law."

In brief, §103(1) requires that advertisements be made for bids prior to the purchase of goods or services. Section 103(4) states that:

> "[N]otwithstanding the provisions of subdivision one of this section, in the case of a public emergency arising out of an accident or other unforeseen occurrence or condition whereby circumstances affecting public buildings, public property or the life, health, safety or property of the inhabitants of a political subdivision or district therein, require immediate action which cannot await competitive bidding, contracts for public work or the purchase of supplies, materials or equipment may be let by the appropriate officer, board or agency of a political subdivision or district therein."

It appears to be the view of the Board that, under the circumstances, the usual competitive bidding process need not have been accomplished. In my view, based upon the facts that you have provided, it is questionable whether an emergency existed. Further, although I am not an expert with respect to the General Municipal Law, it would appear that, even though the bidding process might in some instances be waived, the Board of Education would nonetheless be required to authorize an expenditure during an open meeting. As stated earlier, §100(1) requires that action to appropriate public monies must be accomplished during an open meeting.

Lastly, having reviewed agendas and minutes, there are references to motions "unanimously" carried. Other references merely state "motion carried". Here I would like to point out that §87(3)(a) of the Freedom of Information Law requires that a record of votes be prepared that identifies each member who voted in every instance in which a vote is taken. Specifically, the cited provision states that each agency shall maintain:

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

Therefore, if a motion is carried unanimously, a breakdown of the means by which votes were cast need not be included. However, if a motion is not carried unanimously, I believe that a record must be prepared that identifies each member who voted affirmatively as well as each member who voted in the negative.

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-987

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

February 7, 1984

Mr. Jim Bernet
President
The Foundation for Peace
P.O. Box 703
Woodstock, NY 12498

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. Bernet:

I have received your letter of February 2 in which you raised questions regarding town government.

You wrote that the Town Board of the Town of Woodstock recently adopted an anti-nuclear resolution. Having discussed the issue further with the Supervisor, you were informed that there is no provision "for a permissive referendum or a special town meeting on the nuclear issue". You have asked whether this is true.

Since I am not an expert on the issue of permissive referenda, I have contacted various authorities who are knowledgeable with respect to the powers of local governments, including towns. I was told that the response of the Supervisor is accurate, for the topics subject to a permissive referendum are specified and limited (see e.g., Town Law, §90). To obtain more information regarding permissive referenda, it is suggested that you contact the Division of Legal Services at the Department of State at the same address as that indicated above.

Your second question is whether a town board may call a special meeting "on any matter". In this regard, the Open Meetings Law, the statute within the Committee's advisory jurisdiction, pertains to the procedural aspects of meetings; it does not deal with the topics that a public

body may or may not consider. It is noted, however, that §64 of the Town Law describes the powers and duties of town boards. Perhaps the broadest grant of authority is found in subdivision (23) of §64 entitled "General powers". That provision states that a town board:

> "[S]hall have and exercise all the powers conferred upon the town and such additional powers as shall be necessarily implied therefrom."

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-988

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

February 14, 1984

Mr. Barry B. Abisch
Editor
The Standard-Star
92 North Avenue
New Rochelle, NY 10802

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. Abisch:

I have received your letter in which you requested an advisory opinion under the Open Meetings Law concerning the implementation of the Law by the Board of Trustees of the Village of Pelham with regard to three of its meetings.

You wrote that you were given "cursory notice" of the first meeting. The Mayor of Pelham "told a reporter that the board would meet in executive session to consider the procedures it would follow to recruit and hire a replacement for the Village Administrator, who resigned". Apparently there were "no particular candidates to review", and the discussion involved only the recruitment procedures. You added that there appeared to have been no vote to enter into executive session, which was called to discuss "personnel".

With respect to the second meeting, no notice was given. The subject of the meeting involved a continuation of the discussion on recruitment procedures. The meeting was closed once again, for the Mayor indicated that the topic was "personnel".

A third meeting was held without notice, and "it was held as an executive session to discuss 'personnel'".

As "evidence" of violations of the Open Meetings Law, you indicated that the Board "has scheduled a public hearing on a proposed amendment to the village law concerning the Village Administrator". The Mayor stated that "the proposed amendment was discussed during an executive session".

It is your view that neither an amendment to a local law nor scheduling a public hearing can be discussed during an executive session.

I agree with your contentions for the following reasons.

First, it is emphasized that the term "meeting" as defined in §97(1) of the Open Meetings Law has been expansively construed by the courts. In a landmark decision rendered in 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 conducing 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)].

Second, §99 of the Open Meetings Law requires that every meeting must 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 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 in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings.

As such, it is reiterated that notice must be given in accordance with §99 of the Open Meetings Law prior to all meetings, whether regularly scheduled or otherwise, and whether or not there is an intent to take action.

Third, 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. Consequently, an open meeting must always be convened prior to entry into an executive session by a public body.

Fourth, the Open Meetings Law contains a procedure that must be accomplished during an open meeting before a public body may 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 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, before entry into an executive session, a motion for executive session must be made during an open meeting which identifies in general terms the topic or topics to be discussed, and the motion must be carried by a majority vote of the total membership.

Fifth, also in conjunction with the language of §100(1), in a technical sense, I do not believe that a public body can schedule an executive session in advance of a meeting. Since the Law requires that a motion be made during an open meeting prior to entry into an executive session, it cannot technically be known in advance of a meeting whether such a motion will indeed be carried by a majority of the total membership of a public body.

Sixth, the so-called "personnel" exception 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..." [§100(1)(f)].

It is noted that the language quoted above differs from the language of §100(1)(f) when the Open Meetings Law became effective in 1977. Under the original provision, which referred to "any person", public bodies often entered into executive sessions to discuss matters that involved personnel in general or matters of policy that related to personnel. Based upon its view that §100(1)(f) was intended to protect privacy, rather than to shield matters of policy under the guise of privacy, the Committee recommended changes in the cited provision that were enacted in 1979. In short, the amendments substituted the term "particular" for "any". As such, §100(1)(f) may in my opinion appropriately be asserted only when a discussion pertains to a "particular person" in relation to one or more of the topics listed in that provision.

Under the circumstances, a discussion of recruitment procedures regarding the position of Village Administrator would not in my view have related to a "particular person". On the contrary, the discussion appears to have concerned matters of policy in terms of hiring that would relate to any person who might seek the vacant position.

Similarly, I do not believe that §100(1)(f) concering "personnel", or any other ground for entry into executive session, could justifiably have been cited to discuss amendments to a local law or scheduling a public hearing.

Lastly, it has been held that a motion to enter into an executive session to discuss "personnel" should contain reference to two elements. It should include the term "particular" to indicate that the discussion involves a specific person or corporation; and it should refer to one or more of the topics listed in §100(1)(f) [see Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; and Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981]. As such, a motion to discuss "the employment history of a particular person" or a "matter leading to the appointment of a particular person" would in my view be appropriate; a motion to discuss "personnel" without more would not.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Mayor, Village of Pelham
Board of Trustees, Village of Pelham

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 989

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

February 17, 1984

Mr. David A. Wickerham
Personnel Director
Saratoga County Department of
Personnel
Municipal Center
Ballston Spa, New York 12020

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. Wickerham:

I have received your letters of January 31 and February 10 in which you requested advice regarding the Open Meetings Law.

According to the initial letter, "Saratoga County is in the process of appealing the decision of PERB Hearing Officer that the County has violated its duty to negotiate in good faith by insisting that negotiations be conducted openly". You indicated in the ensuing letter that the Saratoga County Negotiating Team consists of a "three member committee of elected supervisors who are appointed by the Chairman of the Board". You wrote further that the Committee was initially appointed by the Chairman of the Board of Supervisors in September of 1983 and was re-appointed by the new Chairman in January of this year, and that "final decisions concerning the acceptance or rejection of negotiating proposals is the sole responsibility of the three elected supervisors". In addition, although a proposed contract must be ratified by the Board of Supervisors, you stated that the Board "has never rejected a contract which was approved by the negotiating team."

Your question as I understand it is whether the Committee, while in the process of negotiating with a public employee union, must do so in closed or executive sessions.

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

First, as you have described it, the Negotiating Committee is in my view a "public body" that falls within the requirements of 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 member 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 findings of the Committee may, in a technical sense, be accepted, rejected or modified by the full Board of Supervisors, and even though the Committee was appointed by the Chairman of the Board of Supervisors rather than the full Board, judicial interpretations of the Open Meetings Law indicate that the Committee is a "public body". In a determination involving advisory bodies designated by an agency's chief executive officer, in that instance, a mayor, it was found that those entities fell within the framework of the Open Meetings Law [Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982); see also MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977)]. In discussing the advisory bodies that were the subject of its decision, the Appellate Division in Syracuse stated that:

> "[W]hile neither of the committees here usurp the powers of other municipal departments and their recommendations may be characterized as advisory only, in that they did not bind the common council or ther city departments it is clear that their recommendations have been adopted and

> carried without exception. To hold that they are not public bodies within the meaning of the Open Meetings Law would be to exalt form over substance. Both committees perform vital governmental functions affecting the municipality and its citizenry and their recommendations receive automatic approval of the common council. To keep their deliberations and decisions secret from the public would be violative of the letter and spirit of the legislative declaration in section 95 of the Public Officers Law (Matter of Orange County Pub. Div. of Ottaway Newspapers v Council of City of Newberg, 60 AD2d 409, affd 45 NY2d 947; see, also, amdt to Public Officers Law, § 97, subd 2, eff Oct. 1, 1979 [which added the words 'committee or subcommittee or other similar body of such public body' to the definition of 'public body])" [id. at 985].

Based upon the foregoing, I believe that the Negotiating Committee designated by the Chairman of the Board of Supervisors is a public body subject to the Open Meetings Law.

Second, the Open Meetings Law permits a public body to enter into closed or "executive sessions" to discuss various subjects specified in the Law as appropriate for consideration behind closed doors. It is emphasized, however, that the language of the Law indicates that a public body may enter into an executive session; there is no requirement that a public body must confer in private even though a ground for entry into executive session exists. Further, due to the procedure prescribed in the Law, a motion for entry into an executive session must be carried by a majority of the total membership of a public body. 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, if there is a basis for entry into an executive session, a motion may be made that effectively excludes the public from a meeting. However, if no such motion is made, or if a motion to enter into an executive session is not carried by a majority vote of the total membership of a public body, an executive session, in my view cannot be held.

Third, one of the grounds for executive session, §100(1)(e), permits a public body to exclude the public to discuss:

> "collective negotiations pursuant to article fourteen of the civil service law..."

The language quoted above clearly indicates that a public body may enter into an executive session to discuss collective bargaining negotiations under the Taylor Law. It is reiterated, however, that, even though a basis for entry into executive session might exist, I do not believe that there is any requirement that a public body must convene an executive session merely because it may do so.

Lastly, I am unfamiliar with the nature of the scope of the determination made by a hearing officer for the Public Employment Relations Board stating that the Committee in question cannot in good faith conduct negotiations in public. In this regard, it is emphasized that this opinion is based solely upon the provisions of the Open Meetings Law. Consequently, although I an unaware of any provision of the Taylor Law that requires that negotiations be conducted in private, I could not conjecture as to the sufficiency of a contention that Article 14 of the Civil Service Law prohibits open negotiations by the Committee.

I hope that I have been of some assistance. Should any furhter 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-3219
OML-AO-990

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

February 22, 1984

Ms. Katherine Kerrigan
[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. Kerrigan:

I have received your letter of February 7, which was sent to the Committee at the suggestion of a representative of the Attorney General's office.

Your initial area of inquiry is whether there is an agency that can assist citizens in Waverly in asserting their rights under the Freedom of Inforation and Open Meetings Laws. As a general matter, the Committee on Open Government, which was created by the enactment of the Freedom of Information Law in 1974, provides assistance to any person having a question regarding either of the statutes to which you referred. It is noted, however, that an opinion rendered by this office is advisory only, and is not binding upon an agency.

According to your letter, various meetings and deliberations are being conducted regarding the expansion of the Waverly Sewage Treatment Plant. However, those gatherings apparently have consistently been held at a site more than a hundred miles from Waverly. As a consequence, you and others in Waverly have had difficulty in keeping abreast of information that may be developed in the deliberative process relative to the Sewage Treatment Plant.

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

First, of potential significance is the Open Meetings Law, which applies to meetings of public bodies. The term "meeting" has been expansively construed judicially and 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The phrase "public body" is defined in §97(2) of the Open Meetings Law to include:

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

Based upon the language quoted above, if, for example, the Mayor of the Village, representatives of state agencies and a firm meet to discuss the issue, the Open Meetings Law would not in my opinion be applicable, for a quorum of a public body would not be present. On the other hand, if the Village Board of Trustees consists of five members and three of the members meet with representatives of state agencies and a firm, such a gathering in my view would constitute a meeting of a public body subject to the Open Meetings Law in all respects. In short, if a quorum of the Board of Trustees, or any other public body, convenes to conduct public business, the Open Meetings Law would in my view clearly apply.

In that type of situation, the meeting would have to be preceded by notice given in accordance with §99 of the Open Meetings Law. In brief, §99 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 all meetings.

Second, although the Open Meetings Law does not refer specifically to the site of a meeting, §98(a) of the Law states that "[E]very meeting of a public body shall be open to the general public..." Moreover, the first sentence of the statement of legislative intent (§95) provides 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 by fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

In view of the foregoing, while the Open Meetings Law does not indicate where meetings must be held, I believe that every law, including the Open Meetings Law should be given a reasonable interpretation. In this instance, I believe that it would be unreasonable for a public body to conduct a meeting at a location far from the Village.

Third, the other statute to which you referred, the Freedom of Information Law, might serve as a useful vehicle for obtaining records in situations in which people might be unable to attend meetings or where gatherings of less than a quorum of a public body fall outside the scope of the Open Meetings Law.

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 of the grounds for denial appearing in § 87(2)(a) through (h) of the Law.

Further, although the Freedom of Information Law is not a vehicle that requires government officials to answer questions, it applies to all records of an agency and contains a broad definition of "record". Section 86(4) of the Freedom of Information Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Consequently, records in possession of the Village or the Department of Environmental Conservation fall within the scope of rights of access granted by the Freedom of Information Law.

It is suggested that you might want to request records under the Freedom of Information Law from the Village and the Department of Environmental Conservation, as well as any other agency that might be involved in the issue. Section 89(3) of the Freedom of Information Law requires that an applicant submit a request that "reasonably describes" the records sought. In addition, under the regulations promulgated by the Committee, each agency, including the Village or a state agency, must designate a "records access officer" who is responsible for dealing with requests made under the Law. A records access officer must respond to a request made in writing that reasonably describes the records sought within five business days of the receipt of such a request. If for any reason any aspect of the request is denied, the reason for the denial must be given in writing and the applicant must be informed of the identity of the person or body to whom an appeal may be directed.

With respect to Village records, it is suggested that an initial point of contact regarding a request would be the Village Clerk, who is the custodian of Village records. To request records from the Department of Environmental Conservation, you could contact the regional office of the Department in order to determine who at the office would be responsible for handling requests made under the Freedom of Information Law. In the alternative, I believe that a request could be directed to the Department's Records Access Officer in Albany. That person is Mr. Graham Greeley, whose address is 50 Wolf Road, Albany, NY 12233.

Enclosed for your consideration are copies of the Freedom of Information and Open Meetings Laws, an explanatory pamphlet dealing with both laws, and a pocket guide that summarizes the laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Board of Trustees, Village of Waverly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-991

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

February 27, 1984

Ms. Marilyn Adams
Times-Union
55 Exchange Street
Rochester, NY 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. Adams:

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

According to your letter, Lucien A. Morin, the Monroe County Executive, appointed an "Intergovernmental Advisory Council" (IAC). Mr. Morin serves as Chairman of the IAC, which was created to advise him on major issues facing Monroe County. The membership on the IAC includes named representatives of various local governments or government associations in Monroe County. You added that the County Executive has asked the County Legislature to authorize $20,000 to be expended for research that may be carried out for the IAC.

Since the County Executive and the County Attorney contend that the IAC falls outside of the provisions of the Open Meetings Law, your question is whether, in my view, the IAC is subject to the Open Meetings Law.

Based upon the following analysis, I believe that the IAC is subject to the Open Meetings Law in all respects.

The scope of the Open Meetings Law is determined in part by the term "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 this 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 to indicate that committees, subcommittees and other advisory bodies should be subject to the 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 the IAC.

The IAC concists of more than two members. Further, I believe that it is required to conduct its business by means of a quorum. While the action of the County Executive in creating the IAC might not refer to any quorum requirements, the IAC in my view can conduct its 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 officiers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officer 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 IAC, it conducts public business and performs a governmental function for an agency, in this instance, Monroe County.

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 means 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, Fourth Department, pertained to advisory bodies that were not designated by a public body, but rather by an executive. The entities in question consisted of a committee and a task force designated by a mayor 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)].

In view of 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 IAC is a "public body" subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lucien A. Morin, County Executive
John D. Doyle, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-992

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

February 28, 1984

Ms. Josephine Kent
Town Assessor
Town of Deerpark
Drawer A
Huguenot, NY 12746

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. Kent:

I have received your letter of February 17 and appreciate your kind words.

Your inquiry involves a proceeding of a board of assessment review. You were apparently informed by Steven Harrison, an attorney for the State Division of Equalization and Assessment that, in his opinion, deliberations of the board of assessment review are quasi-judicial and, therefore, "should be closed". You wrote further that:

> "The fly in the ointment here is that when the deliberation meetings are open, everyone can attend, including the assessor, and the law says the assessor shall not attend the deliberation meetings of the BAR (RPTL 1524)."

You have requested a clarification regarding the issue.

In my view, a board of assessment review is clearly a "public body" that falls within the scope of the Open Meetings Law. As such, as a general matter, its meetings must be conducted open to the public and preceded by notice (§99). Nevertheless, §103 of the Open Meetings Law contains three exemptions. In brief, if an exemption is applicable, the Open Meetings Law does not apply. One of the exemptions [§103(1)] pertains to "judicial or quasi-judicial proceedings".

In this regard, following a public hearing, when a board of assessment review deliberates toward determinations, I believe that the board conducts a "quasi-judicial proceeding" that falls outside the scope of the Open Meetings Law. Consequently, I agree with Mr. Harrison's view that the deliberations of a board of assessment review would be quasi-judicial in nature and need not be open to the public.

Lastly, with respect to your comment to the effect that an assessor cannot be present during "deliberation meetings" of a board of assessment review, having reviewed §1524 of the Real Property Tax Law, I was unable to find any direction to that effect. Perhaps you are referring to subdivision (1) of the cited provision, which states in part that "[N]either the assessor nor any member of his staff may be appointed to the board of assessment review". From my perspective, that provision would not constitute a prohibition regarding attendance by the assessor. However, it clearly indicates that an assessor cannot serve as a member of the board of assessment review.

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: Steven Harrison

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3233
OML-AO-993

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

March 1, 1984

Honorable Angelo R. Martinelli
Office of the Mayor
City Hall
Yonkers, NY 10701

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 Martinelli:

I have received your letter of February 21, which reached this office on February 27. Your interest in complying with the Freedom of Information and Open Meetings Laws is much appreciated.

Your initial question is whether "meetings of the City Council Rules Committee [are] subject to the Open Meetings and Freedom of Information Laws". In this regard, the scope of the Open Meetings Law is determined in part by §97(2), which defines "public body" to mean:

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

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 this 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 to indicate that committees, subcommittees and other advisory bodies should be subject to the 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.

Further, a review of the elements of the definition of "public body" in my opinion results in such a conclusion in the case of the City Council Rules Committee.

According to Rule VIII of the City Council Rules which are attached to your letter, the Committee in question consists of more than two members. I believe that it is required to conduct its business by means of a quorum, even though the Rules might not refer to any quorum requirement. 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, having reviewed the functions of the Rules Committee, it conducts public business and performs a governmental function for an agency, in this instance, the City of Yonkers.

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 committees and similar 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 means 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, Fourth Department, pertained to advisory bodies that were designated by an executive. The entities in question consisted of a committee and a task force designated by a mayor 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)].

In view of 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 Rules Committee is a "public body" subject to the Open Meetings Law.

Since the question also involved the application of the Freedom of Information Law, I would like to point out that, as a governmental entity performing a governmental function for the City, the Rules Committee's records would be subject to rights of access granted by the Freedom of Information Law [see definitions of "agency" and "record", Freedom of Information Law, §86(3) and §86(4) respectively]. Moreover, in the decision cited earlier, Syracuse United Neighbors, supra, it was held that minutes of meetings of advisory bodies were subject to the Freedom of Information Law.

Your second area of inquiry concerns "what specific requirements would have to be followed by the Rules Committee to comply with Public Notice and records of the Committee meetings".

With respect to notice, 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 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 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 regard to the records of meetings, §101 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Subdivision (1) of §101 concerns minutes of open meetings; subdivision (2) pertains to minutes reflective of action taken during an executive session; and subdivision (3)

requires that minutes of open meetings be prepared and made available within two weeks and that minutes of executive sessions be prepared and made available within one week of an executive session. It is noted that if a public body enters into an executive session and merely discusses an issue, but takes no action, minutes of the executive session need not be prepared.

Lastly, your remaining area of inquiry involves a situation in which the Rules Committee fails to comply with either the Open Meetings or the Freedom of Information Laws and whether:

> "...legislation resulting from such a Committee meeting presented to the City Council on its Agenda for action [would] be proper and legal, and if it were approved by the City Council, would such legislation be proper and legal".

In my view, a violation of the Freedom of Information Law would be irrelevant to any illegality that may have occurred regarding a closed meeting. However, the Open Meetings Law may be relevant, for §102 contains provisions regarding its enforcement. Specifically, §102(1) states that:

> "[A]ny aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.
>
> "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. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or dispostion of a bond issue or notes."

Based upon the language quoted above, the most significant penalty that could be imposed under the Open Meetings Law would involve a situation in which a public body took action behind closed doors which should have been taken during an open meeting. It is important to note, however, that there are judicial interpretations of the Open Meetings Law which indicate that action taken by an advisory body that may be accepted, rejected, or modifed by a governing body, for example, would not be reflective of action taken that could be nullified. Similarly, if a public body enters into an executive session in violation of the Law but takes action in public following the executive session, it has been found that there is no action to be nullified [see Woll v. Erie County Legislature, 83 AD 2d 792 (1981); and Dombroske v. Board of Education, West Genesee School District, 462 NYS 2d 146 (1983)].

In any event, I believe that an action by a public body, although perhaps accomplished in violation of the Open Meetings Law, remains valid unless and until a court determines otherwise.

Also of possible significance is subdivision (2) of §102 which states that:

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

Enclosed for your consideration are copies of the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-994

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

March 2, 1984

Mr. Charles J. Tiano
Ms. Sharon Cherven
Mr. Stephen Singer
[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. Tiano, Ms. Cherven and Mr. Singer:

I have received your letter of February 20 in which you requested an advisory opinion under the Open Meetings Law.

Your questions concern the implementation of the Open Meetings Law by the Town Board of the Town of Woodstock. According to your letter, the Board:

> "...met for the second time in executive session with members of the Citizens Advisory Committee and officials of three engineering companies currently involved in the Woodstock Clean Water Project. They discussed a contract between Sawkill Engineers and the town."

You wrote that the basis for the executive session cited by the Board was §100(1)(f) of the Open Meetings Law. It was also contended that the meeting could be held on the ground that it was in the process of "negotiating" a contract with "the town-hired firm".

You also raised a question regarding notice requirements, for:

> "The town board's position is that since monthly meeting dates are fixed, it is not required to give notice to the press as outlined by Section 99."

The problem has been that although notice for regular Board meetings has been given, the dates of those meetings have been changed and there has been:

> "...a proliferation of town board workshops and special meetings, [and you] feel that the town board is responsible for formal notification of meetings to the media as required under Section 99."

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

First, with respect to the "negotiations", I believe that the issue involves questions of fact. 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..."

If, for example, the Town Board is engaged in a review of a firm's financial or credit history, it would appear that an executive session would be justified. Similarly, if the discussion constitutes a matter "leading to the employment" of a particular corporation, an executive session held on that basis would also be justified in my opinion. However, as I understand the situation, the Board is not involved in reviewing the financial or credit history of a particular corporation. Further, based upon the language of your letter, it appears that the firms in question have already been hired by the Town. If my assumptions are accurate, it does not appear that §100(1)(f) would be applicable.

Second, with regard to notice, §99(1) of the Law pertaining to meetings scheduled at least a week in advance 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 by §99(1) "to the extent practicable" at a reasonable time prior to such meetings.

It has been advised in the past that a notice of scheduled meetings prepared at the beginning of the year that is sent to the news media and continually posted constitutes sufficient notice with respect to those meeting dates identified. However, if a meeting is rescheduled or if other unscheduled meetings are held, I believe that a public body, such as the Town Board, must provide notice of those meetings in accordance with §99.

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-995

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

March 5, 1984

Mr. Robert F. Reninger
[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. Reninger:

I have received your letter of February 24, as well as the materials attached to it. Your inquiry involves the implementation of the Open Meetings Law by the Board of Education of the Greenburgh Central School District.

According to an agenda of the Board meeting of February 9, the meeting began at 6:30 p.m. as an executive session, which was held to discuss:

"1. Personnel Items/L. Gray

2. Summary Items/J. Glazier

3. Real Estate/M. Solomon

4. Legal Matters/R. Gyory

5. For the good or the order".

An open meeting was scheduled to being at 8:30 p.m.

Further, when you requested minutes of the executive session, you were informed by the clerk that there are no minutes.

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

First, it is emphasized that the cornerstone of the Open Meetings Law, the definition of "meeting" [§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, 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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 Open Meetings Law requires that a public body complete a procedure 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 opinion that an executive session is not separate from an open meeting but rather is a portion of an open meeting that may be closed. I believe, too, that, in a technical sense, a public body cannot schedule an executive session in advance of a meeting, for it cannot be known in advance whether a motion to enter into an executive session will be carried by a majority vote of the total membership of a public body.

Third, a public body cannot convene an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §100(1) specify and limit the topics that may appropriately be considered during an executive session.

Fourth, the agenda enclosed with your letter indicate that the Board held an executive session to discuss "personnel items". The Committee has advised and the courts have held that a motion to enter into an executive session to discuss "personnel" or "litigation", without greater description, is inadequate and fails to comply with the Law.

The so-called "personnel" exception 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..." [§100(1)(f)].

It has been held that a motion to enter into an executive session relative to the provision quoted above should contain reference to two elements. It should include the term "particular" to indicate that the discussion involves a specific person or corporation; and it should refer to one or more of the topics listed in §100(1)(f) [see Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; and Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981]. As such, a motion to discuss "the employment history of a particular person" or a "matter leading to the appointment of a particular person" would in my view be appropriate; a motion to discuss "personnel items" without more would not.

Another item for discussion in executive session pertained to "legal matters". Here I direct your attention to §100(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending, or current litigation". In this regard, it has been held that possible litigation or a threat of litigation would not constitute an appropriate basis for entry into an executive session, for the purpose of §100(1)(d) is to enable a public body to discuss its "litigation strategy"

in private, without baring its strategy to an 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. Civ., NYLJ, Dec. 5, 1983]. Moreover, in Daily Gazette v. Town Board, Town of Cobleskill [444 NYS 2d 44 (1981)], it was found that a motion to discuss "litigation" alone or one that "regurgitates" the statutory language of §100(1)(d) is insufficient. It was determined that in the case of pending litigation, an inclusion of the name of suit should be included in the motion for entry into an executive session.

The other topics identified for consideration in executive session, such as "summary items" and "for the good of the order" do not in my opinion indicate in any way whether the discussions could justifiably have been conducted during an executive session.

Lastly with respect to the absence of minutes of an executive session, 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, there need not be minutes of executive sessions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-996

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

March 7, 1984

Mrs. Frances L. Jacob, Chairman
LaGrange Democratic Committee
Barmore Road
LaGrangeville, NY 12540

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. Jacob:

I have received your letter of February 29 and the materials attached to it.

It is your view that the LaGrange Town Board has violated the Open Meetings Law. Specifically, you wrote that the Board "holds a regular meeting on the second Monday of the month and a 'work session' every Wednesday". The controversy as I understand it involves a work session held without public notice during which a member of the Board was appointed to the position of highway superintendent. When questioned about the absence of notice of the meeting, the Supervisor apparently indicated that notice was unnecessary on the ground that the gathering was a "work session".

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

First, the cornerstone of the Open Meetings Law is the term "meeting", which is broadly defined [see attached, Open Meetings Law, §97(1)], and which has been interpreted expansively by the courts. When the Open Meetings Law became effective in 1977, it was contended by many that "work sessions" and similar gatherings during

which there was no intent to take action, but only an intent to discuss public business, fell outside the scope of the Open Meetings Law. Nevertheless, in a landmark decision rendered in 1978 by the Court of Appeals, the state's highest court, it was held that any gathering of a public body for the purpose of conducting public business, including a so-called "work session", 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)]. Therefore, I believe that work sessions and similar gatherings are "meetings" subject to the Open Meetings Law in all respects.

Second, every meeting, including a work session must be preceded by notice.

Section 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.

Third, with respect to the enforcement of the Open Meetings Law, §102(1) of the Law states in 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. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes."

Lastly, since legal issues involving the propriety of a Town Board member who also holds the position of highway superintendent do not fall within the scope of the Committee's jurisdiction, it would be inappropriate to offer advice regarding that subject.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Town Board, Town of LaGrange

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3241
OML-AO- 997

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

March 7, 1984

Hon. Charles V. Dobrescu
Member, City Council
City Hall
Glen Cove, NY 11452

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. Dobrescu:

I have received your letter of February 29, in which you requested an advisory opinion. Your continued interest in complying with the Freedom of Information and Open Meetings Laws is much appreciated.

According to your letter:

> "[I]n order to disseminate pertinent information of government, it has been the continuing policy of the City of Glen Cove to publish in our official newspaper, the City's legal notices advertising bids, schedule of meetings and the minutes of City Council meetings in toto.
>
> "Due to budgetary restrictions, it is the intent of the Mayor to dispense with the publication in the newspaper of the minutes of our Council meetings."

You wrote further that it is your "intent to continue to post in public, the minutes of [your] meeting and to make available to the public, copies of such meetings on a cost-free basis".

In my opinion, the measures that the Council seeks to adopt are consistent and in compliance with the Freedom of Information and Open Meetings Laws.

With regard to minutes, I direct your attention to §101 of the Open Meetings Law (see attached), which prescribes minimum requirements concerning the contents of minutes of open meetings in subdivision (1) and minutes of executive sessions in subdivision (2). Subdivision (3) of §101 states further that:

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of infomration 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."

Based upon the language quoted above, while minutes of meetings must be made available to the public, there is no requirement that they be published in a newspaper, for example.

In addition, while an agency, such as the City of Glen Cove, may provide copies of records free of charge under the Freedom of Information Law, §87(1)(b)(iii) enables the City to charge up to twenty-five cents per photocopy for records not in excess of nine by fourteen inches.

Lastly, in a related area, while §99 of the Open Meetings Law requires that notice of the time and place of meetings be given to the news media and to the public by means of posting, subdivision (3) of §99 states that:

> "[T]he public notice provided for by this section shall not be construed to require publication as a legal notice."

As such, a public body is not required to place a legal notice in its official newspaper regarding its meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-998

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

March 13, 1984

Mr. Robert F. Reninger
[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. Reninger:

I have received your letter of March 9 pertaining to the status of "work sessions" under the Open Meetings Law.

Specifically, your letter contains the following questions:

> "1) Must prior public notice be given of the date and time of WORK SESSIONS
>
> 2) Can the public be excluded from WORK SESSIONS
>
> 3) Can a public body go into Executive Session during a WORK SESSION
>
> 4) Can a public body, such as a Board of Fire Commissioners, exclude the Secretary of the Fire District or the Fire District Treasurer from a WORK SESSION but permit the Fire Chief to attend the WORK SESSION."

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

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 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. 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. 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, since a "work session" is a meeting, a public body may enter into an executive session after following the procedure described in §100(1) of the Open Meetings Law for the purpose of discussing one or more of the topics listed in paragraphs (a) through (h) of the cited provision.

Fourth, with respect to attendance at a work session, assuming that there is no basis for conducting an executive session, presumably any person could be present.

Lastly, with regard to your request for all of the advisory opinions rendered by this office concerning work sessions, it is noted that there are numerous opinions, many of which are repetitive. Consequently, enclosed are the ten latest opinions. If after reviewing those opinions, you continue to want the others, please contact me and I will send them to you.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-999

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

March 14, 1984

Mr. A.E. Wasserbach
[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. Wasserbach:

Secretary of State Shaffer has forwarded your letter to the Committee on Open Government and asked that I respond on her behalf. The Secretary is a member of the Committee, which is a unit of the Department of State.

Your initial area of inquiry concerns notice of a meeting. Specifically, you asked whether it is "legal for a Town Board to call a meeting at 4 PM with only public notice via a radio show at 12:30". Apparently, that type of notice has been given on a least two occasions, and it is your view that the notice is inadequate and that it is unfair to schedule an afternoon meeting, for it is inconvenient for most people to attend at that time of the day.

In this regard, I direct your attention to §99 of the Open Meetings Law (see attached), which requires that public bodies must provide notice of the time and place of all 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) 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 subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings.

While the Open Meetings Law does not prohibit a public body from arranging that a meeting be held quickly, it does require that notice always be given to the news media and posted for the public. Further, while the Law does not refer to the time of the day when a meeting may be held, I agree with your contention that the Law seeks to enhance the capacity of members of the public to attend meetings of public bodies (see §95, the legislative declaration).

A related question concerns an "informational" meeting held to discuss a controversial sewer project. You indicated that, at the informational meeting, only the residents of particular communities were entitled to "speak and ask questions".

I would like to point out that the Open Meetings Law is silent with respect to public participation at meetings. Stated differently, although any person may attend an open meeting of a public body, there is nothing in the Law that confers a right on the part of the public to speak or otherwise participate. However, there is similarly nothing in the Law that prohibits a public body from permitting public participation. Consequently, if a public body chooses to permit public participation, I believe that it may do so based upon reasonable rules that treat all members of the public in like manner.

Further, having reviewed §209(q) of the Town Law, entitled "Sewer, drainage or water improvements", there is reference to a hearing. Subdivision (3) of that provision states in part that:

> "[S]ubsequent to the date of filing of the plan, report and map in the office of the town clerk, as required by section two hundred nine-c of this chapter, the town board may adopt an order and enter the same in the minutes of its proceedings reciting the proposed sewer, drainage or water improvement, a description of the boundaries of the proposed

> benefited area, if any, the maximum amount proposed to be expended for the proposed sewer, drainage or water improvement, the proposed method of apportioning the costs of such sewer, drainage or water improvement, the proposed method of financing to be employed, the fact that a plan, report and map describing the same are on file in the town clerk's office for public inspection and specifying the time when and the place where such board will meet and hold a public hearing at which all persons interested in the subject thereof may be heard concerning the same."

As such, if the provision quoted above applies to the proposal, presumably any interested person would have the capacity to express his or her views at a public hearing.

Lastly, you asked "HOW can a Town Board create a liability for the ENTIRE township when only those residents (a very small fraction of the Township population) were entitled to vote on those proposed projects". Since I am not an expert on municipal finance, I have contacted the Legal Affairs Bureau of the Department on your behalf regarding this question. I was informed that the State Constitution requires that a municipality must pledge its full faith and credit when it contracts for indebtedness. Article VIII, §2 of the Constitution states that:

> "[N]o indebtedness shall be contracted by any county, city, town, village or school district unless such county, city, town, village or school district shall have pledged its faith and credit for the payment of the principal thereof and the interest thereon."

I was also informed, however, that the users of the services provided pay sewer rents, and that non-users generally are not assessed payments.

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- 3249
OML-AO- 1000

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

March 15, 1984

Mr. James C. Krol
Administrative Assistant
St. Lawrence County Board of
Legislators
County Court House
Canton, NY 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. Krol:

I have received your letter of March 1, in which you requested a "ruling" from this office.

According to your letter:

> "...the St. Lawrence County Commissioner of Social Services is in receipt of a letter from the Regional Director of the Western Regional Office of Audit and Quality Control for the New York State Department of Social Services. Mr. Robert E. Smith, the Regional Director, was asked if a scheduled exit conference prior to the release of a draft audit of the County Department of Social Services is a meeting which could be attended by various members of the County Legislature and the media in general. Mr. Smith's reply is as follows: 'An exit conference is an intricate part of the audit process where findings are orally presented to the auditee for discussion, understanding, and agree-

> ment/disagreement. Audit findings are subject to change and further review may be warranted. For these reasons, the information presented at the exit conference is not subject to public release. The exit conference is not designed to be a public hearing open to the general public or media, therefore, they are excluded. Also the exit conference is not the proper form for direct inquiries from local officials or concerned parties..."

In conjunction with the commentary presented in the preceding paragraph, your first question is whether the statement made by Mr. Smith is reflective of "a valid departmental policy in light of the Freedom of Information and Open Meetings Laws". The second question is whether a draft audit is subject to the Freedom of Information Law.

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

First, it is emphasized that the Committee on Open Government does not have the authority to render what might be characterized as a "ruling". On the contrary, the Committee is authorized under both the Freedom of Information and Open Meetings Laws to provide advice. Consequently, the ensuing comments should be considered as advisory.

Second, similar inquiries have arisen involving situations in which municipal officials have met with representatives of various state agencies. From my perspective, whether the provisions of the Open Meetings Law might be applicable to a particular gathering is dependent upon attendance at the gathering.

For instance, similar exit conferences are conducted between representatives of the Department of Audit and Control and local government officials. If, for example, an auditor meets only with a county department head or perhaps with other members of staff, the Open Meetings Law would not be applicable. On the other hand, if, due to the subject matter, a board or committee with expertiese regarding the subject attends, the Open Meetings Law would in my opinion apply.

The scope of the Open Meetings Law is determined in part by the phrase "public body", which is 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 any agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based upon the language quoted above, it is clear in my view that a governing body, such as a county legislature, as well as a committee designated by a governing body, would be subject to the Open Meetings Law.

In conjunction with the facts described in your letter, it is assumed that the "auditee" is the County, or a component of County government. From there, the question would be who attends or who should attend the so-called exit conference. If various members of the County Legislature constituting less than a quorum sought to attend, the Open Meetings Law would not have been applicable. In such a case, although there would be nothing to prohibit the members of the Legislature, the public or the news media from attending, there would be no right to attend. On the other hand, if a quorum of a legislative committee, such as a social services committee, sought to participate in the exit conference in the performance of its official duties, attendance by a quorum of such a committee would in my opinion bring the gathering within the scope of the Open Meetings Law. Further, if there is no ground for executive session, I do not believe that a representative of a state agency could insist upon the exclusion of members of the public or the news media from such a meeting of a public body.

I would like to point out that the Open Meetings Law is silent with respect to public participation. Therefore, it has been advised that although a public body may permit public participation at a meeting, there is no requirement that the public must be allowed to speak or otherwise participate at an open meeting. Consequently, even if the public and news media may attend a meeting, there

need not be disruptions or a grant of an opportunity to be heard as in the case of a public hearing.

Moreover, the statement made by Mr. Smith is in my view somewhat confusing and conflicting. He refers to findings presented to the auditee for discussion and yet concludes that an exit conference is not the proper forum for inquiries made by local officials. In this instance, if a county legislative committee is responsible, at least in part, for the appropriate functioning of a county department, it is difficult to understand how the work of such a committee could or should be severed from that of the agency for which it has oversight.

In sum, if a quorum of a public body confers with a state official for the purpose of conducting public business, such a gathering would in my view constitute a "meeting" subject to the Open Meetings Law. Further, since such a gathering is held by a public body with others, those others in attendance coul d not in my view insist upon closing the meeting.

With respect to your question involving the draft audit, I direct your attention to the Freedom of Information Law.

While a document might be characterized as a "draft", I believe that is is nonetheless subject to rights of access granted by the Freedom of Information Law. In this regard, §86(4) 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."

Due to the breadth of the language quoted above, I believe that a draft audit constitutes a "record" accessible to the extent provided by the Freedom of Information Law by any agency that maintains it.

Second, 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, under the circumstances, it appears that only one of the grounds for denial would be relevant to the record in question. Due to its structure, however, portions of the audit, even though considered "draft", would in my opinion likely be available under the Freedom of Information Law.

Specifically, §87(2)(g) of the Law states that an agency may withhold records that:

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

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.

While I believe that a draft audit could properly be characterized as intra-agency material, or perhaps inter-agency material, since it is shared with the County, those portions consisting of statistical or factual information [see e.g., Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979); Ingram v. Axelrod, App. Div., 456 NYS 2d 146 (1982)] are in my view available. It is noted, too, that it has been found that auditor's work papers consisting of statistical or factual data are available [see Polansky v. Regan, 81 AD 2d 102 (1981)]. Conversely, until the audit is made final, those portions reflective of advice, suggestions, recommendation, or impression, for example, could in my opinion be withheld.

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: Robert E. Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1001

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

March 20, 1984

Mr. David S. Downing
News Director
WXTY 104
P.O. Box 352
Lake George Avenue
Ticonderoga, NY 12883

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. Downing:

I have received your letter of March 6, in which you requested a "determination" under the Open Meetings Law.

According to your letter:

> "[O]n Monday, March 5, 1984, four Trustees of the Village of Ticonderoga and the Ticonderoga Village attorney held a meeting at the Village Attorneys office to discuss a situation surrounding the suspension of the Ticonderoga Village Superintendent of Public Works by the Mayor on an earlier date".

You wrote further that the news media was not notified of the meeting. Consequently, it is your belief that the Board of Trustees:

> "(1) Failed to notify the local news media of the meeting, (2) Failed to call a special meeting of the board, (3) Failed to call

the special meeting to order, (4) Failed to adjourn to Executive session or motion to "discuss particular personnel'."

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

First, I would like to point out that the Committee on Open Government does not have the capacity to render what might be characterized as a "determination". The Committee is, however, authorized to prepare advisory opinions. Consequently, the ensuing remarks should be considered as advisory.

Second, based upon the description of the facts, it is possible that the Open Meetings Law may have been violated in terms of a failure to comply with procedural requirements. Nevertheless, it is possible, too, that the gathering was conducted outside of the requirements of the Open Meetings Law.

Section 103 of the Open Meetings Law contains "exemptions". If a gathering falls within the scope of an exemption, the requirements of the Open Meetings Law do not apply. Of potential relevance is §103(3) which exempts from the Open Meetings Law "any matter made confidential by state or federal law". If, for example, the sole purpose of the Board in meeting with its attorney involved seeking legal advice, the communications between the Board and its attorney in my view would be confidential, for they would fall within the scope of the attorney-client privilege (see Civil Practice Law and Rules, §4503). Consequently, if the sole purpose of the gathering was to engage in an attorney-client relationship, the communications would have constituted a matter made confidential by state law and, therefore, would have fallen outside the scope of the Open Meetings Law.

On the other hand, if the gathering in question was not conducted solely for the purpose of engaging in an attorney-client relationship, the Open Meetings Law in my opinion would have applied, for the gathering would have been a "meeting".

Assuming that the gathering in question was a "meeting", a term which has been expansively interpreted by the courts to include any gathering of a quorum of a public body for the purpose of conducting public business [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], notice should have been given to the news media and the public by means of posting in accordance with §99 of the Open Meetings Law. Further, even though the subject matter considered might have fallen within one of the grounds for executive session, an open meeting should have been convened and the procedure required for entry into an executive session should have been accomplished.

Section 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..."

Based upon the language quoted above, it is clear that an executive session is not separate from an open meeting but rather is a portion of an open meeting during which the public may be excluded. Therefore, if the gathering in question was a "meeting" subject to the Open Meetings Law, and not exempt from the Law, I would agree with your contentions regarding notice, as well as the requirements that the meeting should have been convened open to the public and that the procedure prescribed by §100(1) concerning entry into executive session should have been carried out.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Village Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3259
OML-AO-1002

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

March 22, 1984

Mr. Michael F. Vogt
Executive Director
Private Industry Council
P.O. Box 62
Corning, NY 14830

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. Vogt:

I have received your letter of March 9, as well as the materials attached to it.

Your inquiry concerns the status of the Chemung, Schuyler, Steuben Private Industry Council, Inc. under the Freedom of Information and Open Meetings Laws. In this regard, I am unaware of any judicial determination dealing with a private industry council ("PIC") and its responsibilities under either of the statutes. Consequently, your question involves a matter of first impression.

With respect to the Open Meetings Law, the scope of that statute is determined in part by the phrase "public body", which is defined to include:

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

Based upon a review of the language quoted above in terms of its components, I believe that each condition necessary to a finding that a PIC is a "public body" can be met.

First, a PIC is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. Second, according to the by-laws attached to your letter, its board consists of more than two members. Third, Section 3.a. of the Certificate of Incorporation states that one of the purposes for which the Corporation is formed is:

> "[T]o administer programs for and on behalf of the Counties of Chemung, Schuyler and Steuben and other program sponsors under and pursuant to programs of the United States Government, as approved by the United States Department of Labor, pursuant to the terms and provisions of Public Law 97-300, as enacted on October 13, 1982, and as it may be amended from time to time, and other related or successor programs."

As such, it appears that the Board conducts public business and performs a governmental function for three public corporations, the counties of Chemung, Schuyler and Steuben.

If my reasoning is correct, the Board of the Corporation is a "public body" required to comply with the Open Meetings Law.

In terms of rights of access to records, it is not entirely clear in my view that a PIC falls within the coverage of the Freedom of Information Law.

As you may be aware, the Freedom of Information Law is applicable to records of an "agency", which is defined in §86(3) 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."

Since a PIC is a not-for-profit corporation, it is questionable whether it could be characterized as a "governmental entity", even though it might perform a governmental function.

On the one hand, as a not-for-profit corporation, the entity in question is private; on the other, in view of the statutory provisions leading to its creation, it might be contended that, despite its not-for-profit status, a PIC is an arm of government and is, therefore, a governmental entity.

The only judicial determination of which I am aware that dealt with a similar issue is Westchester-Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)]. In that decision, the Court of Appeals found that a volunteer fire company, also a not-for-profit corporation, was an "agency" in view of its functions, notwithstanding its corporate status. It is noted, too, that the decision stressed the statement of legislative declaration appearing in §84 of the Freedom of Information Law, which indicates that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." Consequently, although it is possible that the records of a PIC might be subject to the Freedom of Information Law, I believe that an unequivocal statement as to the applicability of the Freedom of Information Law remains to be determined judicially.

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-1003

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

March 28, 1984

Mr. John R. Jacobs
[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. Jacobs:

I have received your letter of March 15 as well as the materials attached to it. You have requested an advisory opinion under the Open Meetings Law regarding gatherings of certain members of the Steuben County Legislature at a restaurant.

According to the materials, the County Legislature consists of seventeen members. The gatherings held at a restaurant have been attended by the Chairman of the County Legislature and eight legislative committee chairmen. There appears to be no dispute that the nine in attendance constitute a quorum, "with or without weighted voting".

Although the articles allude to my remarks regarding the propriety of meetings held in a restaurant, I would like to offer the following, more expansive comments.

First, it is noted that the definition of "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, found that the term "meeting" includes any gathering of a quorum of a public body held for the purpose of conducting of 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)]. I would like to point out, too, that the Appellate Division decision that preceded the Court of Appeals' determination made specific reference to the inclusion of so-called "work sessions" and "agenda sessions" within the requirements of the Law. Since a quorum of the County Legislature convenes at the restaurant for the purpose of discussing public business, I believe that it is a "meeting" subject to the Open Meetings Law in all respects.

Second, from my perspective, the intent of the Open Meetings Law is clear. As stated in a legislative declaration, the first section of the Law (§95):

> "[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 by fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

In view of the language quoted above, I believe that the Law is intended to enable any interested member of the public to attend meetings of public bodies without impediment.

While a restaurant might be open to the public, as a general matter, entry into a restaurant most often involves the purchase of food. While that may not be so in this instance, it is possible that many interested members of the public might feel constrained to enter a restaurant without ordering food. As such, while the Open Meetings Law does not prohibit meetings from being held in a restaurant, I believe that such a site might represent a psychological barrier to access to many who might otherwise want to attend.

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

> "[P]ublic bodies shall make or cause to be made all reasonable efforts to that meetings are held in facilities

> that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

I could not conjecture as to whether the restaurant in question permits barrier-free access to physically handicapped persons. Nevertheless, if a county facility does permit barrier-free access, I believe that the meeting would more appropriately be held in such a facility.

As you requested, copies of this opinion will be sent to the individuals identified in your letter

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Richard A. Argentieri
Gary D. Swackhamer
Bernard J. Smith
James G. Bacalles
James H. Burns
E. Beth Clark
John V. Malter
Charles W. Babcock
John Clifford
Lawrence A. Bauter
Joseph Hauryski
Donald R. Davidson
John Helgerson
Paul L. Hendricks
Lynn J. Morse
Althea O. Roll
John A. Snyder
Frederick A, Ahrens, Jr.
Russell N. Kemple
Star Gazette
The Evening Tribune
Yvonne Gill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1004

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

March 29, 1984

Mr. Patrick J. King, Jr.
Village Clerk
Village Hewlett Bay Park
30 Piermont Avenue
Hewlett, NY 11557-2193

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 March 14 in which you requested an advisory opinion under the Open Meetings Law.

Specifically, your inquiry is whether the clerk of a village must attend all meetings of the Board of Trustees, "even executive closed sessions". The Village Attorney apparently advised you that "a village clerk may be removed from an executive session".

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

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)].

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 session are the members of a public body, in this instance, members of the Village Board of Trustees. Therefore, as a general rule, I believe that the Board may permit the Clerk to attend an executive session, but it is not required to do so.

With regard to action appropriately taken during an executive session, §101(2) of the Open Meetings Law 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, §4-402 of the Village Law concerning the duties of a village clerk states in part that the clerk:

> "b. act as clerk of the board of trustees and of each board of village officers and shall keep a record of their proceedings;
>
> c. keep a record of all village resolution and local laws..."

In terms of preparation of minutes that may be required when action is taken during a proper executive session, it is suggested that there may be three options. First, the Village Board of Trustees could permit the Clerk to attend an executive session in its entirety. Second, the 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 of the purpose of taking minutes in conjunction with the duties imposed upon the Clerk by §4-402 of the Village Law. And third, the Board could deliberate toward a decision during an executive session, but return to an open meeting for the purpose of taking 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1005

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

April 3, 1984

Ms. Fran Stahl
[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. Stahl:

I have received your letter of March 30 in which you raised questions relative to the Open Meetings Law.

Specifically, having recently brought "a small tape recorder" to a meeting of the Republic Airport Commission, you were informed that you were prohibited from recording the meeting. You have asked whether, in my view, you have the right to use a tape recorder at open meetings of the Commission.

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

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

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 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 Ysteuta 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 Ysteuta decision requires that the instant opinion supersede the prior opinions of this office, which are cited above, and which were rendered before Ysteuta 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.

You also sought my comments regarding a statement of policy adopted by the Commission and a resolution amending its by-laws, both of which were attached to your correspondence.

The statement of policy pertains to requests for information or services that may be directed by members of the Commission to the Department of Transportation. In brief, any such request that involves "considerable staff effort" is reviewed by the Commission to determine whether the inquiry would be "productive". The Commission would then determine collectively whether the Department of Transportation should respond to the inquiry.

Since the policy does not pertain to the Freedom of Information or Open Meetings Laws, I do not believe that I could appropriately comment. Nevertheless, it is noted that any person may seek records from an agency pursuant to the Freedom of Information Law.

The amendment to the by-laws concerns the designation of the Chairman or his designee to be "the official spokesperson of the Commission" for the purpose of "expressing the Commission's viewpoints and actions as a whole". The resolution also indicates that the Commission "to the greatest degree possible, wishes to present a unified public position on a given subject."

Questions often arise when members of public bodies seek to express their views outside the confines of a meeting subject to the Open Meetings Law. In my opinion, the designation of an official spokesperson would not in any way conflict with provisions of the Open Meetings Law. However, I believe that any member of a public body may express his or her points of view publicly, so long as that member clearly indicates that he or she is speaking as an individual and not as a person representing the views of the Commission as a whole.

Lastly, in terms of the philosophy that underlies the Open Meetings Law and the creation of public bodies generally, I would like to offer the following brief remarks. First, from my perspective, public bodies are created for the purpose of bringing together people having disparate views, in order that a group after deliberating collectively, may arrive at a better decision that an individual could make alone. Further, while it may be desireable to present a "unified public position", I believe that the deliberative process, which is required to be open under the Open Meetings Law, envisions situations in which members of public bodies disagree.

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: Republic Airport Commission
Ross Pusatere, Office of Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1006

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

April 5, 1984

Miss Frances R. Thompson
[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 Miss Thompson:

I have received your recent letter in which you requested various materials and raised a question under the Open Meetings Law.

As requested, enclosed are two copies of the "Pocket Guide to New York's Open Government Laws" and the Open Meetings Law, which is found in Public Officers Law, Article 7, §§95-106.

Your question is whether it is "legally sound to move a Board Meeting (monthly) from place to place". You indicated that the meetings in question are open to the public, but that they are "not advertised well enough for a person to know where to go".

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

First, the Open Meetings Law does not require a public body to designate a location where all of its meetings will be held. Depending upon the nature of the board, however, and the laws with which it must comply, there may be situations in which a specific site must be designated for the purpose of holding meetings. For instance, §62(2) of the Town Law states in 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..." Whether such a provision may apply to the board to which you referred cannot be determined on the basis of the information provided in your letter.

Second, §99 of the Open Meetings Law requires that notice of the time and place of every meeting 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. If the news media do not publish a notice of the time and place of a meeting or if notice is not conveniently posted, it is suggested that you contact the board by telephone prior to a meeting in order to determine the location of a meeting.

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

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

Therefore, if a Board holds its meetings in a variety of locations, one of which provides barrier-free access to physically handicapped persons, "reasonable efforts" should be made to conduct meetings in that 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3270
OML-AO-1007

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

April 5, 1984

Hon. Kevin Moss
Supervisor
Town of Guilderland
Route 20
Guilderland, NY 12084

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 Supervisor Moss:

I have received your thoughtful letter of March 21 and appreciate your kind words.

The question raised in your letter, which was precipitated by an inquiry made by a constituent, concerns the application of the Open Meetings Law to meetings of commissioners of a newly created district.

You alluded to a "special act of the legislature" in 1982 that created the District. According to my research, the legislation in question is Chapter 490 of the Laws of 1982, which states that:

> "[N]otwithstanding any other provision of law, the term "improvement district", as defined in section two hundred nine-a of the town law, shall include an ambulance district in the town of Bethlehem and an ambulance district in the town of Guilderland, both towns being in the county of Albany."

Although the Town Board reviews the budgets of Ambulance Districts within the Town "and makes whatever changes it feels necessary", you indicated that the relationship between the Ambulance Districts and the Town differs from that of a fire district and a town. You also noted that "Our Ambulance Districts are different from a sewer improvement area or a water district since its members are volunteers who are not remunerated in any way for their services by the Town of Guilderland. Therefore, the operations of the Ambulance District are taken care of by members who elect their leaders."

In conjunction with the background information described above, the constituent raised the following questions regarding the Board of Commissioners of the Western Turnpike Rescue Squad, which is the Board of one of the Ambulance Districts:

> "1. Is it legally and morally correct to have the Western Turnpike Board meetings private with the public being refused admittance?
>
> 2. What opinions, influence or questioning process does the public have with regard to the decisions of the Western Turnpike Board?"

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

It is assumed that the Ambulance Districts are not-for-profit corporations. Therefore, while they may be creations of government, they do not clearly appear to be governmental enitites. Nevertheless, in view of the means by which the Districts were created, their formal relationship with the Town, the specific language of the Open Meetings Law, as well as a judicial determination which in my view is relevant, I believe that the meetings of the Boards of Commissioners of the Ambulance Districts are subject to the requirements of the Open Meetings Law.

The scope of the Open Meetings Law is determined in part by the term "public body", which is defined in §97(2) 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."

Under the circumstances, it appears that each of the conditions necessary to a finding that a board of commissions is a "public body" may be met.

First, the Board consists of at least two members, Second, it is required to conduct its business by means of a quorum, pursuant to either the Not-for-Profit Corporation Law or §41 of the General Construction Law. Third, I believe that the Board would "conduct public business" due to its functions and its relationship with the Town. And fourth, as the Board of an improvement district and due to its functions, it appears that the Board would perform a governmental function for a public corporation, in this instance, the Town of Guilderland.

If my assumptions are accurate, each component of the definition of "public body" is present with regard to the Board of Commissioners thereby bringing the Board within the coverage of the Open Meetings Law.

Perhaps equally important is a precedent indicating that a similar type of not-for-profit corporation is an "agency" subject to the Freedom of Information Law. Specifically, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the Court of Appeals, the state's highest court, found that volunteer fire companies, which are not-for-profit corporations, are subject to the Freedom of Information Law. In so holding, the Court stated that:

> "[W]e begin by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad

> declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added: Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [id. at 579].

From my perspective, the volunteer organization in question, is somewhat analogous to a volunteer fire company, which according to the decision rendered by the Court of Appeals, is subject to the Freedom of Information Law. Based upon the reasoning of the Court, I believe that the

meetings of a board of a volunteer fire company or, in this instance, the Board of Commissioners of an ambulance district, would fall within the r quirements of the Open Meetings Law. Consequently, it is my view that the meetings of the Board must be open to the public in accordance with the Open Meetings Law.

Lastly, the constituent's second question involves the role of the public in relation to meetings of the Board of Commissions. In short, the Open Meetings Law confers upon the public the right to attend and listen to the proceedings of public bodies. However, the Law is silent with respect to public participation. As such, it has consistently been advised that a public body may but is not required to permit the public to speak or otherwise participate at an open meeting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerard W. Duda

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3271
OML-AO- 1008

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

April 6, 1984

Mr. Charles H. Atkin
[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. Atkin:

Your letter addressed to the Office of Charities Registration has been forwarded to the Committee on Open Government, which is also a unit of the Department of State.

Your inquiry involves the scope of what you characterized as "sunshine laws". The phrase "sunshine laws" generally refers to statutes that guarantee the public's right to know about government. In New York, the provisions of law generally referred to as sunshine laws are the Freedom of Infomration and Open Meetings Laws.

The Open Meetings Law (see attached) is applicable to meetings of public bodies. 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."

Based upon the language quoted above, as a general matter, the Open Meetings Law applies to governmental entities, such as town boards, city councils, legislative bodies, and the like.

The Freedom of Information Law (see attached) is applicable to records in possession of governmental entities. Specifically, that statute is applicable to records of an "agency" which is defined in §86(3) of the Freedom of Information Law 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."

Consequently, records in possession of governmental entities in New York are subject to the provisions of the Freedom of Information Law.

The Corporation that is subject of your inquiry, the Bethany Senior Citizens Housing Corporation is, based upon further inquiry, a "type c" not-for-profit corporation. Without additional information regarding the corporation, I would not conjecture as to its specific purposes. Nevertheless, in the majority of circumstances, since a not-for-profit corporation is generally not a governmental entity, its records would fall beyond the scope of rights of access granted by the Freedom of Information Law, and its meetings would not likely be 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1009

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

April 11, 1984

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 March 21 in which you requested an advisory opinion under the Open Meetings Law.

Specifically, pursuant to a "Board Policy Statement" approved in 1978, the Community School Board of District #31 designates various advisory committees to assist the Board. Although meetings of the advisory committees had apparently been open to the public, you wrote that "Frank Murphy, Chairperson of the Personnel Advisory Committee, decided that Advisory Committees no longer must be open to the public." You added that Mr. Murphy based his decision on judicial determinations cited in an attachment to your letter.

In my opinion, advisory committees designated by the Board are clearly public bodies that must comply with the Open Meetings Law. The rationale for my view is described in the following remarks.

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, the case cited by Mr. Murphy, involved a situation 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 that 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 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 designated 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 [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Moreover, a review of the definition of "public body" in terms of its components in my opinion leads to the conclusion that an advisory body is subject to the Open Meetings Law. Specifically, an advisory body is an entity consisting of more than two members. It conducts its business by means of a quorum (see General Construction Law, §41 and Syracuse United Neighbors, supra). Further, in view of their duties, I believe that an advisory committee conducts public business and performs a governmental function for an agency, in this instance, the School District.

For the reasons expressed above, the advisory committees are in my view "public bodies" subject to the Open Meetings Law in all respects.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank Murphy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1010

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

April 11, 1984

Hon. Michael J. Finazzo
Councilman
Town of East Hampton
159 Pantigo Road
East Hampton, NY 11937

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 Councilman Finazzo:

I have received your letter of March 22 and the materials attached to it.

According to your letter, on February 29, the three majority members of the Town Board of the Town of East Hampton, on which you serve as a member, and the Town Attorney met in the Supervisor's office. You indicated that you were "intentionally not informed of this meeting" and that, in your view, "these meetings have been taking place on a regular basis."

You have requested my opinion regarding the situation.

First, §97(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening ot a public body for the purpose of conducting public business". It is noted that the state's highest court has expansively construed the definition to include 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Second, it is noted that §103(2) of the Open Meetings Law exempts from the Law political caucuses. However, it has been held judicially that the exemption regarding political caucuses is applicable only to discussions of political party business. It was also found that discussions of public business by the majority of the membership of a public body, even though they might represent a single political party, constitutes a "meeting" subject to the Open Meetings Law that may be attended by minority members and the public generally [see Sciolino v. Ryan, 103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 AD 2d 475, 440 NYS 2d 795 (1981)].

Third, from my perspective, the application of the definition of "meeting" involves an intent to convene as a body. The article attached to your letter appears to indicate that there was no intent that a quorum would convene, but rather that the gathering might have been a chance meeting. If that is so, it is possible that no violation of law occurred. On the other hand, if, as you intimated, gatherings of a majority of the Board are scheduled in advance, I believe that they should be considered "meetings" that must be preceded by notice [see attached, Open Meetings Law, §99] and convened open to the public.

In terms of the "action" that may be taken, §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."

To attempt to enhance compliance with the Open Meetings Law, a copy of this opinion will be sent to the Supervisor. Perhaps a review of the Law and its judicial interpretation will serve to avoid the necessity of the initiation of a legal proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Hon. Judith Hope, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3279
OML-AO-1011

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

April 10, 1984

Hon. Daniel P. Moynihan
Member of the U.S. Senate
733 Third Avenue
New York, NY 10017

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 Moynihan:

I have received your letter of April 6 and appreciate your interest in the New York Freedom of Information Law and Open Meetings Law (see attached).

You have requested that I review and respond with respect to comments made in the correspondence attached to your letter.

The first area of inquiry concerns rights of access to the full contents of a tape recording of an open meeting of a public body. The tape recording is apparently used as an aid in preparing minutes of meetings.

In this regard, I direct your attention to the Freedom of Information Law and would like to offer the following comments.

First, 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.

Second, it is emphasized that the Freedom of Information Law, §86(4), 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."

Since a municipal board is an agency subject to the requirements of the Freedom of Information Law [see §86(3)], once a tape recording exists, I believe that it constitutes a "record" that falls within the scope of rights of access. Moreover, it has been held judicially that a tape recording of an open meeting is a record that is accessible under the Freedom of Information Law [see Zaleski v. Hicksville Union Free School District, Board of Education, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978]. Therefore, based upon the specific language of the Law, as well as its judicial interpretation, it is clear in my view that a tape recording of an open meeting must be made available.

The second area of inquiry involves a contention that minutes of meetings must be accurate and that they consist of a verbatim account of statements made during a meeting. From my perspective, while a public body may prepare a verbatim transcript reflective of every statement made at a meeting, the Open Meetings Law does not require that minutes of that degree of detail must be maintained.

Section 101(1) of the Open Meetings Law prescribes what might be characterized as minimum requirements concerning the contents of minutes of open meetings. The cited provision states that:

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

Based upon the language quoted above, reference must be made in minutes to certain activities that occur during a meeting; however, it does not in my opinion require that a verbatim account of every comment made during a meeting be transcribed and preserved as 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3286
OML-AO-1012

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

April 12, 1984

Ms. Carol Matheke
[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. Matheke:

I have received your letter of March 26, as well as the materials attached to it.

The correspondence involves a series of events in which you had difficulty in obtaining records from the Village of Valatie in a timely manner.

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

First, as you are aware, §101(3) of the Open Meetings Law requires that minutes of an open meeting must be prepared and made available within two weeks of a meeting. It has been reported that public bodies often do not meet within two weeks and, as a consequence, have no opportunity to review or approve the minutes. In those situations, in order to comply with the Open Meetings Law, it has been suggested that the minutes be prepared and made available within the two week period, but that they be marked "unapproved", "non-final" or "draft", for example. By so doing, the public can learn generally of what transpired at a meeting; concurrently, notice is effectively given that the minutes are subject to change.

Second, you referred in the correspondence to the contents of minutes. Section 101(1) of the Open Meetings Law pertaining to minutes of open meetings contains what may be characterized as minimum requirements concerning the contents of minutes. The cited provision states that:

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

As such, it is clear in my view that minutes need not consist of a verbatim account of a meeting or refer to each comment made during a meeting.

Third, with respect to responses to requests for records, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, contain prescribed time limits for responses.

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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business 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 of 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)].

In addition, it has been held that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 108 Misc. 2d 536, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

Lastly, enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, the regulations to which reference was made earlier concerning the procedural implementation of the Freedom of Information Law, model regulations, and several pocket guides that summarize both laws. The model regulations were designed to enable agencies to comply with the Freedom of Information Law in terms of procedure by filling in the appropriate blanks. In addition, in an effort to enhance compliance, the same materials will be sent to the Mayor to be shared with Village officials.

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: Hon. Angelo Nero, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3284
OML-AO-1013

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

April 12, 1984

Ms. Judy R. Wever
[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. Wever:

I have received your letter of March 26 in which you raised a series of questions concerning the responsibilities of officials of the St. Regis Falls School District under the Freedom of Information Law.

The first question is whether it is "legal for the Board of Education to discuss proposed curriculum and staffing in Executive Session". In this regard, it is emphasized that the Open Meetings Law is based upon a presumption of openness. Stated differently, a meeting of a public body, such as a Board of Education, is presumed to be open, unless and until a topic arises that may appropriately be considered during an executive session. Section 100(1) of the Law specifies and limits the types of discussions that may be conducted in executive session.

In my opinion, the only ground for executive session relevant to the question is §100(1)(f), the so-called "personnel" exception. However, due to its specific language, I do not believe that an executive session could be held.

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

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

A discussion of curriculum involves a matter of policy and, as such, could never be considered during an executive session. Similarly, if a discussion of staffing pertains to the allocation of positions, rather than a "particular person", I believe that such a discussion must transpire during an open meeting.

The second question concerns "what can be done" when the Board discusses issues during executive sessions, but "does not release the results of these discussions". As a general matter, if a public body takes no action during an executive session, minutes of the executive session need not be prepared, and no additional disclosure would be required (see Open Meetings Law, §101).

Further, 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 58 NY 2d 626 (1982)]. As such, if a board takes action, based upon the judicial decisions cited above and the facts that you have provided, it would appear that such action should be accomplished by means of a vote taken during an open meeting.

The third question would involve the preparation of a "new plan" for programs and staff, and whether such a plan "need not be released until the preliminary budget meeting". Here I direct your attention to the Freedom of Information Law.

Like the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access. In brief, the Law provides that all records must be made available, except to the extent that they fall within one or more grounds for denial listed in §87(2)(a) through (h).

It would appear that one of the grounds for denial would relate to the record in question. Specifically, §87(2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency 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 described, it would appear, however, that the Board must discuss the plan, a matter of policy, during one or more open meetings. If that is so, presumably the nature of the plan would be disclosed at meetings, if not by means of a record. Further, if a plan is adopted, I believe that it would represent the policy of an agency and would, therefore, be available in its entirety upon adoption.

Fourth, you asked whether it is reasonable "to require a taxpayer to fill our a 'Freedom of Information' form, wait until the minutes have been approved a month later, and pay 25¢ a page once his request has been approved, just to get minutes that are not read in public meeting in the first place?"

In this regard, §101(3) of the Open Meetings Law requires that minutes of an open meeting must be prepared and made available within two weeks of the meeting. In situations where a board does not meet within two weeks and cannot approve the minutes, in order to comply with the Open Meetings Law, it has been advised that the minutes be made available within two weeks, but that they be marked "unapproved", or "draft", for example. By so doing, the public can learn generally of what transpired at a meeting; concurrently, notice is effectively given that the minutes are subject to change.

It is also noted that the Freedom of Information Law makes no mention of a particular form that must be used for the purpose of requesting records. In accordance with §89(3) of that statute, it has been advised that any request made in writing that "reasonably describes" the records sought should suffice. It has also been advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for delaying or denying access to records.

The fifth question pertains to a recent strike and unsuccessful efforts of concerned parents to meet with the Board, which referred questions to the superintendent. You asked whether that was "correct procedure". In my opinion, the Open Meetings Law does not deal with that type of situation. As such, I could not appropriately provide advice.

Sixth, you asked how the public can "be aware of all special meetings called by the board". You added that "Often these are not advertised, and members meet at school 'informally'." The focal point of the Open Meetings Law is the term "meeting" [see §97(1)], which has been expansively construed by the courts. In a landmark decision rendered by the Court of Appeals, the state's highest court, it was found that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conduct-

ing 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 there is an intent on the part of the Board to meet to conduct public business, even "informally", I believe that such a gathering would fall within the requirements of the Open Meetings Law.

Further, every meeting must be preceded by notice of the time and place where it will be held.

Section 99(1) of the Open Meetings Law 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) 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.

The seventh, eighth and ninth questions involve the responsibilities of a school board and/or its staff to answer questions or implement policy. Those questions do not arise under the Open Meetings or Freedom of Information Laws. It is suggested, however, that those questions might be answered by a representative of the State Education Department.

Your tenth question concerns any requirement that proposed new policies be read aloud at an opening meeting prior to their adoption. In my view, although a board may do so, there is no legal requirement that proposed policies be read aloud at meetings.

Lastly, you asked whether it is "legal to tape record the proceedings of a regular meeting". Based upon recent judidical determinations [see e.g., People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979)] and an opinion rendered by the Attorney General in 1980, any person may use a small, portable, battery-operated tape recorder at an open meetings 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 Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3293
OML-AO-1014

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

April 19, 1984

Mr. Donald P. Moore
[redacted]

Dear Mr. Moore:

Thank you for your kind comments regarding my presentation in Rye, which I found to be enjoyable.

As you requested, enclosed are copies of the Freedom of Information and Open Meetings Laws.

You asked whether either of those statutes applies to corporations organized under §402 of the Not-for-Profit Corporation Law. As you may be aware, the variety of corporations organized under the cited provision is extremely broad.

The Open Meetings Law is applicable to meetings of public bodies. 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 of such public body."

Based upon the language quoted above, as a general matter, the Open Meetings Law applies to governmental entities, such as town boards, city councils, legislative bodies, and the like.

The Freedom of Information Law is applicable to records in possession of governmental entities. Specifically, that statute is applicable to records of an "agency" which is defined in §86(3) of the Freedom of Information Law 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."

Consequently, records in possession of governmental entities in New York are subject to the provisions of the Freedom of Information Law.

From my perspective, the applicability of the Freedom of Information or Open Meetings Laws is in my view dependent upon the specific nature and function of the corporation. For instance, I believe that volunteer fire companies would be subject to both the Freedom of Information and Open Meetings Laws, for it has been held that those entities are "agencies" that fall within the requirements of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. Similarly, volunteer ambulance corps may, depending upon the relationship with a municipality, be subject to those statutes. In other instances, however, the nexus with government may be so insignificant or tenuous that neither statute would be applicable.

In short, without more specific information about a particular not-for-profit corporation, I could not advise that all or none would be subject to either of the two open government laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1015

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

April 23, 1984

Mr. Robert F. Reninger
[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. Reninger:

I have received your letter of April 2, you asked that I review a copy of a letter sent to the President of the Board of Education of the Greenburgh School District No. 7 by its attorney, Mr. Richard Gyory.

Having reviewed Mr. Gyory's letter, which provides a clarification of the practices of the Board, I cannot disagree with his comments. Further, I do not believe that they are necessarily inconsistent with a letter sent to you on March 5.

However, you alluded to a request for minutes of a meeting held on February 9. In response, you were apparently informed that there were no minutes. You added that "Presumably, if the Board was in Public Session, there would be minutes".

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

First, the Open Meetings Law contains what may be characterized as minimum requirements concerning the contents of minutes. Specifically, §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."

Based upon the language quoted above, minutes need not consist of a verbatim account of comments made at a meeting or refer to each person who may have spoken.

Second, if, for example, a meeting is convened open to the public and a public body immediately enters into an executive session, such a situation would in my view require that minutes be prepared, even if no additional action is taken. As you may be aware, the procedure for entry into an executive session is prescribed by §100(1) of the Open Meetings Law. That provision requires that a motion to enter into an executive session, including general reference to the topics to be discussed, must be carried by a majority vote of the total membership of a public body. Since a motion must be made, and since §101 indicates that reference to a motion must be included in minutes, minutes must in my view be prepared under such a circumstance. It is also noted that §101(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks of such meetings.

If you could further clarify the issues, perhaps I could provide additional guidance.

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

cc: Hon. Nathan Kolodney
Richard Gyory

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3295
OML-AO-1016

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

April 23, 1984

Richard D. Morse
Deputy Supervisor
Town of Rotterdam
Town Hall
Vinewood Avenue
Rotterdam, NY 12306

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. Morse:

I have received your letter of March 26, which reached this office on April 12. Your continuing interest in complying with the Freedom of Information and Open Meetings Laws is much appreciated.

Having reviewed the Town's resolution regarding access to records, I would like to offer the following comments and suggestions.

First, Section 2 includes the designations of both a fiscal officer and a hearing officer. In my opinion, neither is necessary. While the original Freedom of Information Law made reference to a fiscal officer responsible for the preparation of payroll information, the current Freedom of Information Law, which become effective on January 1, 1978, no longer includes reference to the designation of a fiscal officer.

The function of a hearing officer is unclear. It is noted, too, a denial of a request made by a records access officer may be appealed directly to the designated appeals officer. Therefore, if the designation of a hearing officer represents an additional step in a review procedure, the reference to such a designation should in my view be removed.

Second, the resolution contains verbatim, various aspects of both the original and the current Freedom of Information Law. From my perspective, the resolution should consist of a procedural framework for compliance; it need not make reference to substantive provisions of the Law.

Third, although the general regulations of the Committee appear to be adopted by reference, it might be preferable to incorporate the thrust of the Committee's regulations as an integral part of the Town's rules.

Fourth, and perhaps most importantly, I have enclosed a copy of model regulations that were designed to enable an agency to adopt procedures as required by law by filling in the appropriate blank spaces.

With regard to the resolution adopted in conjunction with the Open Meetings Law, it is noted that, unlike the Freedom of Information Law, the Open Meetings Law does not require the establishment of rules. Often the resolutions regarding the Open Meetings Law pertain only to a designation of the time and place of meetings.

I would like to point out 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 held 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff;d 45 NY 2d 947 (1978)]. Further, it has also been held that the exemption from the Open Meetings Law regarding political caucuses [see §103(2)] applies only to discussions of political party business; conversely, it was found that a gathering of a majority of the total membership of a public body held to discuss public business, even though those in attendance represent a single political party, constitutes a "meeting" subject to the Open Meetings Law, rather than a political caucus exempt from the Law [see Sciolino v. Ryan, 103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 AD 2d 475, 440 NYS 2d 795 (1981)].

As such, in many instances there may be no distinction between a "meeting" and a "work session" or "caucus".

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- 1017

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

April 23, 1984

Mr. Daniel Farrell
[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. Farrell:

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

As a member of the Town Board of the Town of Kinderhook, you raised questions regarding a recent meeting of the Board. Specifically, you wrote that the Board met on March 8 to discuss "various financial matters", and the Board entered into an executive session "where legal and personnel matters were considered". However, you indicated that "At no time prior to the meeting had public notice been given as to the date, time and place of the meeting". You added that, although it was a "special" rather than an "regular" meeting, the Board did not adopt any resolution authorizing the meeting.

You have asked whether violations of law may have occurred and what the "legal status of any actions taken at the meeting" might be.

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

First, it is emphasized that the definition of "meeting" found in §97(1) of the Open Meetings Law has been broadly construed by the courts. In a landmark decision rendered nearly six years ago, 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, whether gatherings are denominated as regular meetings, special meetings, or work sessions, for example, they are in my view subject to the requirements of the Open Meetings Law.

Second, §99 of the Open Meetings Law requires that notice of the time and place of every meeting must be provided.

Section 99(1) 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.

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.

Therefore, even if a meeting must be held quickly, I believe that notice must nonetheless be given.

Third, with respect to a special meeting of a town board, the only provision of which I am aware that deals with such a situation is §62 of the Town Law. Subdivision (2) of the cited provision states in relevant part that "The supervisor of any town may, and upon written request of two members of the board shall within ten days call a special meeting of the town board by giving at least two days notice in writing to members of the board of the time when and the place where the meeting is to be held."

Lastly, with regard to the status of action that may have been taken at the meeting of March 8, I direct your attention to §102 of the Open Meetings Law, which concerns the enforcement of the Law. Section 102(1) and (2) states that:

> "1. Any 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.
>
> "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. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.
>
> 2. In any proceeding brought pursuant to this section, costs and reasonable attorney feels may be awarded by the court, in its discretion, to the successful party."

Therefore, if the only violation constituted a failure to provide notice, that alone could not not in my opinion result in a nullification of action taken. Further, as a general matter, I believe that action taken by a public body remains valid unless and until a court renders a determination to the contrary.

Enclosed for your review are copies of the Open Meetings Law and an article that seeks to provide a common sense view of the Law. In addition, enclosed are several pocket guides that summarize the provisions of the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1018

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

April 23, 1984

Mr. Douglas E. Arters,
The Post Journal
P.O. Box 226
Brocton, NY 14716-0226

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. Arters:

I have received your letter of March 29, in which you requested a "ruling" under the Open Meetings Law.

According to your letter, a public body recently "entered into an executive session" during which no minutes were taken. You added that no record of the action taken, which apparently involved a personnel matter, was released.

You asked whether a public body is required to take minutes during an executive session, and, if so, whether the minutes should be made available.

First, neither the Committee nor its staff has the authority to render what might be characterized as a "ruling". Section 104 of the Open Meetings Law states that advisory opinions may be issued. Consequently, please consider my remarks advisory only.

Second, as a general matter, when a public body appropriately enters into an executive session, it may vote or take action during the executive session, unless the vote involves an appropriation of public monies. Relevant to your inquiry is §101(2) of the Open Meetings Law, which pertains to minutes of executive sessions and states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

As such, in my view, when action is taken during an executive session, minutes reflective of the final determination, the date and vote must be prepared. It is noted, however, that if a public body enters into an executive session and discusses an issue but takes no action, minutes need not be prepared.

Further, §101(3) of the Law states that:

> "Minutes 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 reflective of action taken during an executive session generally must be prepared and made available within one week of the executive session.

Lastly, it is emphasized that the foregoing should be considered as general guidance. My comments might be different if the public body involved is a school board or if, for example, the issue focused upon a tenured teacher or a police officer. In short, if you are willing to provide additional detail, perhaps my response could be more precise.

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- 1019

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

April 23, 1984

Ms. Hazel Shader
President
Concerned Citizens
Rock Stream, NY 14878

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. Shader:

I have received your letter of April 2, as well as the news article attached to it.

The article deals with a proposed "retreat" scheduled by the Board of Education of the Odessa-Montour Central School District. The purpose of the retreat, which is to be closed to the public, apparently involves an intent to "iron out problems working as a board" as stated by the Board president. It appears, though that other, more specific items may be discussed, "along the same lines, as a work session", according to the director of Labor Relations Center at the local BOCES. Further, while the District is located in Schuyler County, the retreat will be held in Steuben County.

You have asked for my opinion regarding the propriety of a closed "retreat". In this regard, I would like to offer the following comments.

First and perhaps most importantly, the focal point of the Open Meetings Law, the definition of "meeting" [see Open Meetings Law, §97(1)], has been expansively construed by the courts. In a landmark decision rendered by the Court of Appeals, the state's highest court, it was found that the term "meeting" includes any gathering 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)]. It is noted, too, that the Appellate Division decision that was unanimously affirmed by the Court of Appeals dealt specifically with situations in which "public bodies meet as a body in closed 'work sessions', 'agenda sessions', 'conferences', 'organizational meetings', and the like, during which public business is discussed, but without the taking of action (id. at 414). The Court stated, however, that "These meetings, regardless of how denominated, come within the tenor and spirit of the Open Meetings Law and should be open to the public" (id. at 416).

From my perspective, the retreat is being conducted to discuss the business of the Board. As such, based upon the Open Meetings Law and its judicial interpretation, I believe that it would constitute a "meeting" that must be open to the public. Clearly, the retreat is something other than a social gathering. Further, since the taxpayers are paying for the retreat, the retreat appears to be a gathering to be held for official school board business.

Since reference to an executive session was brought up in the article, I would like to add that a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, the Open Meetings Law specifies and limits the topics that may appropriately be considered behind closed doors [see Open Meetings Law, §100 (1)(a) through (h)].

Lastly, while the Open Meetings Law does not designate the locations where meetings may be held, I believe that a public body should hold its meetings in locations or facilities that would reasonably enable interested members of the public to attend [see §98]. To bolster that contention, I refer to the Legislative Declaration, §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 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."

Copies of this opinion and the Open Meetings Law will be sent to you and the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1020

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

April 24, 1984

Ms.Nellie M. Love
Superintendent
Whitesboro Central School
Administration Building
67 Whitesboro Street
Yorkville, NY 13495

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 Superintendent Love:

I have received your letter of April 2, as well as the materials attached to it. You have asked that I comment regarding a variety of issues that arise under the Open Meetings Law.

The first issue involves a quotation from the Utica Observer-Dispatch, March 28, 1984, in which it was written that "The state Open Meetings Law, which protects the public's right to participate in board deliberations..." In my view, the statement is inaccurate. The Open Meetings Law provides the public with the right to attend and listen to the deliberations of a public body (see Open Meetings Law, §§95 and 98); however, the Law is silent with respect to public participation. Therefore, in my view, while a public body may permit the public to speak or otherwise participate at meetings, there is no right to participate conferred upon the public by the Open Meetings Law.

The second issue involves the following statement: "An executive session by any public body cannot be scheduled in advance of a public meeting". As I explained during our telephone conversations, a public body cannot, in a technical sense, schedule an executive

session in advance of a meeting. That is so because §100(1) of the Law prescribes a procedure that must be accomplished during an open meeting before a public body may enter into an executive session. In brief, the procedure requires that a motion for executive session be made and carried by a majority vote of the total membership of a public body. Since it cannot always be known prior to a meeting which members will be present or absent, or whether a motion for entry into an executive session will indeed be carried, it has been advised that executive sessions should not be scheduled.

However, as indicated in your letter as well as the news article, the Board convenes an open meeting initially and then seeks a motion for entry into an executive session. From my perspective, such a procedure is appropriate.

A related issue involves your comments regarding the ensuing sentence in the article: "Nor can board members have prior knowledge of the subjects to be discussed in executive session, the law says". You questioned how an executive session could be productive if the members are unaware of the topics to be considered. I agree with what you intimated, and I believe that the sentence quoted from the news article represents a misinterpretation of the Law.

In my opinion if a public body is to function effectively, its membership should have as much knowledge or background information regarding the subject matter to be considered as possible prior to its deliberations as a body.

Further, I believe that familiarity with the subjects to be discussed represents the only method by which a member of a public body could cast an informed vote for or against a motion to enter into an executive session. For that very reason, it is emphasized that, in some instances, it cannot be known with certainty that a given subject will be discussed during an executive session. Therefore, while it is reiterated that, technically, an executive session should not be scheduled prior to a meeting, members of public bodies should in my view have prior knowledge of the substance of the issues to be considered at a meeting.

I hope that the foregoing will serve to clarify the issues that you raised in conjunction with the news article. Copies of this opinion will be sent to the Utica Observer-Dispatch.

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: Donna Hagemann, Executive Editor
Don Knorr

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3307
OML-AO-1021

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

April 26, 1984

Mr. Michael J. Murphy
[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. Murphy:

I have received your letter of April 5, in which you requested my comments regarding the contents of a variety of materials forwarded with your letter.

Since few specific questions have been raised, I would like to offer the following general comments regarding issues which in my view have arisen concerning the materials.

First, it is emphasized that the Freedom of Information Law is an access to records law. Stated differently, the Freedom of Information Law is not a vehicle under which a member of the public may require that questions be answered. It is, however, a statute that enables any person to request records of an agency, such as a school district.

Second, in a related vein, the Freedom of Information Law applies to existing records and states in §89(3) that, as a general rule, an agency is not required to create or prepare a record in response to a request.

In conjunction with one of your questions, you referred to a contention by the District Clerk that the vote of each member of a board of education is not required, but rather only the "final tally" would be required. Please note that one of the few exceptions to the rule that a record need not be created involves a record of votes. 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..."

Consequently, in my opinion, in any instance in which the School Board votes as a body, a record must be prepared which indicates which members voted and the manner in which each member cast his or her vote. If, for example, the Board consists of nine members and a vote is unanimous, I believe that an indication that the vote was nine to zero would be adequate. However, if the vote was seven to zero or if a dissenting vote was cast, I believe that the voting record must indicate who voted and how each member voted.

A related issue arose regarding a request for records that had been disposed of after a year. The Freedom of Information Law does not deal with the retention of records. However, pursuant to §65-b of the Public Officers Law, the Commissioner of Education has developed detailed schedules indicating minimum retention periods for numerous records. It would appear that the records in question could be disposed of in conjunction with a retention schedule established by the State Education Department.

Third, in terms of rights of access generally, the Freedom of Information Law is based upon a presumption of access. 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, §87(2) of the Law states that accessible records must be made available for inspection and copying, and §89(3) provides that an agency must prepare copies of records upon payment of or offer to pay the established fee for photocopying. That fee cannot exceed twenty-five cents per photocopy for records up to nine by fourteen inches, unless a different fee is prescribed by statute [see Freedom of Information Law, §87(1)(b)(iii)].

One of the issues raised in your letter concerns an "investigation" regarding an alleged denial of wages to employees of a particular school. Apparently, the report of the investigation was brief and was made available to you. Subsequently, you requested the records inspected by various School District officies that were used in preparation of the report. I would like to point out that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described".

Under the terms of your request, I would conjecture that it may be difficult, if not impossible, to locate the records that may have been reviewed by the officials that you identified. If that is so, the request, from my perspective, would not have reasonably described the records sought.

Next, one of your requests involves records of salaries and expenses of various District officials. To the extent that such records exist, I believe that they would be available. Section 87(3)(b) of the Freedom of Information Law requires that each agency maintain a record indicating the name, public office address, title and salary of every officer or employee of the agency. In addition, records of expenditures would in my view be accessible on the ground that they constitute factual data available under §87(2)(g)(i).

Finally, one of your latest requests deals with minutes of open meetings and executive sessions of the Board of Education. Here I direct your attention to the Open Meetings Law. Section 101(1) contains what might be characterized as minimum requirements concerning the contents of minutes. The cited provision states that:

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

Further, §101(3) requires that minutes of open meetings be prepared and made available within two weeks of such meetings.

I would also like to point out that, 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 58 NY 2d 626 (1982)]. As such, if a board takes action, based upon the judicial decisions cited above and the facts that you have provided, it would appear that such action should be 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: Leonard Adler, Superintendent
Jeanne Caravella, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3308
OML-AO-1022

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

April 27, 1984

Mr. James R. Beebe
[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. Beebe:

I have received your letter of April 3, as well as the materials attached to it.

Having requested all correspondence between the Superintendent and the Board of Education of the Newark Valley Central School District, you were initially informed that "Requested records are exempted under the Freedom of Information Law". Following the denial, you appealed to the Superintendent, who affirmed, citing §87(2)(g) of the Freedom of Information Law.

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

It is emphasized at the outset 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.

I would also like to point out that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. Consequently, it is clear in my view that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, I believe that the quoted language requires an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

The provision cited by District officials as the basis for a denial pertains to "inter-agency or intra-agency materials". Inter-agency materials would consist of records transmitted from one agency to another. Intra-agency materials involve communications among or between officials of one agency. As such, the correspondence between the Superintendent and the Board would constitute "intra-agency" material. Due to the structure of §87(2)(g), inter-agency and intra-agency materials must often be made available in whole or in part.

Specifically, the cited provision states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency 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.

From my perspective, the correspondence that you requested must be reviewed to determine which portions must be made available as described above.

You referred to and included a copy of a record presented to the Board regarding polling places and related information regarding elections. If, for example, the record was prepared by a District official, it could in my view be characterized as "intra-agency" material; nevertheless, it consists solely of "statistical or factual" information. Therefore, I believe that, on request, it would be accessible to any person under the Freedom of Information Law.

Reference was also made to the Board members' receipt of copies of minutes of previous Board meetings, and an apparent denial of those records on the ground that they are "intra-agency material". Once again, minutes prepared by the District Clerk or a different District official would in my opinion constitute "intra-agency" material. However, assuming that minutes consist of a rendition of events transpiring at a meeting, they would be reflective of "factual...data" accessible under §87(2)(g)(i). They might also contain instructions to staff that affect the public or final agency policies or determinations accessible respectively under §87(2)(g)(ii) or (iii).

Lastly, I would like to direct your attention to the Open Meetings Law as it pertains to minutes. With regard 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."

Further, §101(3) of the Open Meetings Law requires that minutes of open meetings must be prepared and made available within two weeks of such meetings. In situations in which a public body does not meet within two weeks and, therefore, has no opportunity to approve minutes, the following suggestion has been made. To comply with the two week time period, when a public body does not approve minutes, the minutes should nonetheless be prepared and made available after having been marked "unapproved", "draft", or "non-final", for example. By so doing, the requirements of the Open Meetings Law are given effect and, concurrently, members of the public who receive the minutes are provided notice that the minutes are subject to change.

Enclosed are copies of the Freedom of Information and Open Meetings Laws. In addition, copies of this opinion and the two laws will be sent to Mr. Micha, the Records Access Officer, and Dr. Starkweather, the Superintendent and Appeals Officer.

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: Anthony Micha
Dr. William D. Starkweather

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1023

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

April 30, 1984

Mr. Jim Fox
Observer Bureau
Gerace Office Building
Mayville, NY 14757

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. Fox:

I have received your letter concerning the application of the Open Meetings Law to a committee of a county legislative body.

Specifically, you wrote that:

> "[O]n March 28, the Environmental Affairs Committee of the Chautauqua County Legislature, following a full meeting of the parent body, called an 'informal' meeting. It was called at the insistence of one of its minority members to discuss conditions at the county landfill. Chairman Larry Wilcox insisted it was to be an 'informal' meeting with no minutes kept. During that meeting, serious questions about operation of the landfill were raised."

Although you were able to attend the gathering held on March 28, you added that, approximately a week later "another similar session was held, and the clerk of the legislature, O. Winston Bartholomew, was flatly ordered by Mr. Wilcox 'not to tell the press.'"

I would like to offer the following comments regarding the situations that you described.

First, the Environmental Affairs Committee or any committee of the County Legislature is in my view required to comply with the Open Meetings Law. The coverage of the Open Meetings Law is determined in part by the term "public body", which is 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."

Based upon the language quoted above, I believe that the Open Meetings Law clearly applies not only to governing bodies, but also to a "committee, subcommittee or similar body".

Second, the definition of "meeting" [see 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 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 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)].

It is noted that the Orange County case arose due to a claim that "work sessions" and similar "informal" gatherings fell outside the requirements of the Open Meetings Law. Here I would like to add that the Appellate Division, whose decision was unanimously affirmed by the Court of Appeals, found that:

> "[T]he word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the

> application of the law to gatherings which have as their true purpose the discussion of the business of a public body or matters pending before a public body" (60 AD 2d 409, 415).

In sum, an "informal" gathering of the Environmental Affairs Committee as described in your letter would in my opinion constitute a "meeting" subject to the Open Meetings Law in all respects.

Lastly, §99 of the Open Meetings Law requires that public bodies provide notice of the time and place of their meetings prior to all meetings, whether regularly scheduled or otherwise.

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. Larry Wilcox, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1024

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

May 1, 1984

Hon. Daniel Farrell
Hon. Charles White
Members of Kinderhook Town Board
RD
Valatie, New York 12184

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 Messrs. Farrell and White:

I have received your letter of April 10 in which you requested a response regarding an action taken by the Town Board of the Town of Kinderhook.

You wrote that the "town board majority adopted a rule that only the Town Clerk may legally tape record public meetings held by the Board". You added that members of the public are permitted to tape record the meetings, but that you, as minority members of the Board, are prohibited from taping.

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

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

Most recently, the Supreme Court, Nassau County, also found that a public body could not prohibit the use of a "hand held battery operated tape recorder" at an open meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 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 Ysteuta 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 Ysteuta decision requires that the instant opinion supersede the prior opinions of this office, which are cited above, and which were rendered before Ysteuta was decided."

In view of the foregoing, I do not believe that the Town Board could prohibit any of its members or the public from using a portable, battery operated tape recorder 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

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3326
OML-AO- 1025

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

May 8, 1984

Mr. Robert L. Hemming
[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. Hemming:

Your letter of April 17 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. As you are aware, the Committee is responsible for advising with respect to the Freedom of Information Law and Open Meetings Law.

In terms of background, you requested that the Attorney General conduct an investigation to determine whether the Village Board of Trustees of the Village of Waterford is complying with the Open Meetings Law. Please be advised that this office does not have the resources or the authority to engage in such an investigation. Nevertheless, in an effort to assist you, a copy of this opinion will be sent to the Board of Trustees.

Your initial area of inquiry pertains to the brevity of meetings held by the Board of Trustees. You have inferred that other meetings closed to the public might be held, and you alluded to a situation in which a meeting was adjourned, but the Board apparently continued to confer.

In this regard, it is emphasized that the definition of "meeting" [see attached, Open Meetings Law, §97(1)] has been expansively interpreted by the courts. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, found that the term "meeting" in-

cludes 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 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, it is clear in my view that work sessions, agenda meetings, and similar "informal" gatherings fall within the scope of the Open Meetings Law, even if no action is taken at such gatherings.

You also referred to difficulty in obtaining minutes of meetings and budget reports. With respect to minutes, §101(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks. In situations in which action is taken during an executive session, minutes reflective of the nature of the action taken, the date and the vote must be prepared and made available within one week. Questions have often arisen regarding situations in which a public body might not meet for two weeks and, therefore, cannot approve minutes within that period. In those cases, it has been advised that the clerk or whoever is responsible for preparing the minutes should do so within two weeks, but that minutes may be marked "unapproved", "draft", or "non-final", for example. By so doing, the public can learn generally what transpired at a meeting and, concurrently, notice is effectively given that the minutes are subject to change.

Lastly, I believe that budget reports and similar, related records are accessible under the Freedom of Information 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, §87(2)(g)(i) requires that inter-agency or intra-agency materials consisting of "statistical or factual tabulations or data" are accessible. Assuming that budget reports are reflective of statistical or factual information, I believe that they would be available to any person. I would like to point out, too, that §89(3) of the Freedom of Information Law requires that an agency respond to a written request that reasonably describes the records sought within five business days of the receipt of a 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

Enc.

cc: Village Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1026

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

May 11, 1984

Mr. John G. Brenon
Ward and Brenon
5330 Main Street
Williamsville, NY 14221

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. Brenon:

I have received your letter of May 4, as well as the materials attached to it.

You have requested an advisory opinion regarding the status of the Kensington-Bailey Neighborhood Housing Services Inc. under the Open Meetings Law.

According to your letter, the corporation in question was organized under the Not-for-Profit Corporation Law and maintains relationships with various municipal, state, and federal agencies. You wrote further that the primary role of the corporation is as a "conduit for loan applications" to the City of Buffalo and private lenders. You also enclosed a copy of a contract with the City of Buffalo Urban Renewal Agency which describes the obligations and responsibilities of the Corporation as a contractor.

Based upon a review of the materials that you have forwarded, I do not believe that the Corporation is a "public body" subject to the Open Meetings Law. Section 97(2) of the Open Meetings Law defines "public body" to mean:

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

From my perspective, the Corporation likely does not "conduct public business". Further, in its capacity as a contractor, it does not appear that it performs a governmental function.

In short, if my assumptions are accurate, the Kensington-Bailey Neighborhood Housing Services, Inc. is not a "public body" and, therefore, its meetings would fall outside 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3336
OML-AO-1027

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

May 15, 1984

Mr. Dominic Tom
Schenectady Gazette
332 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 Mr. Tom:

I have received your letter of May 8, in which you requested advice regarding two areas of inquiry.

The first pertains to "an impending attempt by the Duanesburg Town Board to possibly institute a ban on the use of recording and audio-visual equipment at town meetings". You have requested my comments regarding the legality of such a move.

It is noted at the outset that the Open Meetings Law is silent with respect to the use of tape recorders as well as audio-visual equipment. While there are several judicial determinations concerning the use of tape recorders at open meetings of public bodies, I am unaware of any determination concerning the use of television cameras or similar devices at meetings.

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

Notwithstanding Davidson, however, the Committee 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 1979. That decision arose when two individuals sought to bring their tape recorders at 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 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."

Most recently, the Supreme Court, Nassau County, also found that a public body could not prohibit the use of a "hand held battery operated tape recorder" at an open meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 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 Ysteuta was decided."

In view of the foregoing, I do not believe that the Town Board could prohibit a member of the public from using a portable, battery-operated tape recorder at its open meetings.

With respect to the use of other types of equipment, I believe that the principle involved concerns the effect of cameras or similar equipment upon the deliberative process. If the use of cameras, special lighting, and related equipment would clearly be disruptive to the deliberative process, it would appear that a rule prohibiting the use of such devices would be reasonable.

Your second area of inquiry concerns an audit prepared by the United States Department of Housing and Urban Development (HUD) relative to the City of Glens Falls. You asked "how much information city officials may release concerning HUD case files". You wrote further that the Director of the City program maintains that he cannot release information about the files "since the program...is between his office and the federal government".

Here I direct your attention to the Freedom of Information Law. That statute 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 fact that records might involve relationships with a federal agency would not in my view alone affect rights of access to records.

Without knowledge of the nature of the records in which you are interested, specific advice cannot be offered. However, as you may be aware, an agency is required to respond to a request for records "reasonably described" [see attached, Freedom of Information Law, §89(3)]. Further, upon locating the records, the agency is in my view required to review them for the purpose of determining which portions, if any, fall within one or more of the grounds for denial listed in §87(2). I would like to point out, too, that §87(2) refers to the capacity to withhold "records or portions thereof" that fall within one or more of the grounds for denial. Consequently, there may be situations in which a single record might be both accessible and deniable. For instance, depending upon the nature of a recipient of a grant or loan, there may be considerations of personal privacy. While the income level of a recipient might be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see §87(2)(b)], the deletion of identifying details might render the remainder of such a record accessible.

Lastly, HUD is a federal agency and the City of Glens Falls is an "agency" subject to the New York Freedom of Information Law. In this regard, although §87(2)(g) of the Freedom of Information Law permits the withholding of inter-agency or intra-agency materials, I do not believe that §87(2)(g) could be cited to withhold communications between the City and HUD. Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

The language quoted above indicates that the Freedom of Information Law, in terms of rights of access as well as the the authority to withhold, pertains to records of state and local government. Since the definition of "agency" does not include a federal agency, it does not appear that §87(2)(g) could be cited as a means of withholding records communicated between the City and a federal agency.

Moreover, a recent decision rendered by the state's highest court, the Court of Appeals, stressed the breadth of the Freedom of Information Law. In Washington Post v. NYS Insurance Department [App. Div., 462 NYS 2d 208 (1983), reversed __ NY 2d __ (1984)], it was contended by a state agency that records submitted voluntarily and under a promise of confidentiality to the Insurance Department fell outside the scope of the Freedom of Information Law. The Court of Appeals reversed, citing the broad definition of "record" appearing in §86(4) of the Freedom of Information Law, holding that records are presumptively available except to the extent that a ground for denial may justifiably be cited.

In short, in my view, a denial based solely upon the relationship between the City of Glens Falls and the federal government is without foundation, for rights of access must in my view be determined on the basis 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

RJF:jm

cc: Town Board
City of Glens Falls Urban Renewal Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3340
OML-AO-1028

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

May 16, 1984

Mr. Robert M. Porterfield
Mr. Brian Donovan
Newsday
Long Island, NY 11747

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 Messrs.:

I have received your letter of May 11 concerning the application of the Freedom of Information and Open Meetings Laws to entities involved in industrial development on Long Island.

Your questions pertain to the application of those statutes to "County and Local Industrial Development Agencies and the Long Island Development Corporation (LIDC).

In terms of background, the LIDC is a corporation subject to the provisions of §1411 of the Not-for-Profit Corporation Law. The LIDC has apparently been designated as a "branch bank" for the New York State Job Development Authority and was formed, in part, "for the purpose of being designated as a Certified Local Development Corporation under the United States Small Business Administration's Section 503 Program." In addition, you wrote that "According to a federal audit report, much of the LIDC's assets are receivables from both Nassau and Suffolk County, indicating that large sums of taxpayer's money are used for operating purposes."

Having contacted Ms. Roslyn Goldmacher, the Processing and Servicing Administrator for LIDC, Ms. Goldmacher indicated that she was informed by a representative of the Small Business Administration that the information that you requested "was confidential and the Small Business Administration had determined that it could not be released to the public."

In conjunction with the foregoing, you have raised the following questions:

> "1.) Whether or not the LIDC (as well as Local and County Industrial/Economic Development Corporations) are governmental agencies subject to the New York State Freedom of Information Laws.
>
> 2.) If so, whether or not we have a right of access to uncensored copies of the minutes of the LIDC's Board of Directors meetings and copies of any annual reports submitted to any authority, county, state, or federal.
>
> 3.) Whether or not the LIDC is required to post public notice of regular and special Board of Directors meetings and whether or not the LIDC is required to admit members of the public to such meetings."

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

First, with respect to industrial development agencies, I believe that the records of such agencies are clearly subject to the Freedom of Information Law, and that the meetings of the boards of such agencies fall within the requirements of the Open Meetings Laws. Section 856 of the General Municipal Law, which is entitled "Organization of Industrial Development Agencies", states in subdivision (2) that such an agency "shall be a corporate governmental agency, constituting a public benefit corporation". Since a public benefit corporation is a "public corporation" as defined under §66(1) of the General Construction Law, an industrial development agency is in my view clearly a governmental entity subject to the provisions of the Freedom of Information Law. Further, to reiterate, I believe that its board would constitute a public body required to comply with the Open Meetings Laws.

With respect to the LIDC, for the reasons discussed below, its meetings must in my view be held in accordance with the Open Meetings Law. However, the application of the Freedom of Information Law to the records of the LIDC is somewhat unclear.

The scope of the Freedom of Information Law is determined in part by §86(3), which defines "agency" to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public coproration, 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."

In view of the language quoted above, the question is whether the corporation is a "governmental" entity performing a "governmental" function.

As a corporation subject to §1411 of the Not-for-Profit Corporation Law, the LIDC may be characterized as a "local development corporation". The cited provision describes the purposes of local development corporations and states that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

Therefore, due to its status as a not-for-profit corporation, it is not clear that the LIDC is a governmental entity, but it is clear that it performs a governmental function.

In an effort to learn more about local development corporations generally, it has been found that their relationships to government are inconsistent. Some are apparently analogous to chambers of commerce and, in great measure, carry out their duties independent of government. Others appear to be extensions of government that carry out their duties in conjunction with government. In my opinion, the LIDC, as you have described its relationships with government, likely falls into the latter category.

Although I am unaware of any judicial determination that deals specifically with the status of a local development corporation under the Freedom of Information Law, it is noted that there is precedent regarding the application of the Freedom of Information Law to certain not-for-profit corporations. Specifically, in Westchester-Rockland Newspaper v. Kimball [50 NYS 2d 575 (1980)], the Court of Appeals found that volunteer fire companies, which are not-for-profit corporations, are subject to the Freedom of Information Law. In so holding, the Court stated that:

> "[W]e begin by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government, relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not

> expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit."

Volunteer fire companies, not-for-profit corporations, perform "an essential public service"; local development corporations perform "an essential governmental function." The boards of volunteer fire companies are chosen independently, and without the consent of the municipalities with which they maintain a relationship.

Due to the relationships with and the strong nexus between the LIDC and various entities of government, it is possible that similar reasoning might be applied with respect to the LIDC as was described in the decision cited above rendered by the Court of Appeals. If such a rationale is applicable, the LIDC would be subject to the requirements of the Freedom of Information Law.

Notwithstanding the lack of clarity regarding the status of the LIDC under the Freedom of Information Law, I believe that meetings of the Board of the LIDC are subject to the Open Meetings Law.

The scope of the Open Meetings Law is determined in part by the phrase "public body", which is defined in §97(2) to mean:

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

By breaking the definition into its components, I believe that each condition necessary to a finding that a local development corporation is a "public body" may be met. A local development corporation is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. Its board consists of more than two members. Further, based upon the language of §1411(a) of the Not-for-Profit Corporation Law, which was quoted in part earlier, it appears that a local development board conducts public business and performs a governmental function for more than one corporation, in this instance, the Counties of Nassau and Suffolk.

In conjunction with your questions, if it is assumed that the Board of the LIDC is subject to the Open Meetings Laws, I believe that it would be required to provide notice pursuant to §99 of that statute under the Open Meetings Law. In brief, §99 requires that notice of the time and place of all meetings must be given to the news media and to the public by means of posting in one or more designated, conspicuous public locations. It is noted, too, that §101 of the Open Meetings Laws requires that minutes of meetings be prepared and made available in accordance with the Freedom of Information Law.

The extent to which "uncensored copies" of minutes of meetings of the LIDC Board or annual reports submitted by the Board to "any authority, county, state, or federal" agency must be determined in my opinion on the basis of the Freedom of Information Law. There may be aspects of such records which, depending upon their contents, might be withheld. However, it is emphasized 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 of the grounds for denial appearing in §87 (2)(a) through (h) of the Law.

Therefore, if the LIDC is subject to the Freedom of Information Law, records sought from the Corporation would have to be reviewed in their entirety to determine which portions fall within one or more of the grounds for denial. For instance, an annual report might contain trade secrets in the nature of financial data that might be deniable under §87(2)(d) of the Freedom of Information Law. Nevertheless, the fact that accessible and deniable information found within one record or report might be intertwined, that alone, based upon case law, would not render the records deniable in toto [see Ingram v. Axelrod, 90 AD 2d 568 (1982)]. On the contrary, the agency would be obliged to review the records sought to determine the extent, if any, to which one or more grounds for denial might justifiably be asserted.

The same principles would apply with respect to records of the LIDC submitted to an agency, such as a county. Those records would in my view be presumptively available and could be withheld only on the basis of the grounds for denial listed in §87(2) of the Freedom of Information Law.

Lastly, you wrote that the Small Business Administration informed the LIDC that the information sought "was confidential". Once again assuming that the LIDC is subject to the Freedom of Information Law, neither a claim nor a promise of confidentiality would in my view serve as a basis for withholding [see Washington Post Co. v. NYS Insurance Department, App. Div., 462 NYS 2d 208, reversed __NY 2d__, March 29, 1984]

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

RJF:ew

cc: Mr. Peter Cohalan, Suffolk County Executive
Mr. Joseph Caputo, Suffolk County Controller
Mr. Francis Purcell, Nassau County Executive
Mr. Owen Smith, Deputy Nassau County Executive
Ms. Roslyn Goldmacher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3352
OML-AO-1029

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

May 23, 1984

Mr. James C. Mescall
[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. Mescall:

I have received your letter of May 11, as well as the materials attached to it.

You wrote that you recently directed a request to the Office of Court Administration for records related to your job performance as court officer. In response to your request, John Eiseman, Deputy Counsel, indicated that the records pertaining to you constituted intra-agency materials that are deniable. He stated further that there are no documents pertaining to incidents that "were received from outside sources". You have asked "what reasons are good enough" for the Office of Court Administration to withhold information that you need in conjunction with the proceeding before the Division of Human Rights. It is your contention that "they had to use outside sources" during an investigation prior to a determination regarding your employment. As such, you have asked whether you may "ask to have copies of the investigation that the Applicant Verification Unit" performs. The third question is whether an "evaluation panel" falls within the scope of the Open Meetings Law and whether you may request minutes or records of its meetings.

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

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that, as a general rule, an agency is not required to prepare or create a record in response to a request. Consequently, I do not believe that the Freedom of Information Law may be used as a vehicle for seeking information that does not exist in the form of a record or records. Further, although you could request records pertaining to an investigation, if no such records are in possession of the Office of Court Administration, the Freedom of Information Law would not in my view apply.

Second, with respect to the denial itself, Mr. Eiseman alluded to the exception found in §87(2)(g) of the Freedom of Information Law. The cited provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public or final agency policy or determinations must be made available. However, the cited provision permits an agency to withhold inter-agency or intra-agency materials reflective of advice, recommendation, suggestion, opinion, and the like. Assuming that the records withheld involve the type of commentary described in the precedining sentence, it would appear that the denial was appropriate.

Lastly, I am unfamiliar with the nature or membership of the "evaluation panel". I would like to point out that the Open Meetings Law is applicable to meetings of public bodies and that §97(2) of that statute 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."

Without additional information regarding the nature of the evaluation panel, I could not conjecture as to the application of the Open Meetings Law.

Nevertheless, even if the panel is considered a "public body", its deliberations regarding the qualifications of prospective employees could in my view clearly be conducted during a closed or "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..."

Further, if action is taken during an executive session, minutes reflective of the nature of the action must be prepared in the form of minutes. However, §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."

I would also like to point out that, in a somewhat similar situation it was found that documents prepared by an advisory hearing panel did not constitute final agency determinations or policy but rather were "pre-decisional materials prepared to assist an agency decision-maker, and therefore were exempt from disclosure" [see McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd w/no opinion)].

In sum, it would appear that the response forwarded to you by Mr. Eiseman was consistent with the Freedom of Information Law. It is suggested that you discuss the matter with the Division of Human Rights.

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 Eiseman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3353
OML-AO-1030

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

May 23, 1984

Ms. Judy Braiman-Lipson
Empire State Comsumer
Associates, 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 Ms. Braiman-Lipson

I have received your letter of May 11 in which you asked that I comment with respect to a series of issues raised in your letter.

According to your letter, on May 8 you contacted Mr. William Leo of the Rochester City School District to arrange an appointment for May 11 at noon "to view the District's asbestos file". During the conversation, you informed Mr. Leo of your desire to review the District's file on the subject including "yearly survey reports, bulk sample reports, all correspondence regarding asbestos, all copies of notices which need to be posted in school buildings containing friable asbestos".

On the day of your appointment, District officials reviewed your request, stating that its characterization as an "asbestos file" was "too general" and that the phrase "could mean anything". You also wrote that the records access officer "refused" to provide a list of categories of the District's files, that she refused to prepare a written denial, and that she went to lunch despite the appointment to meet at noon. You also added that, at a meeting, school officials refused to answer questions regarding the asbestos file and informed you that "the District sets their own policies on how the Freedom of Information Law should be handled".

In conjunction with the facts as you described them as well as the materials attached to your letter, I would like to offer the following comments.

First, it is noted that §89(3) of the Freedom of Information Law requires that an applicant submit a request that "reasonably describes" the records sought. In a recent decision rendered by the Court of Appeals, the state's highest court, it was found that the standard that records be "reasonably described" means that the request should be made in such a way that the "agency may locate the records in question" [see Farbman v. NYC Health and Hospitals Corporation, __NY2d__ (1984)]. Under the circumstances, in view of the nature of your request of April 27 and the ensuing conversation concerning the request, as well as a news release issued by the Board of Education on May 7 which refers to an "asbestos file", it would appear that you met the burden of reasonably describing the records sought.

Moreover, in describing the duties of a designated records access officer, the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, state that the records access officer is responsible for assuring that agency personnel "assist the requestor in identifying the records, if necessary" [see regulations, §1401.2(b)(2)]. Consequently, I believe that the agency bears some of the burden of attempting to help in identifying the records sought.

A second issue involves a refusal to provide a list of categories of the District's files. I assume that you are referring to the "subject matter list". Section 87(3)(c) of the Freedom of Information Law requires that each agency shall maintain:

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

In addition, §1401.6(b) of the regulations promulgated by the Committee states that:

> "[T]he subject matter list shall be sufficiently detailed to permit identification of the category of the record sought."

Third, with respect to the refusal to prepare a written denial, §89(3) of the Freedom of Information Law requires that a denial of a request must be made in writing. Section 1401.7(b) of the regulations requires that the reasons for denial be stated in writing and that the person denied must be informed of the identity of the person to whom an appeal may be directed.

Fourth, with respect to the action of the access officer, who went to lunch despite your appointment, all that I can suggest is that, if indeed an appointment was made, presumably there would be a responsibility on the part of both parties to adhere to an agreement to meet.

Fifth, in terms of the time limits for response to a request, the Freedom of Information Law and the regulations promulgated by the Committee refer to prescribed periods during which an agency must respond.

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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business 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)].

Sixth, you indicated that school officials refused to answer your questions at a meeting. If you are referring to a meeting of the School Board or a committee of the Board, I would like to point out that the Open Meetings Law

is silent with respect to public participation. In brief, the Open Meetings Law provides any member of the public with the right to attend and listen to the deliberations of a public body. However, there is nothing in the Open Meetings Law that confers a right upon a member of the public to speak or ask questions at a meeting.

Lastly, you wrote that District officials provided a copy of the form required to request records under the Freedom of Information Law and informed you that the District sets its own policies regarding "the manner in which the Freedom of Information Law should be handled".

I would like to point out in this regard that §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) of the Law requires each agency, in this instance, the Board of Education, to adopt regulations in conformity with the Law and consistent with the Committee's regulations. Consequently, I believe that the "handling" of the Freedom of Information Law must be performed in a manner consistent with the statute as well as the regulations of the Committee.

Further, having reviewed the District's form used for requesting records that is attached to your letter, I believe that the form is out of date. The section of the form dealing with the capacity to deny refers to provisions of the Freedom of Information Law that appeared as the Law was initially enacted in 1974. However, the original statute was repealed in 1978 by the current Freedom of Information Law.

In addition, there is nothing in the Freedom of Information Law that refers to any particular form that must be used when making a request. Therefore, it has been consistently advised that a failure to complete a form prescribed by an agency cannot be considered a valid basis for delaying or denying access. On the contrary, any request made in writing that "reasonably describes" the records sought should in my view be sufficient.

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: Eleanor Peck, Records Access Officer
William G. Leo, Assistant Superintendent
for Business Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1031

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

May 24, 1984

Mr. Jacques V. Pessah
Vice-Chairman
Community School Board
New York City District No. 31
211 Daniel Low Terrace
Staten Island, NY 10301

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 correspondenc, except as otherwise indicated.

Dear Mr. Pessah:

I have received your letter of May 11 in which you expressed disagreement with an advisory opinion rendered under the Open Meetings Law on April 11 sent to Ms. Lorretta Prisco of PACE.

The issue raised in Ms. Prisco's inquiry involved the status of committees that operate within Community School District No. 31. Specifically, you alluded to Daily Gazette v. North Colonie Board of Education and suggested that the decision coincides with the revisions of the Open Meetings Law that went into effect on October 1, 1979. As such, it is apparently your view that the decision rendered in Daily Gazette, which held that committees are outside the scope of the Open Meetings Law, is controlling. Further, since I referred to a statement regarding legislative intent, you asked who made the statement and in what body it may have been made.

With regard to the committees themselves, you wrote that there is but one member of the Community School Board on the committees. You added that no quorum is required and that committees "have no power to act or recommend" and that "their function is to discuss and inform the one board member of their opinions". Consequently, on those grounds, you have contended that the committees in question are not subject to the Open Meetings Law.

For the reasons expressed below, I disagree with your position, for I believe that the committees are subject to the requirements of the Open Meetings Law in all respects.

First, in terms of background, my letter of April 11 sent to Ms. Prisco was based in part upon materials that she forwarded. A focal point was a Board policy statement adopted on April 7, 1975. The statement of policy specifically deals with the so-called "advisory committees".

According to the policy statement, members of the Board of Education serve as chair and vice-chairpersons of the committees. As chair or vice-chairpersons, the Board members on the committees are responsible for ensuring "that all reports and/or recommendations emanating from the committee [shall] be a product of true consensus among committee members".

Consequently, I disagree with your contention that the committees in question have no authority to advise, for the Board's statement of policy provides to the contrary. Further, the policy clearly indicates that Board representatives who serve on committees act as members of the committees, and not, as you suggested, as persons to whom opinions may be expressed.

Second, the Supreme Court decision in Daily Gazette v. North Colonie Board of Education, was rendered in 1978. The Appellate Division decision was rendered on January 25, 1979 [67 AD 2d 803 (1979)].

In this regard, as you may be aware, the Committee is required under the Open Meetings Law to report annually to the Governor and the Legislature. Its report in 1979 was prepared shortly after the Appellate Division's decision in Daily Gazette, supra. In the report, a recommendation was made to amend the Open Meetings Law in order to ensure that committees, subcommittees and similar advisory bodies would clearly be subject to the Law. Indeed, amendments to the Law were enacted during that session of the Legislature and became effective on October 1. Enclosed are pages five through seven of the annual report, which deal with the issue.

With respect to my statement regarding legislative intent, prior to the passage of the Open Meetings Law in 1976, the legislation was debated on the floor of the Assembly. During that debate, former Assemblyman Clark Wemple asked the sponsor of the legislation, former Assemblyman Joseph Lisa, whether it was his intent to include "committees, subcommittes and other sub-groups" within the

definition of "public body". Mr. Lisa answered affirmatively (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Third, you contended that no quorum is required in the case of the committees in question. Here I direct your attention to §41 of the General Construction Law, which describes quorum requirements and which has been in effect since 1909. The cited provision states that:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public 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, I believe that any entity consisting of three or more public officials or "persons" who are charged with a public duty to be performed or exercised by them jointly, as a body, can only do so by means of a quorum, a majority of its membership. As such, although the committees may include only one board member, they consist of a minimum of five persons who are, according to the statement of policy, given the authority to advise.

Lastly, the phrase "public body" is defined in §97(2) of the Open Meetings Law to include:

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

As I suggested to Ms. Prisco, each of the elements contained within the definition are in my view present with respect to the committees. Each of the committees consist of at least two members, for as you stated in your letter, they range from five to thirty-six members. Moreover, based upon the statement of policy adopted by the Board in 1975, it is clear in my view that the committees "conduct public business" and "perform a governmental function" for a governmental entity, in this instance, the School Board. Due to the provisions of §41 of the General Construction Law, which was quoted earlier in full, the committees may perform their duties only by means of a quorum. Further, the specific language of §97(2) refers to committees and subcommittees.

It is my hope that the foregoing will provide you with sufficient rationale and background information to conclude, as I have advised, that the committees of Community School District No. 31 are public bodies subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis J. Murphy, Chairman
Loretta Prisco, PACE

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1032

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

May 30, 1984

Ms. Anne Marie McKenna
Concerned Property Owners of
Mt. Vernon, Inc.
P.O. Box 64
Mt. Vernon, NY 10551

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. McKenna:

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

Specifically, the issue concerns discussions that might be held by the Mount Vernon Board of Education during executive sessions. You wrote that at a recent open meeting of the Board, a vote was taken "to replace a retiring administrator with another specific individual". Although the motion was carried, two of the Board members explained that their negative votes were based upon "monetary considerations".

You indicated that "since there will be other administrators retiring this year and in the future, with the potential for consolidation or the elimination of some of these positions", it is your view that you "have the right to witness this decision making process".

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

First, as you may be aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings of public bodies must be conducted open to the public, except to the extent that a subject falls within one or more of the grounds for entry into executive session lised in §100(1)(a) through (h) of the Law.

Second, under the circumstances, there appears to be one ground for executive session that may be relevant to the type of situation that you described. Specifically, §100(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

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

In my opinion, the language quoted above, which constitutes the so-called "personnel" exception for executive session, may appropriately be invoked only when an issue deals with a "particular person or corporation" in conjunction with one or more of the topics listed in §100(1)(f).

As such, if the Board of Education discusses whether or not to fill a position based upon the needs of the District or budgetary concerns, for instance, those topics would in my view involve issues of policy that must be discussed during an open meeting. Those considerations of policy would not in my view pertain to a "particular" person. Conversely, if a determination is made to fill a position and the discussion focuses upon the qualifications of specific applicants, I believe that an executive session could at that juncture be held.

As you requested, a copy of this opinion will be sent to Mr. Manuel Barreiro, President of the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Manuel Barreiro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1033

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

May 31, 1984

Ms. Valerie A. Leuthe
Chairman
Cheektowaga Republican Town Committee
[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. Leuthe:

I have received your letter of May 17 and the correspondence attached to it.

In your letter, you described at some length events involving a so-called "work session" held by the Town Board of the Town of Cheektowaga. Consequently, you raised a series of questions regarding the Open Meetings Law. In this regard, I would like to offer the following comments.

It is noted at the outset that there is in my view no distinction between a "work session" and a "meeting". In a decision rendered in 1978, the Court of Appeals, the state's highest court, held that the definition of "meeting" [see attached, Open Meetings Law, §97(1)] 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 [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, assuming that a majority of the Town Board was present at the work session, I believe that it was a meeting subject to the Open Meetings Law in all respects.

Although you requested my opinion regarding the specific situation that you described, I believe that responses to the questions that you raised separately will provide adequate advice regarding that situation.

Your first four questions involve whether a Town Board may "conduct public business in a closed meeting", "schedule a closed meeting in advance", enter into "executive session without taking a vote or getting a motion stating the specific purpose of the executive session", and whether a Town Board may enter into an executive session "for several different reasons". The seventh question, which is related to the first four, is whether a Town Board may enter into an executive session "to discuss the subject of its choice".

As a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be held open to the public, except to the extent that one or more of the grounds for executive session may appropriately be invoked pursuant to paragraphs (a) through (h) of §100(1). Therefore, a public body may not discuss "the subject of its choice" during an executive session, for it may exclude the public to discuss only those topics that are deemed appropriate for consideration in an executive session.

It is also noted that the phrase "executive session" is defined to mean a portion of an Open meeting during which the public may be excluded [see §97(3)]. 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. Specifically, the cited provision states in relevant part that"

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

Based upon the language quoted above, it is clear in my opinion that a motion to enter into an executive session must be made during an open meeting, that the motion must indicate in general terms the subject or subjects to be considered and that the motion must be carried by a majority vote of the membership of a public body. Unless each of those conditions precedent are met, I do not believe that a public body may properly convene an executive session.

In addition, in a technical sense, a public body cannot in my opinion schedule an executive session in advance of a meeting, for it might not be known prior to a meeting

which members will be present or whether a motion to enter into an executive session will indeed be carried by a majority of a public body.

The fifth and sixth questions are whether a Town Board may enter into an executive session to discuss "litigation and personnel matters", or to consider "any personnel matters".

From my perspective, some discussions regarding litigation and personnel may be discussed during executive sessions. However, there may be issues involving "litigation" or "personnel" that do not necessarily fall within the grounds for entry into executvie session.

With respect to litigation, §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". It has been held in this regard that the purpose of the exception is to enable a public body to discuss its litigation strategy in private, without baring its strategy to its adversary [see Weatherwax v. Town of Stony Point, App. Div., 468 NYS 2d 914 (1983)]. Further, in the case of pending litigation, it has been held that a motion to enter into an executive session to discuss "litigation" without additional specificity is inadequate. In Daily Gazette v. Town Board, Town of Cobleskill, [444 NYS 2d 44 (1981)], the court held that a "regurgitation" of the statutory language is insufficient and that the motion must identify "the" litigation that is being considered.

With regard to personnel matters, §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..."

As such, an executive session may appropriately be held to consider a "particular person" in conjunction with one or more of the topics listed in §100(1)(f). Further, in Becker v. Town of Roxbury, [Sup Ct., Chemung Cty., April 1, 1983] and Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981], it was found that a motion identifying the subject to be discussed as "personnel" without more would fail to comply with the law. In both

cases, it was held that a motion to enter into executive session in conjunction with §100(1)(f) should make reference to the fact that the issue concerns a "particular person", and that it involves a topic or topics described in the cited provision.

Therefore, while a motion to discuss "personnel" would, based upon the case law, be insufficient, a motion to discuss "the employment history of a particular person", for example, would be proper.

In a related vein, the news article attached to your letter indicates that personnel matters may have involved a consideration of the elimination of positions "in a move to cut departmental costs". If indeed the discussion involved questions of policy regarding staffing and the expenditure of public monies, I do not believe that an executive session could justifiably be held, for the issues would not have pertained to a "particular person".

Your eighth question involves rights of access to minutes of open meetings and executive sessions when action is taken. Here I direct your attention to §101 of the Open Meetings Law, which provides in part that:

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

Consequently, if action is taken during an executive session, minutes reflective of the nature of the action taken, the date and the vote must be prepared. It is also noted that §101(3) requires that minutes of open meetings be prepared and made available within two weeks and that minutes of executive sessions be prepared and made available within one week.

Your ninth and tenth questions pertain to the recourse available to the public when a town board violates the Open Meetings Law and whether a court may "vacate" action taken by a town board when it meets and takes action behind closed doors.

The provisions regarding the enforcement of the Law are found in §102. Section 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 descretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

As requested, copies of this opinion will be sent to members of the Town Board as well as the 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:ew

Enc.

cc: Daniel E. Weber, Supervisor
Tom Johnson, Councilman
William Rogowski, Councilman
Patricial Jaworowicz, Councilman
John Rogowski, Councilman
Dennis Gabryszak, Councilman
Jim Dirisits, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1034

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

May 31, 1984

Ms. Phoebe Meranus
Trustee
Village of Herkimer
[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. Meranus:

I have received your letter of May 22 in which you requested an advisory opinion under the Open Meetings Law.

Your first area of inquiry concerns information that I might provide "indicating that the use of a tape recorder during the public portion of a Village Board Meeting is lawful and not to be denied."

In this regard, it is noted at the outset that the Open Meetings Law is silent with respect to the use of tape recorders. Nevertheless, there are several judicial determinations concerning the use of tape recorders at open meetings of public bodies.

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

Notwithstanding Davidson, however, the Committee 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 1979. That decision arose when two individuals sought to bring their tape recorders at 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 in 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 legilative 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 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."

Most recently, the Supreme Court, Nassau County, also found that a public body could not prohibit the use of a "hand held battery operated tape recorder" at an open meeting [Mithcell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 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 rendered before Ysteuta was decided."

In view of the foregoing, I do not believe that a village board of trustees may prohibit the use of a portable, battery-operated tape recorder at its open meetings.

You made reference to a decision that I described to you orally in which a reporter was forcibly ejected from a meeting due to his failure to remove a tape recorder. The Court ruled that the reporter had the right to use the tape recorder and, due to the unique circumstances, awarded a substantial sum as punitive damages, payable by the town supervisor. Although I have requested a copy of the decision, I have not received it as yet. When it arrives, I will send a copy to you.

Your second area of inquiry concerns the capacity of the mayor to "unlilaterally make procedural policy for board meetings".

I would like to point out initially that a mayor is but one member of a village board of trustees. Further, under the Open Meetings Law and §41 of the General Construction Law, which pertains to quorum requirements, action may be taken by a public body only by means of an affirmative vote of the majority of its total membership.

The Village Law also provides direction regarding the authority of a mayor or a board of trustees. Subdivision (1) of §4-400 of the Village Law states in part that:

> "[I]t shall be the responsibility of the mayor:
>
> a. To preside at the meetings of the board of trustees, and may have a vote upon all matters and questions coming before the board and he shall vote in case of a tie, however, on all matters and questions, he shall vote only in his capacity as mayor of the village and his vote shall be considered as one vote..."

In addition, subdivision (2) of §4-412 of the Village Law, entitled "Procedure for meetings: states that:

> "[T]he mayor of the village shall preside at the meetings of the board of trustees as provided in section 4-400 of this article. A majority of the board shall constitute a quorum for the transaction of business, but a less number may adjourn and compel the attendance of absent members. Whenever required by a member of the board, the vote upon any question shall be taken by ayes and noes, and the names of the members present and their votes shall be entered in the minutes. The board may determine the rules of its procedure, and may compel the attendance of absent members by the entry of a resolution in the minutes, directing any peace officer, acting pursuant to his special duties,

> or police officer residing within the village to arrest such absent member and take him before the board of trustees to answer for his neglect."

Based upon the final quoted sentence of §4-412(2), it is clear that "The board may determine its rules of procedure..."

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-1035

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

June 5, 1984

Mr. James Magill
[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. Magill:

I have received your letter of May 30, as well as the news article attached to it. Your questions focus upon the Open Meetings Law as it applies to a village zoning board of appeals.

You have requested that a copy of the Open Meetings Law be sent to you, with passages marked that pertain to villages or zoning boards of appeals. Although a copy of the Open Meetings Law is enclosed, its provisions pertain to public bodies generally; there is no specific reference to villages. Further, the only reference to zoning boards of appeals is found in §103(1). Extensive comments will be made about that provision in the ensuing paragraphs.

You also wrote that you are concerned about the legality of a "one on one" discussion that led to a determination by the zoning board. According to the article, the village attorney indicated that "as long as there is no quorum" the Open Meetings Law does not apply. I agree that unless a quorum, a majority of the total membership of a public body, convenes, the provisions of the Open Meetings Law would not be applicable. Nevertheless, at the same time, I believe that a series of "one on one" discussions that lead to a determination would represent an evasion of the Law. From a somewhat philosophical perspective, I believe that the intent behind the creation of a zoning board or public bodies generally involves the notion that a group of people should deliberate collectively in order to reach a better decision than an individual could make alone. Further, it is the deliberative process that is the heart of the Open Meetings Law.

Third, with respect to the Open Meetings Law as it affects a zoning board of appeals, it is noted that problems of interpretation and inconsistencies among laws led to recommendations made by the Committee to the Governor and the Legislature to treat all zoning boards in like manner under the Open Meetings Law. As such, the comment in the article to the effect that "we changed the law" refers to proposals made by the Committee that were later approved by the State Legislature and signed by the Governor.

Prior to the amendment to §103(1) of the Open Meetings Law, the Law exempted from its coverage "quasi-judicial proceedings". Therefore, if, for example, a zoning board was engaged in deliberations of a quasi-judicial nature, the Open Meetings Law would not apply. Nevertheless, inconsistencies in the treatment of zoning boards resulted in problems of interpretation.

For instance, in the case of a city zoning board of appeals, there was no direction given by any provision of law (other than the Open Meetings Law) which indicated the degree to which such boards must deliberate in public. Consequently, it was advised by the Committee and held judicially that the quasi-judicial proceedings of city zoning boards of appeals were exempt from the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409 at 419, aff'd 45 NY 2d 947].

There was, however, statutory direction regarding the openness of meetings of town and village zoning boards of appeals. Specifically, §§267(1) of the Town Law and 7-712(1) of the Village Law, which concern town and village zoning boards of appeals respectively, had long provided that "[A]ll meetings of such boards shall be open to the public". Based upon those provisions, the Committee advised that the exemption for quasi judicial proceedings was inapplicable to town and village zoning boards of appeals and that the deliberations of such boards must be held open to the public.

Section 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."

Since the cited provisions of the Town and Village Laws were "less restrictive with respect to public access..." than the Open Meetings Law, those provisions remained in effect as the Supreme Court, Westchester County, in Matter of Katz concluded (NYLJ, June 25, 1979).

It is noted, however, that the opposite conclusion was reached in Capital Newspapers v. Town of Guilderland Zoning Board of Appeals [91 AD 2d 763 (1982)]. In that case, the court found that when a town zoning board of appeals acted in a quasi-judicial capacity, the proceedings could be closed. It was stated further that closed deliberative sessions "are based on tradition reaching back through many, many decades."

As such, the deliberations of city zoning boards of appeals could clearly be closed; in the case of a town zoning board, judicial determinations reached opposite conclusions.

In terms of policy, as stated in its annual reports to the Legislature, the Committee suggested that zoning boards play a crucial role in the development of their communities, and that, therefore, meetings of zoning boards should be conducted under the same presumption of openness as other public bodies.

The importance of deliberations of zoning boards of appeals was highlighted in an editorial of February 21, 1982 appearing in the Albany Times-Union. The editorial dealt with meetings of zoning boards of appeals and lent support to the recommendations made by the Committee. The editorial stated that:

> "[W]hat is at stake, in short, is nothing less than the principle of government of and by the people - the fundamental right of citizens in this society to know what their representatives are doing and how well they are doing it."
>
> "Some have objected to the proposal, arguing that it would inhibit the free deliberations of zoning boards of appeals. To that we can only reply that if government officials conduct their business without regard to the will and sentiments of the people, then the system of government in operation is something other than a democracy. At any rate, what would

> more likely be inhibited at open meetings would not be proposals fair, reasoned and in the general interest, but proposals small, narrow and for the benefit of a few.
>
> "The nature of the business conducted by zoning boards is necessarily of immediate concern to a city's residents, as their wealth and neighborhood may lie in balance. As sen. Caesar Trunzo (R,C - Brentwood) has said, because of the importance and long-term effect of board decisions on individuals and communities, the public should have full knowledge of the reasons for board decisions.
>
> "Citizens in a democratic society clearly have the right to know of deliberations that can touch them even in their own baskyard."

In short, although the legislation required for the first time that the deliberations of some zoning boards of appeals be open to the public, the Committee believes the impact of the deliberations of such boards on the public is significant and that such deliberations should generally be open to the public. I would like to add, too, that the legislation signed in 1983 by Governor Cuomo was twice vetoed by Governor Carey.

The result of the legislation is that it brings all zoning boards of appeals within the scope of the Open Meetings Law in the same manner as other public bodies. As such, town and village zoning boards of appeals subject to the Town and Village Laws which may have had no authority to enter into a closed or executive session may do so in accordance with §100(1) of the Open Meetings Law. Concurrently, the deliberative process of public bodies whose determinations may have a significant impact upon the public are generally 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

RJF:ew

Enc.

NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1036

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

June 15, 1984

Mr. Les Trautmann
Staten Island Advance
950 Fingerboard Road
Staten Island, NY 10305

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. Trautmann:

I have received your letter of June 5 concerning a meeting of the Borough Board of Staten Island.

According to your letter, the Board met on May 25 to discuss "the city's proposed shelter for the homeless on Staten Island". In terms of background, you wrote that:

> "The city has proposed placing a shelter for 500 homeless men at Sea View Hospital and Home on Staten Island, a facility run by the city Health and Hospitals Corp. That plan has met strident opposition from residents and public officials alike. Because of that opposition, the city has asked Staten Island officials to come up with alternative suggestions for a shelter site.
>
> "The Borough Board's May 25 meeting was called specifically to collect alternative suggestions from board members. The meeting was attended by five of the six members, enough for a quorum."

Although the Advance was "informally notified of the meeting," you indicated that no "formal announcement" regarding the meeting had been given to the general public. Further, when a reporter for the Advance arrived at

Borough Hall for the purpose of attending the meeting, the public relations officer indicated that the meeting would be closed. Further, no ground for executive session described in the Open Meetings Law was cited. Thereafter, upon a protest from the reporter, "Borough President Anthony R. Gaeta said the meeting was not a regular board meeting, but an informal meeting of board members. Gaeta said publicity of alternative suggestions would cause undue community reaction and possibly hurt the board's 'credibility'". You wrote that Mr. Gaeta "then polled the remaining board members present and announced that a 'consensus' supported his desire for the reporter to be excluded from the meeting". Following the gathering, it was disclosed that a decision had been made to consider a particular site as an alternative suggestion to be forwarded to the City officials. That determination was apparently reached by "consensus" rather than a vote.

Since in your view the Open Meetings Law was violated, you have asked that "the Committee use its authority to declare the May 25 meeting illegal and take appropriate action against the Borough Board of Staten Island".

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

First, the authority of the Committee under the Open Meetings Law is solely advisory. Stated differently, the Committee does not have the capacity to compel a public body to open or close its meetings or to invalidate action taken by a public body. The remedies that may be sought regarding violations of the Open Meetings are available to aggrieved persons and will be discussed later in this opinion.

Second, although the gathering may have been described by the Borough President as an "informal" meeting, I believe that it was nonetheless subject to the Open Meetings Law in all respects. It is emphasized that the definition of "meeting" [see attached, Open Meetings Law, §97(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, 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 is a "meeting" that must be convened open to the public, whether or not there is intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I would like to point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, 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" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "[T]he word "formal is defined merely as "following or according with established form, custom, or rule" (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the clear direction given by the courts, the meeting of May 25 in my opinion clearly should have been held in accordance with the Open Meetings Law.

Third, every meeting of a public body must be preceded by notice of the time and place of the meeting. Section 99(1) of the Law 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. 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 time prior to such meetings. Therefore, it is reiterated that notice must be provided prior to all meetings, regardless of whether the meetings are considered formal or otherwise.

Fourth, the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". 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...."

In view of the foregoing, it is clear in my view that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting during which the public may be excluded. It is also clear that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss a subject listed in the Open Meetings Law as appropriate for discussion behind closed doors.

Based upon your letter as well as the news article that you forwarded, it does not appear that any ground for executive session could justifiably have been cited to exclude your reporter or any member of the public from the meeting in question.

With respect to the contention by the Borough President that publicity "could arouse unnecessary community concern and may have an adverse effect on the board's 'credibility'", I believe that such a contention is irrelevant to the duties of a public body subject to the Open Meetings Law. In short, the Open Meetings Law is in my opinion intended to ensure that the deliberative process of a public body must be conducted openly, notwithstanding the possibility of an adverse effect upon its "credibility". Moreover, a major responsibility of a public body, including the Borough Board, in my view involves the requirement that its business be conducted open to the public.

Lastly, with respect to the enforcement of the Open Meetings Law, I direct your attention to §102(1), which 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."

In addition, §102(2) states that:

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

In an effort to apprise the Borough Board of this opinion and the requirements of the Open Meetings Law, copies of the opinion and the Law will be sent to Mr. Gaeta, Borough President.

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:ew

Enc.

cc: Mr. Anthony R. Gaeta, Borough President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1032

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

June 21, 1984

Ms. Janette D. Hunter
Town Clerk and New Castle
Ethics Board Chairman
200 South Greeley Avenue
Chappaqua, NY 10514

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. Hunter:

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

Specifically, in your capacity as Town Clerk and Chairperson of the Ethics Board of the Town of New Castle, you have asked "whether our Ethics Board could meet in executive session, after motion duly made at an open meeting, to deliberate on a disclosure statement filed by a member of the Town Board".

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

First, I believe that the Town Ethics Board is a public body required to comply with the Open Meetings Law. The scope of the Law is determined in part by §97(2), which defines "public body" to mean:

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

The Ethics Board in my view is subject to the Law, for it consists of at least two members, it may conduct its business only 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, a town. Further, the Law makes specific reference to committees, subcommittees and "similar" bodies.

Second, although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally be conducted upon to the public, §100(1) of the Law lists eight grounds for entry into executive session.

Third, relevant to your inquiry is §100(1)(f) of the Law, 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..."

If the issue before the Ethics Board involves a particular person in conjunction with one or more of the subjects listed in §100(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, §100(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

Lastly, as you intimated, a motion must be made and carried by the Ethics Board prior to entry into an executive session. I would like to point out that the Open Meetings Law prescribes a procedure that must be followed by a public body during an open meeting before conducting an executive session. Section 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..."

In sum, if the topic under discussion may appropriately be considered during an executive session, and if the procedural steps described in §100(1) are followed, I believe

that the Ethics Board may deliberate 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1038

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

June 21, 1984

Mr. Douglas Arters
[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. Arters:

I have received your letter of June 11 in which you requested an advisory opinion regarding the Open Meetings Law.

Your first area of inquiry concerns the use of tape recorders at open meetings. Apparently at a recent meeting of a town board, an individual was told by the town attorney that he could not use a tape recorder "without special permission from the town board members".

While the Open Meetings Law is silent with respect to the use of tape recorders at meetings, for the reasons discussed in the ensuing paragraphs, I believe that any person may use a portable, battery-operated tape recorder at an open meeting.

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, 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 advance 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" [Op. Atty. Gen., 80-145].

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

The second area of inquiry concerns the time at which a meeting was scheduled. Specifically, you wrote that a town board scheduled a meeting to "conduct some special business at 3:30 p.m. in the afternoon, not the normal time for this board to meet". A resident of the town complained that the time of the meeting was inconvenient for many people, and you have asked whether there is "any ruling regarding the appropriate time for public meetings".

There is nothing in the Open Meetings Law that deals specifically with the time of day during which meetings may be held. So long as notice of the time and place of meetings is given in accordance with §99 of the Law, it would appear that a meeting scheduled for 3:30 p.m. would be valid. The only point that I can add is that, in my opinion, the Open Meetings Law, like all other statutes, should be given a reasonable interpretation in a manner consistent with statutory intent. If, for example, a meeting had been scheduled for 3:30 a.m., it is possible that a court might find that a meeting held at that time would be unreasonable, for members of the public interested in attending would not likely have the capacity to do so. However, I do not believe that a meeting scheduled during an afternoon could be characterized as unreasonable.

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

STA... YORK
D... OF STATE
CO... ON OPEN GOVERNMENT

FOIL-AO-3387
OML-AO-1039

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

June 22, 1984

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 June 15 in which you requested an advisory opinion regarding the activities of New York City Community Board No. 11.

According to your letter and the minutes of meetings of the Community Board attached to it, the minutes do not include information regarding "how each member present voted as an individual". The minutes indicate that several of the actions taken were not adopted unanimously, but rather by "split" votes. You also wrote that the minutes do not refer to a particular motion, which would appear to have been made, since motions are identified by number consecutively.

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

It is noted initially that the Community Board as described in §2800 of the New York City Charter is in my opinion an "agency" subject to the Freedom of Information Law and a "public body" required to comply with the Open Meetings Law.

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

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the

> state or any one or more municipalities thereof, except the judiciary or the state legislature".

From my perspective, a community board is a municipal entity that performs a governmental function for a municipality, New York City. Therefore, it is in my view an "agency" subject to the Freedom of Information Law.

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

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

By breaking the definition into its components, I believe that it may be concluded that a community board is a "public body" subject to the Open Meetings Law. First, it is an entity that may consist of up to fifty persons. Second, §2801 of the City Charter indicates that a community board must act by means of a quorum as described in that provision. Third, based upon §2800 of the City Charter, a community board clearly conducts public business and performs a governmental function. And fourth, the duties of a community board are performed on behalf of a public corporation, the City of New York.

In view of the foregoing, I believe that a community board is clearly a "public body" subject to the Open Meetings Law in all respects.

With respect to the absence of a record indicating the manner in which the members present cast their votes, I direct your attention to §87(3)(a) of the Freedom of Information Law, which states that each agency shall maintain:

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

Since a community board is an "agency" subject to the Freedom of Information Law, it is required to create a record of votes indicating the manner in which each member voted in each instance in which a vote is taken.

Further, if a motion was made, I believe that the minutes must make reference to it, whether or not it was carried. Section 101 of the Open Meetings Law concerning minutes of meetings states in subdivision (1) 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".

Since minutes must refer to all motions and proposals, I believe that any motion introduced should be cited in minutes, even though the motion might not have been adopted.

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:ew

cc: Mr. Bernard Haber, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1040

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

July 2, 1984

Ms. Marie Imp
Marino, Chambers & Lou
175 Main Street
White Plains, NY 10601

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. Imp:

I have received your letter of June 20 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry concerns the capacity to use a tape recorder at an open meeting of a public body. In this regard, I would like to offer the following comments.

While the Open Meetings Law is silent with respect to the use of tape recorders at meetings, for the reasons discussed in the ensuing paragraphs, I believe that any person may use a portable, battery-operated tape recorder at an open meeting.

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, 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 advance 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" [see attached, Op. Att. Gen., 80-145].

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1041

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

July 3, 1984

Mr. James Magill
[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. Magill:

I have received your letter of June 19, in which you indicated that my response of June 5 was unclear.

The issue raised in your earlier letter was whether a village zoning board of appeals may enter into executive session "for the purpose of deliberations of a quasi-judicial nature".

As stated at the conclusion of my earlier letter to you, which alluded to legislation enacted in 1983:

> "[T]he result of the legislation is that it brings all zoning boards of appeals within the scope of the Open Meetings Law in the same manner as other public bodies. As such, town and village zoning boards of appeals subject to the Town and Village Laws which may have had no authority to enter into a closed or executive session may do so in accordance with §100(1) of the Open Meetings Law. Concurrently, the deliberative process of public bodies whose determinations may have a significant impact upon the public are generally open to the public".

Therefore, it is reiterated that, even though deliberations of a zoning board of appeals might be characterized as "quasi-judicial", those deliberations are required

to be conducted open to the public under the Open Meetings Law, unless a ground for executive session may be invoked pursuant to §100(1) of the Law. Section 100(1) specifies the topics that may be discussed during an executive session. Consequently, unless one of those topics arises, in my opinion, an executive session may not be held, even if the discussion is considered "quasi-judicial".

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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1042

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

July 5, 1984

Ms. Marlene Burr
Town Clerk
Town of Bethel
Drawer B
Kauneonga Lake, NY 12749

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. Burr:

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

Your inquiry involves the contents of minutes. According to your letter, a resident of the Town of Bethel, which you serve as Town Clerk, has found fault with the minutes of meetings that you prepare. It appears that the complaint is based upon a contention that the minutes do not refer to each matter discussed at meetings, and particularly issues raised by members of the public in attendance. As such, your question is: "What amount of information is the Clerk responsible to put in her minutes from the Town Board and the public?"

In this regard, I direct your attention to the Open Meetings Law, which in §101 provides direction regarding the contents of minutes. It is noted that the cited provision contains what may be characterized as the minimum requirements concerning the contents of minutes. Specifically, §101(1), which pertains to 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."

Based upon the language quoted above, I do not believe that minutes are required to consist of a verbatim account of comments made at a meeting or include reference to every comment made by a member of the Town Board or others in attendance. On the contrary, minutes must in my view indicate only those aspects of a meeting to which the language of §101(1) refers.

It is noted, too, that the Open Meetings Law is silent with respect to public participation at meetings. Consequently, although a public body may permit the public to speak at an open meeting, there is no right to speak conferred upon the public by 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-1043

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

July 6, 1984

Mr. Alex J. Daszewski
[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. Daszewski:

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

According to your letter, in January, the Town Board of the Town of Glenville "formed a committee to review emergency medical services in the town". On June 20, "the committee gave its final report to the town board," a copy of which you enclosed. At that time, you asked whether the meetings of the committee were publicized. In response, you were "told that these meetings did not have to be open to the public".

You have asked whether the meetings of the committee in question should have been held open to the public.

The first paragraph of the report of the committee states that:

> "[I]n January of 1984, the Town Board authorized the establishment of a committee to determine how seriously residents of the Town of Glenville would be affected by the closing of Empire Ambulance, which was the only ambulance in the town which provided advanced life support services. The committee was to ascertain whether the advanced life support services of Mohawk Ambulance, located in the City of Schenectady, were sufficient or if other provisions should be made."

The end of the report indicates that the committee consists of five members.

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

From my perspective, the issue is whether the committee in question 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" 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 is 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 described in the report to the Town Board, 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 be 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 Town of Glenville. 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, 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)].

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:ew

cc: Town Board, Town of Glenville

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1044

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

July 6, 1984

Mr. Douglas E. Arters
Stringer--The Post Journal
P.O. Box 226
Brocton, NY 14716-0226

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. Arters:

I have received your letter of June 25 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, "a series of negotiation-meetings recently took place between two public bodies..." You indicated that the meetings were conducted "to reach an agreement regarding a newly formed water district". The two most serious issues involved the charge for water to be levied and the "point of hook-up" into the existing water distribution system. Although an agreement was reached, to the best of your knowledge, the meetings were neither open to the public nor were notices posted. Your question is whether the meetings "should have been closed or open".

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

First, the scope of the Open Meetings Law is determined in part by §97(1), which defines the term "meeting". It is noted that the definition of "meeting" has been interpreted broadly by the state's highest court to include 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 the gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

Therefore, if a quorum of one of the public bodies was present at the gatherings to which you referred, I believe that those gatherings constituted "meetings" subject to the Open Meetings Law in all respects.

It is noted, too, that it has been held that joint meetings held by two or more public bodies also fall within the scope of the Open Meetings Law [see Oneonta Star, Division of Ottoway Newspapers, Inc. v. Board of Trustees of Oneonta School District, 66 AD 2d 51].

Second, assuming that the gatherings in question were "meetings", I believe that they should have been preceded by notice. Section 99 of the Open Meetings Law requires that notice of the time and place of every meeting must be given. In the case of meetings scheduled at least a week in advance, §99(1) requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. 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 time prior to such meetings.

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 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..."

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 that it is a portion of an open meeting during which the public may be excluded. Further, I believe that it is also clear that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss those matters prescribed in paragraphs (a) through (h) of §100(1) of the Law.

Lastly, having reviewed the grounds for executive session, it does not appear that any could appropriately have been invoked to close the meetings as you described them.

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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3394
OML-AO-1045

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

July 9, 1984

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

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. Martineau:

As you are aware, I have received your letter of June 19, in which you requested an advisory opinion regarding a series of requests for records sent to the Village of Pleasantville.

In terms of background, the requests have been made by an attorney representing a firm currently involved in litigation with the Village. The firm has also filed a notice of claim against the Village. Several of the requests indicate that the records sought are intended to be used in pending litigation.

Having reviewed your letter and the materials attached to it, I would like to offer the following observations.

It is noted initially that the Court of Appeals recently unanimously held that:

> "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Art. 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman and Sons, Inc. v. New York City Health and Hospitals Corp., __NY2d__, May 10, 1984].

As such, the pendency or possibility of litigation has no effect upon the use of the Freedom of Information Law or rights of access granted by the Freedom of Information Law, even though the requests have been made by a litigant.

At this juncture, comments will be made regarding the specific requests directed to the Village.

The first area involves a request for copies of materials concerning an approved site plan. In a letter of April 23, John St. Leger, the Village Administrator, indicated that copies would be made available.

The second request, which is dated April 26, involves the names of those attending an executive session of the Board of Trustees held on April 25, "together with a transcript of the minutes required by the Public Officer's Law in the event any action was taken". Here I direct your attention to the Open Meetings Law. Relevant under the circumstances is §101(2), which 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, if, for example, no action was taken during the executive session, minutes would not in my opinion be required to have been prepared. Contrarily, if action was taken, minutes must be prepared in accordance with §101(2) and made available to the public pursuant to the Freedom of Information Law as required by §101(3).

It is noted that the applicant requested a "transcript". In the event that action was taken and minutes must be prepared, the minutes in my opinion need not consist of a verbatim account of the discussion conducted during the executive session. Section 101(2) provides that the minutes must consist only of "a record or summary of the final determination of such action and the date and vote thereon".

It is assumed that the minutes of the meeting would indicate those who attended both the meeting and the executive session. I would like to point out, too, that §87(3)(a) of the Freedom of Information Law requires that a record be prepared in any instance in which a vote is taken that identifies the manner in which each member of a public body cast his or her vote.

The third area of inquiry is similar, for it concerns the identities of those who attended a joint executive session of the Board of Trustees and the Planning Commission on April 23, as well as any minutes that may have been prepared.

Again, it is assumed that the minutes of the joint meeting would indicate the members of public bodies who attended. Further, if indeed action was taken at the executive session, minutes would have to be prepared and made available in accordance with §101 of the Open Meetings Law.

The fourth area of inquiry, which is found in a request dated May 16, involves "a statistical compilation of all expenses incurred by the Village of Pleasantville" with respect to litigation identified in the request. Here I would like to point out that the Freedom of Information Law applies to existing records. Section 89(3) of the Law states that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if no "statistical compilation" exists, I do not believe that the Village would be required to prepare such a compilation in response to the request.

It is noted that, while a municipal board 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 details in the bills might justifiably be withheld, numbers indicating the amounts expended are in my view accessible under the Freedom of Information Law.

The fifth area of inquiry concerns a request for "copies of all parking violations issued for parking violations on Manville Road and Grant Street, Pleasantville, New York from January, 1983, to the present". In my opinion, assuming that the records in question can be located, I believe that they are available. In Johnson Newspapers Corp. v. Stainkamp, it was found that copies of arrest records concerning speeding and other violations in possession of the State Police must be made available [94 AD 2d 826, modified __NY2d__ March 22, 1984]. In a brief opinion, the Court of Appeals upheld the petitioner's rights of access to the records sought, but added that rights of access would not apply to any records that may have been sealed pursuant to the provisions of §160.50 of the Criminal Procedure Law. That statute indicates that when criminal charges against an accused have been dismissed in favor of the accused, records pertaining to the arrest become sealed. The Court stated, however, that "In so doing we are not to be understood as addressing or deciding whether the provisions of section 160.50 are applicable to traffic tickets or to lists of violations of the Vehicle and Traffic Law; the validity of any sealing orders under section 160.50 is not within the scope of our review in this proceeding" (id.). Therefore, as a general matter, I believe that records of violations must be made available.

The final area of inquiry concerns all "blotter entries" regarding complaints made by named individuals "regarding the operation of businesses located on Manville Road...from April, 1980 to the present". From my perspective, the contents of police blotters are generally available, assuming that they consist of a log or diary of events reported by or to a police department [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. The question, however, is whether the terms of this request as well as the request involving parking violations "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. Although the phrase "reasonably describe" is not specifically defined, the Court of Appeals in Farbman, supra, held that a request must contain sufficient information "so that the respondent agency may locate the records in question". Therefore, if the requests enable officials to locate the records sought, the applicants have in my view met the burden of reasonably describing the records sought. Contrarily, if the records cannot be located based upon the information provided by the applicant, it is likely that the Village could require that more detail 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:ew

OML-AO-1046

State of New York
COMMITTEE ON OPEN GOVERNMENT
MEMORANDUM

TO: Virginia Plunkett July 11, 1984

FROM: Bob Freeman

SUBJECT: Status of Community Action Agencies under the Open Meetings Law

As you are aware, I have received your memorandum of June 21, as well as various materials pertaining to community action agencies.

As I understand your inquiry, the question involves the relationship between designated community action agencies that are not-for-profit corporations and the Open Meetings Law. Consequently, my comments will deal only with designated community action agencies, which clearly perform their duties pursuant to a legal relationship with the state or one or more municipalities, as opposed to a community action program, which is not designated and which may apparently act independently of government.

The scope of the Open Meetings Law is determined in part by §97(2) of the Law, which defines "public body" to mean:

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

By means of a review of the language quoted above, as well as the thrust of federal legislation, it appears that a designated community action agency may be considered a "public body" subject to the Open Meetings Law, notwithstanding the fact that it may be a not-for-profit corporation.

As a general matter, it is my view that most not-for-profit corporations, which are not governmental entities, fall outside the requirements of the Open Meetings Law. Nevertheless, it has been advised that particular types of not-for-profit corporations, due to their strong nexus with government, such as volunteer fire companies and

local development corporations, are subject to the Open Meetings Law. In the case of a designated community action agency, it appears that the relationship between such an agency and government is sufficiently significant to bring a designated community action agency within the requirements of the Open Meetings Law.

In terms of the components of the definition of "public body", the board of a community action agency must consist of more than two members. Section 211(b) of the Economic Opportunity Act of 1964, as amended, indicates that the board must have not less than fifteen but not more than fifty-one members.

Section 211(d)(1) indicates that the board may perform its duties by means of a quorum "which shall not be less than fifty per centum of the total membership".

The legislation enacted by Congress indicates that a designated community action agency conducts public business. As stated in Sec.201(a), the general purposes of a community action agency include:

> "to stimulate a better focusing of all available local, State, private, and Federal resources upon the goal of enabling low-income families, and low-income individuals of all ages, in rural and urban areas to attain the skills, knowledge, and motivations and secure the opportunities needed for them to become fully self-sufficient..." [Sec. 201(a)(1)]

and

> "to provide for basic education, health care, vocational training, and employment opportunities in rural America to enable the poor living in rural areas to remain in such areas and become self-sufficient therein..." [Sec 201(b)].

In view of the language quoted above, once again, it appears that a community action agency "conducts public business".

Moreover, when a community action agency is designated, Sec. 211 indicates that the community action agencies perform a governmental function for the state or for one or

more public corporations. It is noted that a public corporation includes a county, city, town, village, or school district, for example. As such, by means of the designation as community action agencies, those agencies perform their duties for the state or at least one public corporation.

Lastly, §213 of the enabling legislation expresses an intent to enhance public participation as well as disclosure of information regarding the functions and duties of community action agencies. Specifically, subdivision (a) of §213 states in relevant part that:

> "[E]ach community action agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. Each community action agency shall also provide for reasonable public access to information, including but not limited to public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible..."

Based upon the clear statement of intent expressed by Congress, I believe that the application of the Open Meetings Law to such boards would be consistent with that intent. Further, as described in the analysis provided in the preceding paragraphs, I believe that each component of the definition of "public body" is present with respect to the board of a community action agency.

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

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1047

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

July 13, 1984

Mr. Robert F. Reninger
[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. Reninger:

I have received your letter of July 9 in which you requested copies of advisory opinions rendered under the Open Meetings Law and asked whether a notice of a special meeting must indicate the purpose of the meeting.

In this regard, while §99 of the Open Meetings Law requires that notice be given regarding the time and place of meetings, there is nothing in that statute that requires that the notice include the purpose of the meeting, whether the meeting is characterized as regular or special.

Further, since your inquiry concerns a school board, I have made inquiries on your behalf regarding the requirements of the Education Law. While §1606 requires that notice of a special meeting must be given, that statute contains no requirement that the notice refer to the purpose for which a meeting may be held.

Enclosed, as you requested, are copies of opinions 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1048

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

July 13, 1984

Ms. Nerissa Kern
[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. Kern:

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

According to your letter,:

> "[T]he town of Union Vale's Zoning Board of Appeals has been constantly discussing the granting of variances and special use permits behind closed doors at public meeting while the Town's people have to sit and wait for hours, outside, to get a decision."

You also wrote that the "so-called closed executive session does not come under any of the 8 subjects that may be discussed behind closed doors." You have raised questions regarding the legality of such meetings and whether a decision may be considered "null and void until the meeting is given again, correctly".

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

In terms of background, numerous problems and conflicing interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning board of appeals. The Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberates toward a decision, its deliberations could be considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. Nevertheless,

in 1983 the Open Meetings Law was amended. If brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals [see attached, Open Meetings Law, §103(1)]. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law. Further, due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session. As you are aware, paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a public body, including a zoning board of appeals, must deliberate in public.

With respect to the legality of action that may have been taken in violation of the Law, I direct your attention to §102(1) of the Open Meetings Law, which 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."

Based upon the language quoted above, although an aggrieved person may initiate a lawsuit under the Open Meetings Law, I believe that action taken by a public body remains valid unless and until a court renders a determination to the contrary.

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

Sincerely,

Robert J. Freeman

RJF:ew

Enc.

cc: Zoning Board of Appeals, Town of Union Vale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1049

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

August 2, 1984

Ms. Lou Ann Murawski
Town Clerk
Town of Niagara
7105 Lockport Road
Niagara Falls, NY 14305

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. Murawski:

As you are aware, I received your letter of July 5. Please accept my apologies for the delay in response.

You have requested an opinion regarding a requirement that you, as Town Clerk, must attend "work sessions" held by the Town Board "when no formal action is taken by the Town Board, but rather items are discussed with reference to the next regular meeting of the Town Board".

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

It is noted at the outset that the definition of "meeting" [see Open Meetings Law, §97(1)] has been interpreted expansively by the courts. In brief, the Court of Appeals held that the definition includes any convening of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which a meeting may be characterized [see Orange County Publications v. Council of the City of Newburgh, 45 NY 2d 947]. Consequently, it is clear in my view that a "work session" is a "meeting" subject to the Open Meetings Law.

With respect to the contents of minutes of open meetings, §101(1) of the Open Meetings Law states that:

> "[M]inutes shall be taken al 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, minutes need not, in my opinion, consist of a verbatim transcript or account of each comment made at a meeting. On the contrary, the requirements imposed by the Open Meetings Law indicate that minutes must include reference to what might be characterized as the highlights of a meeting.

The problem as I see it involves the interpretation of the Open Meetings Law in conjunction with §30 of the Town Law, which in subdivision (1) states in relevant part that the town clerk:

> "[S]hall have the custody of all the 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..."

Although the Town Law requires that the clerk be present at each meeting of the town board for the purpose of taking minutes, I do not believe that it would be reasonable to construe §30(1) to require the presence of a clerk at a work session during which there are no motions, proposals, resolutions or votes taken.

Section 30 of the Town Law was enacted long before the Open Meetings Law went into effect. Consequently, I do not feel that the drafters of §30 could have envisioned the existence of an extensive Open Meetings Law analogous to the statute now in effect. Further, I believe that §30 was intended to require the presence of a clerk to take minutes only in situations in which motions and resolutions are introduced and in which votes are taken. If that is not the case with respect to work sessions, it is in my view unnecessary that a town clerk be present to take minutes.

Consequently, in the case of a "work session" or similar gatherings in which there is no intent on the part of a board to take action, but rather only an intent to discuss, it is my view that the Town Clerk need not be present, for §30 of the Town Law was in my opinion intended to require a clerk to be present only in the event that motions or resolutions, for example, are introduced, followed by action by a 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3411
OML-AO- 1050

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

August 8, 1984

Mr. John D. Abbott
[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. Abbott:

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 Hilton Central School Borad of Education recently elected its officers by ballot. At the direction of the Board, the Clerk will publish the vote of each member in the minutes of that meeting". Although the votes of each member will be included in the minutes, you indicated that the Board "declined to release the votes of individual members during the meeting even though requests were made by members of the board, press and public".

Your question is "whether or not the legislature intended that there be this kind of delay in allowing the public, especially those who are interested enough to have attended the meeting, to gain access to this information".

From my perspective, the provisions of two statutes, the Freedom of Information Law and the Open Meetings Law, are relevant to your inquiry. In this regard, I would like to offer the following comments.

First, although the Freedom of Information Law is generally applicable to existing records, a vote taken by a public body represents one of the few situations in which a record must be prepared. Specifically, §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 agency proceeding in which the member votes..."

As such, in any instance in which the Board takes a final vote, a record must be prepared that indicates the manner in which each member cast his or her vote.

Second, the provisions of the Open Meetings Law relative to minutes include reference to a vote. Section 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."

Therefore, when §87(3)(a) of the Freedom of Information Law and §101(1) of the Open Meetings Law are viewed in conjunction with one another, I believe that the record of votes required to be prepared under the Freedom of Information Law should be included within minutes required to be prepared under the Open Meetings Law.

It is noted that §101(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks of such meetings.

Nevertheless, it is my view that it was the intent of the legislature to require that members of public bodies, when casting votes, should do so openly, and not by means of a paper ballot that may later be used in the preparation of a record of votes. Perhaps most important in terms of legislative intent is §95 of the Open Meetings Law, the "Legislative Declaration". The first sentence of the cited provision 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."

From my perspective, when a school board or any other public body takes action by means of a vote, the vote of the members should be taken publicly and in such a manner that the members can be identified with affirmative or negative votes. In my opinion, unless members of public bodies vote in the manner described above, the ability of those in attendance to "observe the performance of public officials" would be diminished to an extent inconsistent with the intent as expressed in the legislative declaration regarding 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1051

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

August 8, 1984

Ms. Phoebe Meranus
[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. Meranus:

As you are aware, I have received your recent letter, in which you requested an advisory opinion regarding the use of a tape recorder at a meeting.

Specifically, in your capacity as a member of the Board of Trustees of the Village of Herkimer, you are seeking "[A] statement to the effect that the use of a tape recorder at Village Board Meetings is legal, and that its use may not be forbidden by a Mayor or anyone else." You also requested permission to introduce my response at the upcoming meeting of the Board of Trustees and to include it as part of the record.

In this regard, I would like to offer the following comments, which you may publicly disclose as you see fit.

It is noted at the outset that the Open Meetings Law is silent with respect to the use of tape recorders. Nevertheless, there are judicial determinations concerning the use of tape recorders at open meetings of public bodies which in my opinion indicate that neither a public body, nor one of its members, such as a mayor, could prohibit the use of a portable, battery operated tape recorder at an open meeting.

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 1979. That decision arose when two individuals sought to bring their tape recorders at 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 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."

Most recently, the Supreme Court, Nassau County, also found that a public body could not prohibit the use of a "hand held battery operated tape recorder" at an open meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 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 fore going, I do not believe that the Board of Trustees or the Mayor could prohibit a member of the public or the Board from using a portable, battery-operated tape recorder 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

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1052

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

August 9, 1984

Ms. Phoebe Meranus
[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. Meranus:

I have received your recent letter in which you raised a series of questions pertaining to incidents relative to a meeting of the Board of Trustees of the Village of Herkimer held on July 30.

It is noted at the outset that the meeting was apparently begun as an executive session, which was scheduled to occur between 6 and 7 p.m. It appears that the purpose of the "executive session" was to review the agenda prior to the public portion of the meeting.

In this regard, I believe that the convening of an executive session prior to an open meeting represents a failure to comply with the Open Meetings Law.

I would like to point out that the term "meeting" as defined in §97(1) of the Open Meetings Law has been broadly construed by the courts. In a landmark decision rendered in 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 [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Appellate Division decision, which was later unanimously affirmed by the Court of Appeals alluded to "closed work sessions", "agenda sessions", and similar "informal" gatherings which were found to be "meetings" subject to the Open Meetings Law in all respects, which must be convened open to the public and preceded by notice given in accordance with §99 of the Law. Therefore, I believe that the "executive session" that began at 6 p.m. on the evening of July 30 should have been convened as an open meeting.

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 followed by a public body during an open meeting before it may enter into a closed or "executive session". Specifically, the cited provision states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion idenfitying 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..."

Based upon the language quoted above, it is clear in my opinion that an executive session is not separate and distinct from an open meeting, but rather that is is a portion of an open meeting during which the public may be excluded. Moreover, it is reiterated that a motion to enter into an executive session must be made during an open meeting, which indicates the subject or subjects to be considered and which must be carried by a majority vote of a public body before the public may be excluded from a meeting. I believe that it is also clear that a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, the topics that may be considered during an executive session are specified and limited in paragraphs (a) through (h) of §100(1).

At this juncture I will attempt to respond to the specific questions raised in your letter.

Your first question is whether the former Village attorney may participate in an executive session "as the Mayor's personal representative without Board approval". Here I direct your attention to §100(2) of the Open Meetings Law which states that:

> "Attendance 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, only members of public bodies have the right to attend an executive session. No other persons would in my view have the right to attend without the approval of a public body. Under the circumstances, assuming that

the Board of Trustees consists of five members, I believe that a quorum, at least three of the five members, would be required to agree to permit the attendance of a person other than a member of the Board.

Your second question is whether "a meeting may be considered legal at which only the Mayor has personal legal representation and the Trustees have no counsel present." Your third question is whether a vote taken under the conditions described in the preceding sentence is "considered binding". In this regard, I do not believe that there is any provision of the Open Meetings Law that would require the presence of counsel at a meeting of a public body. Consequently, it does not appear that there would be any illegality regarding a meeting during which the Board of Trustees is not represented by counsel.

The fourth question is whether "a vote taken at a Meeting which is subsequently declared a 'closed door' Meeting considered binding". As a general matter, as indicated in §100(1), which was quoted in part earlier, I believe that a public body may vote during a properly convened executive session, unless the vote is to appropriate public monies. Further, there is nothing in the Open Meetings Law that would bring about an automatic nullification of action taken at a meeting or a closed door session, even though the action might have been taken in violation of the Open Meetings Law.

Section 102 of the Open Meetings Law pertains to the enforcement of its provisions. Subdivision (1) of §102 states in part that:

> "Any 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 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 view of the language of the provision quoted above, I believe that action taken by a public body remains valid unless and until a court determines to the contrary.

Your fifth question relates to the response given in the preceding paragraph. You asked "who would determine whether the 'Executive Session' after the Public Meeting of July 30 was legal or illegal." Again, I believe that only a court could render such a determination.

Your sixth question is whether action taken at an executive session held on July 30 could be "declared invalid if duress and intimidation are charged". In this regard, §102 of the Open Meetings Law describes the type of situation in which a court may invalidate action taken in violation of the Open Meetings Law. In my view, your question cannot likely be answered under the Open Meetings Law, but rather, only by a court.

The seventh question concerns "the official Village newspaper's responsibility with regard to publishing accounts of Village Board Meetings". In short, neither the Open Meetings Law nor any other provision of law of which I am aware imposes a requirement upon a newspaper to print accounts of meetings of public bodies.

The eighth question is why a particular newspaper "reported nothing at all" about the meeting of July 30. Once again, I an unaware of any law that could be cited to answer that question. In a related vein, you also asked whether a newspaper could refuse to accept to publish a paid advertisement regarding its coverage of the Board. In all honesty, since the question falls outside the scope of the Committee's legal authority, I have neither the expertise nor the jurisdiction to provide a response.

Finally, you wrote that a meeting has been scheduled for August 9 between the Village Board and Valley Health Service, a "non-profit group" which recently purchased a municipal hospital "for conversion to a nursing home". The meeting will, according to your letter, focus upon "which party is responsible for payment of benefits to retired Herkimer Memorial Hospital employees". You have raised questions regarding the status of the gathering.

First, assuming that a quorum of the Village Board of Trustees is present, I believe that the gathering would be a "meeting" subject to the Open Meetings Law in all respects. As such, it must in my view be convened open to the public and preceded by notice of the time and place of the meeting given to the news media and the public as required by §99 of the Open Meetings Law.

Second, the meeting in my opinion must be conducted open to the public unless and until a topic arises that may properly be considered during an executive session as described in §100 of the Law.

Third, you asked whether a vote could be taken at the meeting in question. In my view, there in nothing in the Open Meetings Law that would preclude the taking of a vote at the meeting.

Lastly, you questioned whether a tape recorder could be used. As indicated in a previous opinion addressed to you, I believe that any person may use a portable, battery-operated 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1053

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

August 9, 1984

Mr. Lohr McKinstry
Editor
Hamilton County News
P.O. Box 166
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 Mr. McKinstry:

As you are aware, I have received your letter of July 17. Please accept my apologies for the delay in response.

You have requested an advisory opinion concerning a meeting of the Village Board of Trustees of the Village of Speculator. Specifically, according to your letter:

> "[A]t its July 16 regular meeting, the board went into executive session on a motion made by a board member that did not state the reason for the executive session. When a reporter for this newspaper, who was present covering the meeting, asked the reason, the village attorney, Kathleen Corbett of Saratoga Springs, replied, "Possible litigation." No other reason was given, and no litigant was named."

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

First, a motion for entry into an executive session must indicate the topic or topics to be discussed. As stated in §100(1) of the Law, which in part describes the procedure for entry into executive session:

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

Based upon the language quoted above, it is reiterated that a motion to enter into an executive session must include, in general terms, reference to the subject to be considered behind closed doors.

Second, the provisions in the Open Meetings Law concerning "litigation" are found in §100(1)(d). The cited provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "[T]he purpose of paragraph d is "to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The 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, 97 AD 2d 840, 841 (1983)].

Based upon the language quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.

Lastly, 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), emphasis added by court].

Based upon the determination quoted above, I do not believe that the motion as you described it would have been sufficient.

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:ew

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1054

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

August 10, 1984

Mr. Hank Kuczynski
[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. Kuczynski:

As you are aware, I have received your letter of July 15. Please accept my apologies for the delay in response.

According to your letter:

> "Early in June, Saratoga County Republican Chairman James Foley called a meeting with the all-Republican Law and Finance Committee. Every Committee member was present.
>
> "It is the most powerful committee of the board making recommendations on all matters dealing with the law and finance. And it is responsible for recommending any changes to the tentative budget proposed by the County Budget Officer.
>
> "It has been reported in the Saratogian newspaper that four committee people admitted that the recent 4.5 million dollar investment snafu was discussed."

You wrote further that you believe that the gathering in question represented a violation of the Open Meetings Law. Consequently, you raised questions regarding the enforcement of the Open Meetings Law and the penalties that might be imposed when the Law is violated.

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

First, with respect to the scope of the Open Meetings Law, it is noted that §103(2) of the Law states that its provisions do 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 must be open to members of opposing political parties as well as the general public.

The leading decision on the subject is Sciolino v. Ryan [103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 AD 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 holding rendered in Sciolino and assuming the accuracy of the circumstances described in your letter, I concur with your contention that the gathering constituted a violation of the Open Meetings Law. In my view, a committee of a county legislative body is clearly a "public body" as defined in §97(1) of the Open Meetings Law. Since every member of the Committee attended, a quorum was present. Further, if matters of public business rather than political party business were discussed, in my view, the gathering would not have been a political caucus exempt from the Open Meetings Law, but rather a meeting subject to the Open Meetings Law in all respects.

Second, the provisions concerning the enforcement of the Open Meetings Law are found in §102. The cited provision states in part that:

> "1. Any 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...
>
> "2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the unsuccessful party."

Therefore, an "aggrieved person", such as a county taxpayer, could initiate a lawsuit within four months of the date of the event, under Article 78 of the Civil Practice Law and Rules. In terms of "penalties", §102 indicates that a court may, "upon good cause shown", invalidate action taken in violation of the Law. Further, should a member of the public prevail in a lawsuit, that person may be awarded attorney fees.

I would like to add that the Committee has recommended that a court be given the authority to fine members of public bodies who engage in repeated or flagrant violations of the Open Meetings Law. Although legislation including the recommendation was introduced at the request of the Governor, it was not enacted.

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:ew

cc: Law and Finance Committee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3417
OML-AO- 1055

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

August 14, 1984

Ms. June Maxam
North Country Gazette
Route 9
Box 408
Chestertown, NY 12817

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, unless otherwise indicated.

Dear Ms. Maxam:

As you are aware, I have received your recent letter. Please accept my apologies for the delay in response.

Your inquiry concerns the implementation of the Freedom of Information and Open Meetings Laws by the North Warren School District and its Board of Education.

According to your letter and our conversation, although notice of "special" meetings of the Board of Education may be posted, no additional notice is given. In this regard, it is noted that the term "meeting" as defined in §97(1) of the Open Meetings Law has been broadly construed by the courts. In a landmark decision rendered in 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 [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Appellate Division decision, which was later unanimously affirmed by the Court of Appeals alluded to "closed work sessions", "agenda meetings", and similar "informal" gatherings which were found to be "meetings" subject to the Open Meetings Law in all respects, which must be convened open to the public and preceded by notice given in accordance with §99 of the Law.

Section 99 of the Open Meetings Law requires that notice of the time and place of every meeting be given to the public by means of posting and to the news media. Subdivision (1) pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous, public locations not less than seventy-two hours prior to such meetings. Subdivision (2) of §99 pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and 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. Therefore, even if a meeting is characterized as "special" or "emergency", an effort must in my opinion be made to provide notice to the public and the news media. In the case of the news media, notice is often given by phone when a meeting is scheduled less than a week in advance.

In our conversation, you alluded to executive sessions held by the School Board to discuss "school business" and "renovations". Here I direct your attention to §100(1) of the Law, which prescribes the procedure that must be followed by a public body prior to entry into an executive session. The cited provision states in relevant part that:

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

Based upon the language quoted above, a motion to enter into an executive session must indicate, in general terms, the subject or subjects to be considered during an executive session. Further, it is clear in my view 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) specify and limit the topics that may appropriately be considered during an executive session. Without additional description, I do not believe that "school business" or "renovations" would constitute appropriate characterizations of topics for consideration in an executive session.

Lastly, you indicated that requests made under the Freedom of Information Law have gone unanswered. Please be advised that the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, contain prescribed time limits concerning 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business 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 ten 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)].

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Enclosed are copies of the Freedom of Information Law, Open Meetings Law, and a pocket guide that summarizes both statutes. Please note that the responses made in the preceeding comments pertain to the current Open Meetings Law. On September 1 the Open Meetings Law will be renumbered. A copy of the Law as it will appear on September 1 has been enclosed. Copies of this opinion and the same materials will be sent to School District officials.

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:ew

Enc.

cc: Mr. Donlon, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1056

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

August 15, 1984

Mr. Robert L. Hammserslag
Executive Director
Essex Community Heritage
Organization
Essex, New York 12936

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. Hammerslag:

As you are aware, I have received your letter of July 23. Please accept my apologies for the delay in response.

According to your letter, at a recent meeting of the Essex Town Board, you were "asked to stop tape recording the proceedings by the Town Supervisor". As a consequence, there was discussion regarding the legality of the use of tape recorders at meetings and you have requested my opinion on the subject.

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. Nevertheless, there are judicial determinations concerning the use of tape recorders at open meetings of public bodies which in my opinion indicate that neither a public body, nor one of its members, such as a town supervisor, could prohibit the use of a portable, battery operated tape recorder at an open meeting.

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 1979. That decision arose when two individuals sought to bring their tape recorders at 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 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."

Most recently, the Supreme Court, Nassau County, also found that a public body could not prohibit the use of a "hand held battery operated tape recorder" at an open meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 board may proclude 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 the Town Board or the Supervisor could prohibit a member of the public from using a portable, battery operated tape recorder at its open meetings.

As requested, a copy of this opinion will be sent 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

cc: Supervisor, Town of Essex

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1057

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

August 20, 1984

Ms. Annette La Belle
[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. La Belle:

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

According to your letter, the Board of Health of Westchester County has "prevented" you from attending a meeting of its committee, which was apparently held to discuss a proposal for review of the County's Clean Indoor Air Act. The Chairman of the committee, Dr. Schrafft, indicated to you that the public had no right to attend a "working session" of the committee.

You have asked that I provide advice to the County Executive, the County Attorney, as well as the Board of Health regarding the requirements of the Open Meetings Law.

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 phrase "public body", which is defined in §97(2) to mean:

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

Based upon the language quoted above, it is clear in my view that a committee of a public body, including a committee designated by the Board of Health or the County Legislature, for example, is subject to the Open Meetings Law in all respects. It is noted, too, that the courts have held that advisory bodies, which may have no capacity to take final action but perhaps only the capacity to recommend, are "public bodies" required to comply with the Open Meetings Law [see e.g., Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)].

Second, with respect to the claim that "working sessions" fall outside the scope of the Open Meetings Law, the state's highest court, the Court of Appeals dealt with such a contention in 1978. In Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], it was held that the term "meeting" as defined in §97(1) encompasses 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 the gathering may be characterized. Therefore, assuming that a quroum of the committee in question convened to discuss the Clear Indoor Air Act, such a gathering, even though it may have been characterized as a "working session", was in my view a "meeting" that should have been convened open to the public and preceded by notice.

Third, with respect to notice, §99 of the Open Meetings Law requires that notice of the time and place be given prior to every meeting. Subdivision (1) of §99 pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Subdivision (2) of §99 pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings.

You have asked whether there is "any legal action" that you might appropriately take in order to enhance compliance with the Open Meetings Law. As you may be aware, §102 of the Open Meetings Law provides that any "aggrieved person" may initiate a suit under the Open Meetings Law.

However, at this juncture, since you intimated that officials of Westchester County may be relatively new and unfamiliar with the requirements of the Law, I will send to them a copy of this opinion and the Open Meetings Law. Perhaps when they review this opinion, the statute, and relevant case law, compliance with the Open Meetings Law can be achieved.

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: Andrew Rourke, County Executive
County Attorney
Chairman, Board of Health

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1058

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

August 20, 1984

Mr. Paul Lester
News Director
WDLC
Port Jervis Broadcasting Co., Inc.
Neversink Drive
P.O. Box 920
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. Lester:

As you are aware, I have received your recent letter in which you requested an advisory opinion.

According to your letter, a dispute has arisen between the news media and the Minisink Valley School Board regarding the use of tape recorders at school board meetings. The board has adopted a policy regarding the use of tape recorders which in your view is inappropriate.

In brief, the policy requires that a person who seeks to tape record a meeting must "send a letter of intent to the board" at least a week prior to the meeting. At the meeting, the person who seeks to tape record must "identify the specific agenda items they plan to tape record". The policy states that tape recording cannot occur prior to obtaining "recognition" by the chairman and declaring an intent to tape record at the meeting. The policy requires that the chairman "poll the Board, District employees present, and any persons in attendance for their consent to the recording". The same provision states that if any person present at the meeting requests that the equipment be turned off, that such a request "will be honored immediately...". In addition, any person who has tape recorded any aspect of the meeting must "sign an affidavit guarenteeing that the replaying or reproduction of the recording...will be in its entirety...". The affidavit must also stipulate that copies of the tape must be made available to the district free of charge and that written releases must be obtained "from all persons who made statements during the portions of the meeting that was taped".

In my opinion, the statement of policy is inconsistent with various judicial decisions on the subject. 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. Nevertheless, there are judicial determinations concerning the use of tape recorders at open meetings of public bodies which in my opinion indicate that neither a public body, nor any person in attendance at a meeting, may prohibit the use of a portable, battery operated tape recorder at an open meeting.

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 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 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, enbodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

Most recently, the Supreme Court, Nassau County, also found that a board of education of a school district could not prohibit the use of a "hand held battery operated tape recorder" at an open meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 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 the School Board can prohibit a member of the public or the news media from using a portable, battery operated tape recorder at its open meetings. Similarly, based upon the case law as

well as the reasoning described in the preceeding paragraphs, I do not believe that any consent is required in order to tape record any aspect of an open meeting. Further, a public body could not in my opinion compel a member of the public or the news media to provide copies of the tape recording on request. In short, if a tape recording of an open meeting has been made, I believe that the owner of the tape recording may do with it as he or she sees fit.

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:ew

cc: Minisink Valley School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3426
OML-AO-1059

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

August 22, 1984

Ms. Ann Ruzow Holland
Executive Director
Friends of Keeseville, Inc.
Civic Center
Keeseville, NY 12944

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. Holland:

As you are aware, I have received your letter of July 25 and the materials attached to it.

Your inquiry concerns the responsibilities of the Friends of Keeseville, Inc., a not-for-profit corporation, under the Freedom of Information and Open Meetings Laws. As I understand the functions of the corporation, although much of its funding comes from various governmental entities, the Corporation performs its duties through various contractual agreements.

In this regard, the scope of the Freedom of Information Law is determined in part by the term "agency", which is defined in §86(3) 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."

The language quoted above indicates, as a general matter, that the Freedom of Information Law is applicable to units of state and local government. Based upon the information that you have supplied regarding the Corporation, it does not appear that the Corporation is an "agency", for it is not a governmental entity, nor does it perform a governmental function. If those assumptions are accurate, the Corporation would not in my view be required to comply with the Freedom of Information Law.

The Open Meetings Law is applicable to meetings of public bodies, and the phrase "public body" is defined in §97(2) of the Law to include:

> "...any entity, for which a quorum is required in order to 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, the Corporation likely does not conduct public business. Consequently, I do not believe that it could be characterized as a "public body" required to comply with the Open Meetings Law.

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws.

I hope that I have been of some asssistance. 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-3433
OML-AO-1060

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

August 23, 1984

Mr. Len Chaimowitz
Editor & Publisher
The Greenwood Lake News
Windermere Avenue
Box K37
Greenwood Lake, NY 10925

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. Chaimowitz:

I have received your letter of July 28. Please accept my apologies for the delay in response.

You have raised a series of questions regarding the Open Meetings Law.

The first area of inquiry pertains to a situation in which members of a village board of trustees met in the village clerk's office after a meeting had ended. You wrote that the gathering in question involved a quorum of the members of the board who were engaged in "animated conversation". You indicated further that they appeared to have been involved in discussions of matters of public business.

From my perspective, based upon the facts as you have described them, the gathering in the clerk's office was likely a "meeting" subject to the requirements of the Open Meetings Law. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, held that the definition of "meeting" [§97(1)] includes within its scope 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 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)]. Therefore, it appears that the gathering described in your letter was a "meeting" that fell within the scope of the Open Meetings Law.

Your second area of inquiry concerns an event that occurred during a meeting of a village board of trustees. Specifically, two members sought "to discuss something outside of the meeting room". Your question is whether two members of a board may "discuss something in another room away from the public". In this regard, I believe that the Open Meetings Law applies to public business conducted by a quorum, a majority of the total membership of a public body. If, for example, a village board of trustees consists of five members, a discussion conducted by two of its members would fall outside the requirements of the Open Meetings Law, for less than a quorum would be present.

With respect to your third question, you asked whether a board can meet in an executive session in private prior to the convening of an open meeting. For the reasons expressed below, I believe that an open meeting must always be convened prior to entry into an executive session.

First, 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.

Second, §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. Specifically, the cited provision states in relevant part that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, it is clear in my view that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting that can be convened only after an open meeting has begun.

Lastly, you asked whether "the laws of a municipality must be made available". In this regard, you wrote that "a newly codified village set of laws" is available at a cost of $100. You have asked whether there is a requirement that specifies where local laws must be made available or whether there is precedent for making local laws available free of charge to a local newspaper, such as the "official" newspaper of a village.

Here I direct your attention to the Freedom of Information Law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof that fall within one or more grounds for denial appearing in §87 (2)(a) through (h) of the Law.

Laws adopted by any public body are in my view clearly available for inspection and copying, for no ground for denial would be applicable with respect to a law.

I believe that such laws would have to be made available at the village hall by the clerk, who, under §4-402 of the Village Law, is the legal custodian of village records.

Further, I am unaware of the volume of the set of village laws. It is noted, however, that §87(1)(b)(iii) of the Freedom of Information Law indicates that an agency may generally charge no more than twenty-five cents per photocopy. Therefore, if you are interested in obtaining a copy of a particular municipal law, I do not believe that you could be charged more than twenty-five cents per photocopy. Further, as indicated previously, inspection of such records could be made at no charge.

Lastly, I have no knowledge of any provision that would require that copies of municipal laws be made available free of charge to the news media generally, or to an "official" newspaper.

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-1061

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

August 23, 1984

Mr. Kevin B. Murray
Minority Leader
Monroe County Legislature
132 Highland Parkway
Rochester, NY 14620

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. Murray:

I have received your letter of July 30. Please accept my apologies for the delay in response.

According to your letter, you are the Minority Leader of the Ways and Means Committee of the Monroe County Legislature. The Committee on Ways and Means consists of nine members, five of whom are Republicans and four of whom are Democrats. You wrote that:

> "On July 25, 1984, after public presentations, one of which concerned a referral to come before the Committee, the Chairman of the Committee recessed the meeting for an extended period of time. Upon his return, he announced that it was his, 'intention not to act on this referral tonight'."

When you suggested that a decision had been reached during "private caucus in contravention of the Open Meetings Law", the Chairman apprently contended that "the Republican majority was not in violation because at one point a Democratic legislator had come in (and left)". It was apparently further contended that "people came and went" and that five members were present for only a short portion of the "caucus".

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

First, as you may be aware, the scope of the Open Meetings Law is determined in part by the phrase "public body", which is 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 of for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based upon the language quoted above, it is clear in my view that a committee of a county legislature, such as the Committee on Ways and Means, is a "public body" required to comply with the Open Meetings Law.

Second, §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". 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 in 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 decision rendered in Sciolino, supra, to the extent that a majority of the total membership of the Committee on Ways and Means was present for the purpose of conducting public business, I believe that such a gathering could not have been characterized as a political caucus exempt from the provisions of the Open Meetings Law, but rather as a "meeting" that should have been open to the public. Further, from my perspective, the party designation of those who might have been present during the so-called "caucus" would likely have been of no moment. Stated differently, so long as five of the nine members of the Committee, a majority, were present for the purpose of conducting public business, the Open Meetings Law would in my view have been applicable to that extent.

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

FOIL-AO-1062

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

August 27, 1984

Dr. Jonathan Slosser
[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 Dr. Slosser:

I have received your letter of August 4 in which you raised questions regarding the capacity to videotape meetings or hearings.

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 as well as audio-visual equipment. While there are several judicial determinations concerning the use of tape recorders at open meetings of public bodies, I am unaware of any determination concerning the use of television cameras or similar devices at meetings.

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

Notwithstanding Davidson, however, the Committee 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 1979. That decision arose when two individuals sought to bring their tape recorders at 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 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."

Most recently, the Supreme Court, Nassau County, also found that a public body could not prohibit the use of a "hand held battery operated tape recorder" at an open meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 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 could prohibit a member of the public from using a portable, battery-operated tape recorder at its open meetings.

With respect to the use of other types of equipment, I believe that the principle involved concerns the effect of cameras or similar equipment upon the deliberative process. If the use of cameras, special lighting, and related equipment would clearly be disruptive to the deliberative process, it would appear that a rule prohibiting the use of such devices would be reasonable.

With regard to hearings, there is a statute that is cited most often in relation to the use of cameras in the courtroom that also may be applicable to certain types of hearings. Specifically, §52 of the Civil Rights Law states in relevant part that:

> "[N]o person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising , broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a

> court, commission, committee, administrative agency or other tribunal in this state; except that the prohibition contained in this section shall not apply to public hearings conducted by the public service commission with regard to rates charges by utilities, or to proceedings by either house of the state legislature or committee or joint committee of the legislature..."

Stated differently, if a person is or may be compelled to testify before a court or during a hearing conducted by an agency, I believe that videotaping would be prohibited by §52 of the Civil Rights Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3441
OML-AO-1063

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

August 27, 1984

Ms. Julie Krug
[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. Krug:

I have received your letter of August 6 in which you requested an advisory opinion.

Specifically, you wrote:

> "...in order to save time, that several items on a school board agenda by grouped together and instead of individual votes on each item, the board might be able to take a 'consensus vote.'"

You added that the "consensus vote" involved a series of personnel matter identified on the attached agenda.

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

Although the phrase "consensus vote" has arisen in previous situations, in all honesty, I have no recollection of the phrase being used in a situation similar to that which you described. Most often, the phrase "consensus vote" has been used where a public body deliberates and appears to reach a determination, but does not vote "officially". In this instance, it appears that an official vote was taken with respect to a series of issues, rather than taking separate votes regarding each issue.

In my view, the Open Meetings Law provides little guidance regarding the legality of the so-called "consensus vote". The only requirement that may be relevant to the issue involves the preparation of minutes.

With respect to minutes, §101 provides what might be characterized as minimum requirements concerning the contents of minutes. The cited provision states that:

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

While the language quoted above does not specify that each issue must be determined by means of separate votes, it is clear that minutes must include reference to all motions, proposals and resolutions. Therefore, if for example, motions are introduced with respect to each item on the agenda, even though one vote may have been taken with respect to all, the minutes would nonetheless have to indicate those motions.

It is also noted that, in the past, a "consensus vote" may have been taken in such a way that the manner in which members of a public body cast their votes would not be known. Here I direct your attention to the Freedom of Information Law. One of the few instances in which an agency must create a record under the Freedom of Information Law involves a situation in which a public body votes. Section 87(3)(a) of the Freedom of Information Law states that each agency shall maintain:

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

As such, in any instance in which a public body votes, a record must be prepared, presumably as a part of the minutes, which specifies the manner in which each member cast his or her vote.

As you requested, a copy of this opinion will be sent to the Superintendent and the President of the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sandra Holden, President
Dr. Lewis Grell, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1064

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

August 27, 1984

Mr. Max R. Haak
[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. Haak:

I have received your letter of August 6, as well as the letter attached to it that was originally sent to Attorney General Abrams.

According to your letter, four members of a school board were recently charged with violating the Open Meetings Law. Although the members of the Board successfully defended themselves, you indicated that there was no clarification or interpretation of the Law rendered by the court. You wrote further that:

> "[A]t the present time the accused board members fear that they are in danger of prosecution if they so much as pass the time of day when meeting one another on the street, if they are to be placed in such a position then it is my feeling that all executive meetings, which are held behind closed doors at meetings of school boards, village boards, town boards and county boards are also illegal."

In addition, you expressed the contention "that as long as no action is taken at a meeting and no business is transacted that all such officials should be allowed complete freedom of speech."

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

First, as a matter of policy, the Committee does not render advisory opinions following the commencement of litigation or during the pendency of litigation. It is assumed on the basis of your letter that litigation has ended. Further, under the circumstances, the ensuing comments are general and would apply to all public bodies subject to the Open Meetings Law.

Second, perhaps the central provision of the Law is the definition of "meeting" [see §102(1)]. In a landmark decision rendered in 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 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 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, informal meetings or work sessions of a public body attended by a majority of its membership are in my view clearly subject to the Open Meetings Law, whether or not there is an intent to take action.

Third, as intimated in the preceding paragraph, a gathering of less than a quorum of the membership of a public body would fall outside the requirements of the Law. Similarly, since the definition of "meeting" involves an intent to conduct public business, a chance meeting similar to that described in your letter would not in my opinion fall within the scope of the Open Meetings Law.

Fourth, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings of a public body must be held open to the public, except to the extent that a closed or "executive session" may properly be held.

It is noted that §102(3) defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, §105(1) prescribes a procedure that must be followed during an open meeting before a public body may enter into an executive session.

Lastly, 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 §105(1) specify and limit the topics that may appropriately be considered during an executive session.

Enclosed is a copy of the Open Meetings Law for your consideration.

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-3147
OML-AO-1065

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

August 29, 1984

Defend Our Environmentally Concerned
Citizens and Establish a Pollution
Free Atmosphere
[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. Augustine, Ms. Augustine and Ms. Smith:

I have received your letter of August 10 in which you requested an advisory opinion.

According to your letter, you have attempted to determine whether or when the City of Beacon has designated a records access officer under the Freedom of Information Law. You wrote that the access officer appears to have been designated "by word of mouth". Further, you indicated that the City of Beacon has apparently failed to adopt procedures under the Freedom of Information Law or prepare a "subject matter list". In a related area, you stated that the City of Beacon has been asked to post notices of all of its meetings on the bulletin board in the City Hall lobby, but that your request has not been fulfilled.

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

First, in terms of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural aspects of the Freedom of Information Law as well as the subject matter list required to be prepared under §87(3)

(c). In turn, §87(1)(a) of the Freedom of Information Law requires that the governing body of a public corporation, such as the City of Beacon, must adopt uniform rules and regulations for all agencies under the aegis of the City consistent with the Law and in conformity with the Committee's regulations.

Second, one aspect of the Committee's regulations involves the responsibility of the governing body of a public corporation to designate one or more "records access officers" [see 21 NYCRR, §1401.2]. In brief, the records access officer has the duty of coordinating the agency's response to requests for records and maintaining an up to date subject matter list.

Therefore, I believe that the governing body for the City of Beacon has the duty under the Freedom of Information Law to promulgate regulations, which would include the designation by name or title of one or more records access officers.

Third, as a general matter, an agency is not required to prepare a record under the Freedom of Information Law [see §89(3)]. However, an exception to that rule involves the preparation of a subject matter list. Specifically, §87(3)(c) requires that each agency shall maintain:

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

It is emphasized that a subject matter list is not intended to consist of an index that identifies each and every record of an agency. Nevertheless, the list is required to identify by category the types of records maintained by an agency. Further, §1401.6 of the regulations promulgated by the Committee states that:

> "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought."

Your remaining question pertains to the posting of notices of meetings. Here I direct your attention to the Open Meetings Law. Section 104 requires the posting of notice prior to all meetings of a public body. Subdivision (1) of §104 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 public locations" not less than seventy-two hours prior to such meetings.

Subdivision (2) of §104 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 §104(1) "to the extent practicable" at a reasonable time prior to such meetings.

Consequently, it is clear in my view that notices of meetings must be conspicuously posted in one or more locations that are designated by a public body in order that the public can know where notices will be consistently displayed. Although there is no requirement that notice be posted on a bulletin board in a city hall, for example, I believe that posting in that type of location is common.

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

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

OML-AO-1066

August 31, 1984

Ms. Roberta C. Nelson
Assistant to the Director
Saratoga Springs Preservation
Foundation, Inc.
P.O. Box 442
465 Broadway
Saratoga Springs, NY 12866

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. Nelson:

I have received your letter of August 13 in which you requested an advisory opinion under the Open Meetings Law.

You have asked whether the Thoroughbred Racing Capital Investment Fund (the Fund) is "subject to Article 7 of the Public Officers Law". In my opinion, the Board of Directors of the Fund is a "public body" subject to the Open Meetings Law in all respects for the following reasons.

The scope of the Open Meetings Law is determined in part by §102(2), which 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 Fund was created by means of Chapter 1006 of the Laws of 1983 and is governed under the provisions of a new Article II-A, §§251 through 268, of the Racing, Pari-mutuel, Wagering and Breeding Law. Section 253(1) states in relevant part that:

> "[A] corporation to be known as the 'New York state thoroughbred racing capital investment fund', in this article referred to as 'the fund', is hereby created. Such fund shall be a body corporate and politic, constituting a public benefit corporation."

Section 66(1) of the General Construction Law defines "public corporation" to include a "public benefit corporation".

Since the definition of "public body" includes an entity consisting of at least two members that conducts public business and performs a governmental function "for a public corporation as defined in §66 of the General Construction Law", I believe that the Board of Directors of the Fund is clearly a "public body" subject to the Open Meetings Law in all respects.

Further, since the definition of "public body" refers to the capacity to conduct business by means of a quorum, it is noted that subdivision (6) of §253 states in part that:

> "[T]he affirmative vote of four of the members shall be necessary for the transaction of any business or the exercise of any power or function of the fund."

In sum, I believe that the meetings of the Board of Directors of the Fund must be 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

RJF:ew

cc: John VanLindt, Chairman, New York Racing and Wagering Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1067

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

September 6, 1984

Mr. Bill Lowe
News Director
WHAM Radio
350 East Avenue
Rochester, NY 14604

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. Lowe:

As you are aware, I have received your letter of August 17, as well as the materials attached to it. You have requested the assistance and views of this office relative to a resolution adopted by the Town Board of the Town of Chili that prohibits the use of tape recorders at its meetings.

According to a news article attached to your letter, the resolution, which was passed by a 4 to 1 vote, states:

> "That there be no tape recorders used by any members of the Town Board or those in attendance in the meetings, and if the town clerk feels in the future the need for a tape recorder, that she would get permission to do so."

In my opinion, the resolution is inconsistent with various judicial decisions on the subject. 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. Nevertheless, there are judicial determinations concerning the use of tape recorders at open meetings of public bodies which in my opinion indicate that neither a public body, nor any person in attendance at a meeting, may prohibit the use of a portable, battery operated tape recorder at an open meeting.

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 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 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."

Most recently, the Supreme Court, Nassau County, also found that a board of education of a school district could not prohibit the use of a "hand held battery operated tape recorder" at an open meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 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 Ysteuta was decided."

In view of the foregoing, I do not believe that the Town Board can prohibit a member of the public, the news media, one of its members or the town clerk from using a portable, battery operated tape recorder at its open meetings.

In an effort to alter the situation and inform the Town Board of the contents of this opinion, a copy will be sent to the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1068

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

September 6, 1984

Mr. Jerome F. Brixner
Councilman
Town of Chili
14 Hartom Road
Rochester, NY 14624

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. Brixner:

As you are aware, I have received your letter of August 20, as well the materials attached to it.

In your capacity as a member of the Town Board, you have requested the assistance and views of this office relative to a resolution adopted by the Town Board of the Town of Chili that prohibits the use of tape recorders at its meetings.

According to a news article attached to your letter, the resolution, which was passed by a 4 to 1 vote, states:

> "That there be no tape recorders used by any members of the Town Board or those in attendance in the meetings, and if the town clerk feels in the future the need for a tape recorder, that she would get permission to do so."

In my opinion, the resolution in inconsistent with various judicial decisions on the subject. 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. Nevertheless, there are judicial determinations concerning the use of tape recorders at open meetings of public bodies which in my opinion indicate that neither a public body, nor any person in attendance at a meeting, may prohibit the use of a portable, battery operated tape recorder at an open meeting.

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 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 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."

Most recently, the Supreme Court, Nassau County, also found that a board of education of a school district could not prohibit the use of a "hand held battery operated tape recorder" at an open meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 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 Ysteuta was decided."

In view of the foregoing, I do not believe that the Town Board can prohibit a member of the public, the news media, one of its members or the town clerk from using a portable, battery operated tape recorder at its open meetings.

In an effort to alter the situation and inform the Town Board of the contents of this opinion, a copy will be sent to the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3457
OML-AO- 1069

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

September 6, 1984

Mr. E.M. Knapik
[redacted]

Dear Mr. Knapik:

I have received your letter of September 3. As requested, enclosed are two copies each of the Freedom of Information and Personal Privacy Protection Laws. Also enclosed are copies of the Open Meetings Law. In addition, one copy of each of those statutes will be sent to Mr. Stratton.

You expressed a complaint regarding the conduct of business by a local government agency. In this regard, I would like to offer the following general comments.

First, the Freedom of Information Law is applicable to records of an "agency", which is defined in §86(3) of that statute 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 is clear that the Freedom of Information Law is applicable to records of virtually all units of state and local government.

Second, the scope of the Personal Privacy Protection Law, however, is not as extensive as that of the Freedom of Information Law. The Personal Privacy Protection Law is also applicable to records of agencies; however, the term "agency" is defined in §92(1) of that statute to mean:

> "any state board, bureau, committee, commission, council, department, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Therefore, although the Personal Privacy Protection Law is applicable to state agencies, it does not apply to units of local government, such as a county, city, town, or school district, for example.

Third, since you alluded to "supervisors meetings", it appears that you are referring to meetings of a county legislative body. Here I would like to point out that the Open Meetings Law pertains to meetings of a "public body", which is defined in §102(2) of that statute 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."

Therefore, the Open Meetings Law pertains to meetings of commissions, county legislative bodies, town boards, city councils, and the like.

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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1070

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

September 6, 1984

Ms. Sandra A. Smith
Village Clerk
Village of Massena
Massena, NY 13662-1975

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 August 16. As Clerk of the Village of Massena, you raised issues concerning the "added burdens" imposed upon clerks by the Open Meetings Law.

Specifically, you referred to the requirement that a public body convene an open meeting in order to enter into an executive session. You wrote further that:

> "An example of this is if the Mayor sees the need for an emergency Executive Session in the evening and obvious no immediate action will be taken, the Clerk must make herself available for a few minutes" (emphasis yours).

Due to the provisions of the Open Meetings Law and the Village Law, it appears that the clerk must be present at the type of gathering that you described, even the presence of the clerk may be brief, and even though action might not be taken. In this regard, I would like to offer the following comments.

First, as you may be aware, the definition of "meeting" [see Open Meetings Law, §102(1)] has been construed broadly by the courts to include 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Further, the Law requires that a procedure be accomplished during an open meeting before a public body may enter into an executive session. Specifically, §105(1) of the Open Meetings 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..."

As such, it is clear in my view that a motion must be made and carried during an open meeting prior to entry into an executive session.

Third, §106(1) states that:

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

Since a motion to enter into an executive session must be made, minutes must in my opinion refer to the motion.

Fourth, §4-402 of the Village Law states in part that:

> "The clerk of each village shall, subject to the direction and control of the mayor...
>
> b. act as clerk of the board of trustees and of each board of village officers and shall keep a record of their proceedings..."

Lastly, in similar situations in which a "work session" open to the public is held in which it is clear that no motions or resolutions will be adopted, it has been suggested that a clerk need not be present.

The problem as I see it involves the interpretation of the Open Meetings Law in conjunction with §4-402 of the Village Law, which was quoted above in relevant part. Although the Village Law requires that the clerk be present at each meeting of the board for the purpose of taking minutes, it may be unreasonable to construe §4-402(b) to require the presence of a clerk at a work session during which there are no motions, proposals, resolutions or votes taken.

The cited provision of the Village Law was enacted before the Open Meetings Law went into effect. Consequently, I do not feel that the drafters of that provision could have envisioned the existence of an extensive Open Meetings Law analogous to the statute now in effect. On the contrary, I believe that §4-402(b) was likely intended to require the presence of a clerk to take minutes in situations in which motions and resolutions are introduced and in which votes are taken. If that is not the case with respect to work sessions and similar gatherings, it may be unnecessary that a clerk be present to take minutes.

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-1071

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
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GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 6, 1984

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 August 16, 1984 regarding the status of a committee formed to study a site for a town dog kennel.

In your letter, you explained that "the board" voted at its meeting on Wednesday, August 15, to authorize a committee to study "where a dog kennel for the Town of Newburgh should be located". In response to your question whether such a committee is subject to the Open Meetings Law, I would like to offer the following comments.

All public bodies, as defined by the Open Meetings Law, are required to comply with the law. Section 102(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."

By breaking the definition into its components, it appears that the committee in question is subject to the Open Meetings Law.

First, I assume that the Committee created by the Newburgh Town Board consists of two or more members.

Second, the Committee may be required to conduct its business by means of a quorum regardless of the lack of reference to a quorum in the act that created it. I direct your attention to §41 of the General Construction Law, which indicates that whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that the committee must conduct its business by means of a quorum, §41 of the General Construction Law likely imposes such a requirement upon the committee.

Third, since the committee conducts public business and performs a governmental function for a public corporation, the Town, each of the conditions precedent to a finding that the committee is a public body may be met.

Finally, §102(2) of the Open Meetings Law also includes within the definition of "public body" committees, subcommittees or other similar bodies of a public body. Thus, committees formed by a public body, even if such committee is advisory and without the authority to take formal action, are subject to the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, app dis 55 NY 2d 995]. For the reasons stated above, I believe the committee in question would be 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3459
OML-AO-1072

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

September 7, 1984

Ms. Karen Kleparek
[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. Kleparek:

I have received your letter of August 17 in which you expressed concern regarding the practices of the Akron Central School District Board of Education.

Your first area of inquiry pertains to the manner in which the School Board gives, or fails to give, notice of its regular meetings. In response to your initial question, there is no provision in the Open Meetings Law which exempts a school board meeting from compliance with the Law's notice requirements. Specifically, §104 of the Open Meetings Law provides 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.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

In view of the language quoted above, I agree with your understanding of the Law. Although §104(3) provides that a public body need not pay to publish notice of its meetings as "legal notice", §104(1) requires that a public body give notice to the news media and to the public by means of posting in one or more designated public locations at least seventy-two hours prior to each meeting scheduled at least one week in advance. Public notice of meetings scheduled less than a week in advance must be given to the news media and posted in the same manner as described above "to the extent practicable" at a reasonable time prior to such meetings. In short, notice, in my opinion, must be given prior to both special meetings and regular meetings of the Board. Additionally, you may want to inquire as to which public locations have been designated by the Board for the purpose of posting notices of meetings.

Second, you questioned the appropriateness of an executive session held by the Board regarding the report and recommendations of the "non-teaching salary committee". Specifically, you stated that you believe that matters discussed by the Board fell outside the grounds for conducting an executive session. Based upon the information which you have provided, it appears that the Board improperly entered into executive session to discuss the matters referenced in the minutes.

As you may be aware, §105 of the Open Meetings Law specifies and limits the purposes for which a public body may conduct an executive session. I agree with your contention that the only grounds for entry into executive session that might have been relevant to the matters discussed by the Board are §§105(1)(e) and (f).

Section 105(1)(e) permits a public body to enter into an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains generally to the relationship between management and public employee unions or "employee organizations". As such, §105(1)(e) does not permit entry into an executive session to discuss "negotiations" generally, but only negotiations between a public employer and a public employee union pursuant to the Taylor Law. Consequently, if the non-teaching/administrative employees are not unionized, §105(1)(e) would not, in my view, be applicable as a basis for entering into executive session.

With regard to §105(1)(f), which you quoted in your letter, I agree that a discussion of benefits affecting the non-teaching/administrative employees as a group would not involve a "particular" person and, therefore, could not have been conducted during an executive session. If, however, the performance of a particular employee is reviewed, the discussion might involve consideration of the employment history of a particular person. To that extent, an executive session would likely have been proper. The fact that people and personalities might be discussed would not alone, in my view, result in an appropriate basis for entry into an executive session, for, once again, §105(1)(f) is limited to discussions relative to a "particular person" and only in conjunction with the topics listed in §105(1)(f).

In addition, you asked what, if anything, can be done to void the action of the Board. Here I direct your attention to §107 of the Open Meetings Law. That section provides in §107(1) that:

> "Any 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 emphasized that while a court may, upon "good cause" shown, void any part of the Board's action taken in violation of the Law, that power is solely within the court's discretion.

Third, you expressed concern and frustration regarding your requests for records from the School District pursuant to the Freedom of Information Law. Specifically, you stated that on at least one occasion, you had to wait twelve days for records, despite various written and telephone contacts made during that period. I agree with your understanding of the Freedom of Information Law, which contains specific time limits within which an agency must act upon a request for records.

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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business 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 with 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 ten 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)].

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Finally, you asked whether the Open Meetings Law or the Freedom of Information Law have been recently amended to exclude boards of education or school superintendents from the application of those statutes. I have enclosed the most recent provisions of each law and note that neither has been amended to exclude school boards or school district officials from coverage of either of those laws.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1073

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

September 10, 1984

Mr. Edward J. Bartos
[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. Bartos:

I have received your letter of August 28, in which you requested information on recent court decisions with regard to the use of cassette tape recorders at public school board meetings.

Specifically, you asked whether a cassette tape recorder can be used to record a school board meeting, whether the tape recorder must be turned off if an individual does not want his/her statement recorded and whether the school board has the legal authority to demand that the recorder be turned off at any time during the open part of the meeting. Finally, you asked what recourse an individual has if that person is told by the school board to stop recording. In response to your questions, 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. Nevertheless, there are judicial determinations concerning the use of tape recorders at open meetings of public bodies which in my opinion indicate that neither a public body, nor one of its members could prohibit the use of a portable, battery operated tape recorder at an open meeting.

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 1979. That decision arose when two individuals sought to bring their tape recorders at 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 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."

Most recently, the Supreme Court, Nassau County, also found that a public body could not prohibit the use of a "hand held, battery operated tape recorder" at an Open Meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Cty., Nassau Cty., April 6, 1984].

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 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 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 believe that a portable, battery operated cassette tape recorder may be used to record an open school board meeting and that the board is without authority to prohibit its use.

Likewise, it is my opinion that an individual who speaks during an open meeting cannot prohibit the use of the tape recorder because such individual does not wish to have his/her statement recorded.

Finally, with respect to the recourse an individual has upon being told to stop recording, a member of the public may challenge the action of a public officer or a public body by initiating 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1074

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

September 11, 1984

Mr. Charles J. Tiano
Ms. Tinker Twine
Ms. Sharon R. Cherven
[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. Tiano, Ms. Twine and Ms. Cherven:

I have received your letter of August 30 in which you requested an advisory opinion with regard to a meeting held by the Woodstock Town Board and Planning Board at the office of the Town Attorney.

According to your letter, the Town and Planning Boards, which act as "co-lead" agencies in the ongoing SEQRA process for a local project, held a meeting with the Town's attorney for the project at the attorney's office in Kingston. You wrote that the meeting was called without notice to the press or public and that the Town Board "has taken the position that the meeting was called hurriedly without time to notify the press and public". You also stated that, although the subject of litigation was not discussed at the meeting, the gathering was described by the Town Board as an executive session because "there might be possible litigation initiated". Finally, you wrote that, since the meeting was held outside of the Town of Woodstock, it is your belief that it was held in violation of §62 of the Town Law.

With respect to these issues, I would like to offer the following comments.

First, §104 of the Open Meetings Law 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 all 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 §104(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 §104(2)]. In my view, the Open Meetings Law requires that a reasonable effort be made to give notice of a meeting, even if such a meeting is called "hurriedly". The requirements of the Law relative to notice could be met by contacting the local news media by phone and by posting notice in the locations designated for posting.

Second, the Open Meetings Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded [see §102(3)]. The Law also prescribes a procedure that must be accomplished during an open meeting prior to entry into an executive session. Specifically, §105(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 cited provisions, it is my opinion that an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting.

Moreover, the grounds for entry into executive session are limited to those enumerated in §105(1). Relevant to the Boards' concern regarding "possible" litigation is §105(1)(d), which permits a public body to conduct an executive session for "discussions regarding proposed, pending or current litigation". Judicial interpretations of §105(1)(d) indicate that it is intended

to "enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" [Concerned Citizens to Review the Jefferson Valley Mall et al. v. Town Board of the Town of Yorktown et al., 83 AD 2d 612]. In turn, the courts have held that the belief that litigation is possible or "almost certain" does not justify the conducting of public business in an executive session [Weatherwax v. Town of Stony Point, 468 NYS 2d 914].

Based upon the provisions of the Open Meetings Law and its interpretation, it is my view that an executive session cannot be conducted solely because "there might be possible litigation initiated by a group of people who oppose the project".

Finally, since you alluded to §62 of the Town Law, I would like to point out that subdivision (2) of that statute provides in 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."

Enclosed for your review are copies of the Open Meetings Law and §62 of the Town 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm
Enc.
cc: Town Board
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO- 1075

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

September 10, 1984

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 August 21, in which you requested an advisory opinion.

According to your letter, at a recent meeting of the City Council of the City of Beacon, a person in attendance "was ordered" by the Mayor "to stop tape recording the meeting...". You have asked whether "tape recording of public meetings [is] allowed" and whether "a precedent has been set by the courts".

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. Nevertheless, there are judicial determinations concerning the use of tape recorders at open meetings of public bodies which in my opinion indicate that neither a public body, nor one of its members, such as a mayor, could prohibit the use of a portable, battery operated tape recorder at an open meeting.

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 While 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 1979. That decision arose when two individuals sought to bring their tape recorders at 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 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."

Most recently, the Supreme Court, Nassau County, also found that a public body could not prohibit the use of a "hand held, battery operated tape recorder" at an open meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 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 the Mayor or the City Council can prohibit a person in attendance from using a portable, battery operated tape recorder at an open meeting.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

cc: Mayor, City of Beacon
City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3469
OML-AO- 1076

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

September 13, 1984

Mr. William F. Brown, Jr.
General Manager
Batavia Broadcasting Corporation
WBTA Radio 15
438 East Main Street
Batavia, NY 14020

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. Brown:

I have received your letter of August 31 which concerns the minutes of an executive session held by the Genesee County Legislature.

According to your letter, the "purpose of the meeting was to discuss a personnel matter involving an employee of the Genesee County Nursing Home". You explained that the "matter may involve felony criminal charges in the theft of social security checks from nursing home patients". According to your letter, at the meeting, "at least one legislator who attended the Executive Session spoke vigorously on the matter and insisted to the clerk that her remarks be taken down and included in the minutes of that session". It is your belief, therefore, that two sets of minutes exist, one of which is attached to your letter, and another that includes the remarks made by legislators.

You questioned whether the situation, as you described it, violates the Open Meetings Law and the "requirement that minutes of both open meetings and executive sessions must be compiled and made available". In this regard, I would like to offer the following comments.

First, I direct your attention to §106 of the Open Meetings Law concerning minutes. The cited provision states:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> "2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; 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.
>
> "3. Minutes 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."

Please note that the requirements for taking minutes of an executive session are less expansive than those regarding minutes of open meetings. Specifically, minutes are required to be taken at executive sessions only with respect to action that is taken by formal vote. The minutes need only consist of a record or summary of the final determination of such action. Therefore, if the County Legislature did not take formal action with regard to the nursing home employee, in my view, there would have been no requirement that minutes be prepared.

Second, while it is not clear on the basis of your letter that the remarks of the legislator were recorded as minutes of the executive session, I would like to point out that §106 of the Open Meetings Law does not require a public body to record the remarks of an individual made during an executive session merely because that person so requests.

Section 106(3) requires that the minutes of an executive session, taken pursuant to subdivision two, be made available to the public within one week from the date of the executive session. I would point out, however, that the summary of any final determination required to be included in the minutes "need not include any matter which is not required to be made public by the freedom of information law" [see §106(2)]. Stated differently, even though a public body might take formal action during an executive session, information that would be deniable under the Freedom of Information Law need not be made available as part of the minutes of the executive session.

With respect to your situation, it appears that no action was taken by formal vote. Therefore, the minutes of the executive session that are attached to your letter likely comply with §106 of the Open Meetings Law.

However, if another set of minutes exists or a record of the comments made by the legislators was kept, those documents would, in my view, constitute "records" that fall within the scope of the Freedom of Information Law.

It is noted that §86(4) of the Freedom of Information Law defines "record" broadly to include:

> "any information kept, held, filed, produced or reproduced by, with, or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examination, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, paper, designs, drawings, maps, photos, letters, microfilms, computer tapes, or discs, rules, regulations or codes".

As such, if a "second" set of minutes has been prepared, it would be a "record" subject to the Freedom of Information Law.

In brief, the Freedom of Information Law requires that all records be made available, except to the extent that they contain information considered deniable in conjunction with the grounds for denial listed in §87(2)(a) through (i) of the Law.

Under the circumstances, it appears that there may be considerations present relative to personal privacy as well as law enforcement functions. In order to provide additional information regarding rights of access, enclosed are copies of both the Freedom of Information and Open Meetings Laws.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1077

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

September 14, 1984

Mr. John W. Haubennestel
Zoning Enforcement Officer
Village of Wappingers Falls
Mesier Homestead
Dutchess County
Wappingers Falls, NY 12590

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. Haubennestel:

I have received your letter of September 5 in which you requested an advisory opinion concerning meetings and hearings held by the Zoning Board of Appeals of the Village of Wappingers Falls.

Initially, you asked whether:

> "the Chairman of a Zoning Board of Appeals, at a public hearing, [can] declare an Executive Session and exclude everyone except the members of the Zoning Board of Appeals and [its] attorney and then at the conclusion of the Executive Session request whatever action has been discussed?"

It is your view that a motion to enter into an executive session and a second of the motion must be made, followed by "a favorable vote from the Zoning Board of Appeals before such Executive Session transpires". Furthermore, you expressed the belief that the Chairman must announce why the Executive Session is necessary.

Additionally, you have contended that, during the period in which others were excluded from the meeting, the Board "made a decision on the subject on review and legal advice was sought, after which, reconvening the session, action was taken by the Zoning Board of Appeals, contrary to that which was recommended by the Village Planning Board and County Planning Board".

Based upon the facts as described in your letter, I would like to offer the following comments.

First, as you may be aware, the Open Meetings Law was amended in 1983 to bring zoning boards of appeals within the requirements of the Law in the same manner as public bodies generally. Prior to the amendment, a zoning board could deliberate outside the requirements of the Open Meetings Law when it conducted "quasi-judicial proceedings".

Second, the Open Meetings Law prescribes the procedure, to which you referred, 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, §105(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 appropiate 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.

Therefore, based upon the cited provisions and the circumstances described in your letter, it is my opinion that the Chairman of the Zoning Board of Appeals could not without "previous action or announcement, declare a break and exclude all from the session except members of the Zoning Board of Appeals and [its] attorney". It appears that the Board failed to vote in an open meeting pursuant to a motion identifying the subjects to be discussed prior to entry into an executive session, and that its failure to do so resulted in a violation of the Open Meetings Law.

Further, it is emphasized that paragraphs (a) through (h) of §105(1) specify and limit the topics that may appropriately be considered during an executive session. Unless one or more of those topics were discussed, no ground for executive session would have existed.

Lastly, it is possible that a closed session might validly have been held. Section 108 of the Open Meetings Law contains three exemptions. If an exemption is applicable, the requirements of the Open Meetings Law do not apply. Subdivision (3) of §108 exempts from the Law "any matter made confidential by federal or state law".

In this regard, if, for example, the sole purpose of the closed session involves a desire on the part of the Board to seek legal advice from its attorney, an attorney-client relationship would have been established. To the extent that the communications between the Board and its attorney fell within the scope of an attorney-client relationship, those communications would, in my view, be privileged under §4503 of the Civil Practice Law and Rules and, therefore, outside the scope of the Open Meetings Law. To clarify further, if a matter is "exempt" from the Open Meetings Law, the procedural steps required for entry into an executive session would not apply.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1078

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

September 17, 1984

Ms. Rose Eisner
[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. Eisner:

I have received your letter of August 31, in which you raised a series of questions regarding the implementation of the Open Meetings Law by the Board of Trustees of the Village of Valley Stream.

According to your letter, of late:

> "...the Village Board and the Mayor had held 'public' meetings with no more prior notice than an 8 x 10 page posted on the Village Board door. At times, such posting brings forth a few residents who have noticed it, and the Board then declared that the 'public' notice was in error, and that they had intended an executive session, and demanded that all the residents leave, for they intended to discuss personnel matters. Thus, we had an 'off again/on again' meeting."

In this regard, your first question is "what constitutes adequate notice...?" Here I direct your attention to §104 of the Open Meetings Law, which requires that notice of the time and place of all meetings be given to the public and the news media. Subdivision (1) of §104

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. Subdivision (2) of §104 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.

In view of the provisions of §104, it is reiterated that notice must be given prior to all meetings to at least two representatives of the news media and to the public by means of posting prior to all meetings, whether the meetings are regularly scheduled or otherwise.

The second question involves when a village board of trustees and its mayor are "legally allowed to hold an Executive Session and exclude the public". You also asked "how far in advance of a public meeting can such an Executive Session be held".

It is noted at the outset that the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Moreover, the Open Meetings Law prescribes a procedure that must be followed by a public body, during an open meeting, before it may enter into an executive session. Specifically, §105(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 an open meeting, but rather that it is a portion of an open meeting. In addition, in a technical sense, I do not believe that a public body may hold or schedule an executive session in advance of a meeting, for, as indicated earlier, a motion to enter into an executive session must be made and carried during an open meeting. Since it cannot be known in advance, due, for example, to possible absences, whether a motion will be carried, I do not believe that an executive session can be either scheduled or held in advance of a meeting.

The language of §105(1) also indicates that 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 §105(1) specify and limit the topics that may appropriately be considered for discussion during an executive session. Rather than listing each of those grounds, enclosed is a copy of the Open Meetings Law.

The third question is whether the Board of Trustees may adopt a resolution, without prior notice, "that the public cannot speak to any resolution on the agenda unit after it is passed". I would like to point out that the Open Meetings Law is silent with respect to public participation. While the public may attend and listen to the discussions and deliberations that occur during a meeting, the Open Meetings Law confers no right upon the public to speak or otherwise participate at a meeting. Consequently, it has been advised that a public body may but need not permit public participation at a meeting. It has also been suggested that if a public body does permit public participation, it should do so based upon reasonable rules that treat all in attendance in like manner.

Lastly, you asked which topics may be conducted during an executive session generally, and specifically, whether an executive session may be held to consider "all personnel matters" or "certiorari settlements".

As stated previously, the eight grounds for entry into executive session are listed in §105(1)(a) through (h) of the Open Meetings Law.

With respect to "personnel matters", the provision most often cited is §105(1)(f), which permits the 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 §105(1)(f), some issues involving personnel may be discussed during an executive session. However, the Law specifies that an executive session may be held to discuss a "particular person", and only then in conjunction with one or more of the topics listed in §105(1)(f).

It is noted, too, that a motion for entry into an executive session to discuss "personnel matters" without additional description would, based upon case law, be inadequate [see Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983, and Doolittle v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981]. In my opinion, a motion should indicate that the discussion involves a "particular" person and include reference to one of the topics listed in the cited provision.

With respect to certiorari settlements, it is assumed that you are referring to situations in which litigation has been initated. One of the grounds for executive session, §105(1)(d), permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". As such, if a board of trustees is discussing pending litigation, §105(1)(d) could likely be invoked as a basis for entering into an executive session and excluding the public.

Since you referred to the term "settlement", my response would be different if the discussion occurs between the Board and its opponent in the litigation. As indicated judicially, the purpose of §105(1)(d) is to enable a public body to discuss its litigation strategy in private, without baring its strategy to its adversary [see Weatherwax v. Town of Stony Point, 97 AD 2d 840 (1983) and 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)]. As such, if a discussion of a settlement occurs between both parties to the litigation, I do not believe that any ground for entry into an executive session could justifiably be cited.

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: Board of Trustees, Village of Valley Stream

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1079

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

September 17, 1984

Mr. Charles Sassi
[redacted]

The staff of the Commieett 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. Sassi:

I have received your letter of September 6 concerning the use of tape recorders at the City of Beacon Common Council meeting.

According to your letter, you were "informed by the mayor that taping the public meeting was not allowed". Specifically, you asked whether it is legal to tape a public meeting using a battery-powered tape recorder. 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. Nevertheless, there are judicial determinations concerning the use of tape recorders at open meetings of public bodies which in my opinion indicate that neither a public body, nor one of its members could prohibit the use of a portable, battery operated tape recorder at an open meeting.

In terms of background, until mid-1979, there has 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 1979. That decision arose when two individuals sought to bring their tape recorders at 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 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."

Most recently, the Supreme Court, Nassau County, also found that a public body could not prohibit the use of a "hand held, batter operated tape recorder" at an Open Meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 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 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 believe that a portable, battery operated cassette tape recorder may be used to record an open Common Council meeting and that the Mayor is without authority to prohibit its use.

Finally, I have enclosed, at your request, copies of the Ystueta and Mitchell opinions cited above.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3480
OML-AO-1080

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

September 18, 1984

Ms. Florence Gioia
Genesee County Legislature
[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. Gioia:

I have received your letter of September 7 in which you raised questions regarding minutes.

In your capacity as a member of the Genesee County Legislature, you raised the following question:

> "When a government body makes a motion to go into Executive Session, which has been seconded and approved, are the minutes that are taken in that session allowed to be deleted and/or destroyed."

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

First, although you did not identify the topics that might have been considered by the County Legislature during its executive sessions, it is emphasized that the Open Meetings Law specifies and limits the topics that may appropriately be considered during an executive session. Enclosed is a copy of the Open Meetings Law, which in paragraphs (a) through (h) of §105(1) specifies the grounds for enty into an executive session.

Second, as a general matter, a public body may vote or take action during a properly convened executive session, unless the vote involves the appropriation of public monies. When action is taken during an executive session, minutes must be prepared. Section 106(2) of the Law pertains to minutes of executive sessions and states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

As such, when action is taken during an executive session, minutes reflective of the nature of the action taken, the date and the vote must be prepared. Section 106(3) requires that such minutes be made available pursuant to the provisions of the Freedom of Information Law within one week of an executive session.

It is noted that the provision concerning minutes of executive sessions does not require that expansive minutes be taken indicating those who may have spoken during an executive session or the views that may have been expressed during an executive session. Consequently, although deliberations during executive session may have been lengthy, the minutes may be brief.

Third, if, as you suggested, expansive minutes are taken, you asked whether they could be "deleted and/or destroyed". Once minutes have been prepared, whether they are brief or lengthy, I believe that they are subject to rights granted by the Freedom of Information Law. Here I would like to point out that the Freedom of Information Law is expansive in its scope, for in §86(4), the term "record" is defined 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."

Based upon the language quoted above, as soon as minutes exist, they would in my view constitute a "record" subject to rights of access granted by the Freedom of Information Law.

Further, 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 (i) of the Law.

As a consequence, there may be situations in which some aspects of minutes of an executive session might justifiably be deleted, if those deletions represent information that falls within one or more of the grounds for denial.

Lastly, with respect to the destruction of records, §65-b of the Public Officers Law provides that a unit of local government, such as a county, cannot destroy or dispose of records without the consent of the Commissioner of Education. In turn, the Education Department has devised detailed schedules that indicate minimum retention periods for particular types of records. In short, records cannot be destroyed until the minimum period of retention has been reached.

To obtain specific information regarding retention schedules, it is suggested that you contact the Local Records Section of the State Archives at the Education Department. I believe that an inquiry could be answered by Mr. Bruce Dearstyne. His address is NYS Department of Education, Office of Cultural Education, Cultural Education Center, Empire State Plaza, Albany, New York 12230.

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.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1081

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

September 18, 1984

Ms. Doris Aiken
Founder
RID
P.O. Box 520
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. Aiken:

I have received your letter of September 1 in which you requested an advisory opinion concerning the applicability of the Open Meetings Law to "STOP-DWI Committees".

According to your letter, the Committees are "set up by law to program and spend the fines of drunk drivers in anti-DWI activity on the County level". You stated that it is your belief that all of "the 62 STOP-DWI Committees would benefit by receiving a description of a public body, so that they are aware of their responsibility to hold public meetings, and vote on submitted proposals, in public".

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

It is noted at the outset that I have reviewed Article 43-A of the Vehicle and Traffic Law which provides for the establishment of "special traffic option programs for driving while intoxicated" at the option of county governments. While Article 43-A is silent with respect to STOP-DWI Committees, I have been informed by a representative of the Office of Alcohol and Highway Safety that many of the Committees are created by county governing boards; others are appointed by program coordinators. I was also informed that the Committees perform different roles from one county to the next, but that they generally serve to advise county governing boards with regard to how expenditures should be allocated for the programs.

Generally, the Open Meetings Law requires that every meeting of a public body be open to the public, except to the extent that executive esssions may be conducted pursuant to §105 of the Law. Section 102(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, it appears that the Committees are subject to the Open Meetings Law.

First, it is assumed that the membership of committees is appointed by the governing body of a county or by the coordinator of each program, who is also appointed by a county governing board [see Vehicle and Traffic Law, §1678-b]. It is also assumed that each of the Committees consists of two or more members.

Second, the Committees may be required to conduct their business by means of a quorum, regardless of the absence of reference to a quorum in the acts that created them. I direct your attention to §41 of the General Construction Law, which indicates that 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 a STOP-DWI Committee must conduct its business by means of a quorum, §41 of the General Construction Law likely imposes such a requirement.

Third, since the Committees conduct public business and perform a governmental function for a public corporation, a county, it appears that the conditions precedent to a finding that the STOP-DWI Committees are public bodies may be met.

Finally, §102(2) of the Open Meetings Law also includes within the definition of "public body" committees, subcommittees or other similar bodies of a public body. Thus, com-

mittees formed by a public body, even if such committees are advisory and without authority to take formal action, are subject to the Open Meetings Law. It is noted, too, that case law indicates that an advisory body designated by a government official, rather than a public body, falls within the requirements of the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, app dis 55 NY 2d 995].

For the reasons stated above, I believe that the STOP-DWI Committees are 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Marcus Salm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1082

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

September 24, 1984

Mr. John Peter DeLibero
Tuckahoe Teachers Association
2 Siwanoy Boulevard
Eastchester, NY 10707

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. DeLibero:

I have received your letter of September 11 in which you requested an advisory opinion concerning the "working meetings" held by the Tuckahoe Union Free School District Board of Education.

According to your letter, public notices are not posted for working meetings held by the Board, although notices are posted for its monthly and budget meetings. You explained that a working meeting was held on September 10 for the purpose of detailing the goals and objectives of the Tuckahoe School District for 1984-1985. You wrote that only through an "occasional conversation" did your association learn of the meeting.

In addition, you stated that "after each monthly meeting the board announces that they would then go into Executive Session never mentioning the general areas to be discussed".

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

First, the Open Meetings Law requires that public notice be given prior to all meetings of a public body, and §104 of the Law provides direction for the accomplishment of notice requirements. Specifically, §104(1) requires that a public body give notice to the news media (at least two) and to the public by means of posting in one or more designated public locations at least seventy-two hours prior to each meeting scheduled at least one week in advance. Section 104(2) requires that public notice of meetings scheduled less than a week in advance be given to the news media and posted in the same manner as described above "to the extent practicable" at a reasonable time prior to such meetings.

Second, the courts have held that "working meetings" and similar gatherings are "meetings" within the meaning of the Open Meetings Law. In brief, it has been held that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting", whether or not there is an intent to take action. The courts have specified that every step of the decision-making process is necessary to formal action and, although no such formal action is contemplated at a working meeting, it is nonetheless subject to the provisions of the Law [see Matter of Orange County Pubs., Div. of Ottoway Newspapers v. Council of City of Newburgh, 60 AD 2d 409, aff'd 45 NY2D 947; Binghamton Press Co., Inc. v. Board of Education of the City School District of the City of Binghamton, 67 AD 2d 797]. Therefore, it is my belief that the Board must comply with §104 of the Open Meetings Law in providing notice prior to its working meetings.

Third, with respect to the executive sessions held by the Board following each of its monthly meetings, I direct your attention to §105(1) of the Open Meetings Law. That provision states in relevant part that:

> "upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public monies..."

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.

Moreover, it is emphasized that paragraphs (a) through (h) of §105(1) specify and limit the topics that may appropriately be considered during an executive session. Unless one or more of those topics are discussed, no ground for executive session exists.

For your information, I have enclosed a copy 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Dr. Margaret Gotti, President
Mr. John Harold, Esq.
Dr. Anthony Mazzullo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3488
OML-AO-1083

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

September 25, 1984

Mrs. Margaret S. Baum
[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. Baum:

I have received both of your letters of September 12. One concerns the implementation of the Freedom of Information Law by the Deer Park Union Free School District; the other involves the Open Meetings Law.

According to one of the letters, you requested minutes of "planning sessions" held by the Board of Education on particular dates. Your request was denied by the Superintendent, Ronald F. Paras, who indicated that "minutes are not required nor are they taken during an executive session of a planning session of the Board of Education". As such, Dr. Paras stated that the District could not comply with your request. Following his response, you appealed to the Board of Education. You wrote that, although you expected a response from the Board, Dr. Paras again answered. In this regard, I would like to offer the following comments.

First, as you may be aware, the Freedom of Information Law requires that the Committee on Open Government promulgate general regulations regarding the procedural implementation of the Freedom of Information Law [see attached Freedom of Information Law, §89(1)(b)(iii)]. In turn, §87(1) of the Law requires the governing body of a public corporation, in this instance, the Board of Education, to adopt rules and regulations consistent with those promulgated by the Committee and in conformity with the Law. The regulations adopted by the Board of Education must in my view include the designation of one or more "records access officers" who are responsible for coordinating an agency's responses to requests made under the Freedom of Information Law. The Board's regulations must also include the designation of a person or body to whom appeals may be directed. As indicated in §89(4)(a) of the Freedom of Information Law, an appeal may

be directed to the governing body of the agency, or the person or body designated by the Board of Education for the purpose of making a determination on appeal. It is noted, too, that §1401.7(b) of the regulations promulgated by the Committee indicates that the "records access officer shall not be the appeals officer". Therefore, as a general matter, I do not believe that Dr. Paras could serve in a dual capacity as records access officer and appeals officer.

Second, under the circumstances, it does not appear that Dr. Paras denied access to records. From my perspective, the response by Dr. Paras indicated that the records that you requested did not exist. If that is so, records were not denied, and it does not appear that any denial could have been appealed. Stated differently, an appeal may be made when records are withheld rather than in a situation when records sought do not exist.

As an aside, you asked whether a determination rendered on appeal by Dr. Paras dated April 6 was sent to this office. According to a review of our files, that correspondence was received by this office on April 25.

The second letter also concerns a request for minutes of an executive session held by the Board on September 5. Once again, it was indicated that no such minutes existed. It was also stated by Dr. Paras that action taken by the Board must generally be accomplished during an open meeting. Nevertheless, you wrote that you contacted Board members following the meeting to ask if action was taken. They responded by stating that they could not discuss the matter until the Board voted publicly during a meeting to be held on September 19. The issue involved the appointment of an individual to a new position. Although the Board apparently did not take final action by voting in public at its meeting of September 5, you attached to your letter a copy of an announcement dated September 7 in which it was indicated that a particular individual had been selected to begin serving in a new position. As such, while the Board may have reached a consensus during an executive session, it apparently had not taken final action. At the same time, however, the consensus appears to have resulted in the announcement which is reflective of action taken.

Your concern is that there is an inconsistency; i.e., if no final action was taken, it would be inconsistent to announce the selection of an individual for a position.

In this regard, I am in general agreement with the Superintendent's statement regarding minutes of executive sessions. However, at the same time, it appears that a decision was made.

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, §105(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 §105(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 58 NY 2d 626 (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. Perhaps, after having discussed the issue during an executive session, the Board could have returned to an open meeting for the purpose of taking final action. If such a step had been taken, minutes of the open meeting would indicate the nature of the action and the date upon which action was taken.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Dr. Paras, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1084

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

September 26, 1984

Mr. Stephen D. Miller
Bennett and Miller
Law Offices
Two North Main
Holland, NY 14080

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. Miller:

I have received your letter of September 13 in which you requested an advisory opinion concerning the scope of the Open Meetings Law.

According to your letter, the Supervisor of the Town of Sardinia appointed seven citizens to serve on a "Landfill Discussion Committee" to "formulate suggestions and review the landfill". You explained that "the Committee was not assigned to function as a voting body, no quorum was required and the ideas and opinions that it formulated were considered by the Town Board at meetings".

In addition, you wrote that "the Town is currently enjoined from holding Town Board Meetings or Landfill Discussion Committee Meetings without specifically following the tenets of the Open Meetings Law". In regard to this matter, I would like to offer the following comments.

Generally, the Open Meetings Law requires that every meeting of a public body be open to the public, except to the extent that executive sessions may be conducted pursuant to §105 of the Law. Section 102(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 is 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, it appears that the Landfill Discussion Committee is a "public body" subject to the Open Meetings Law.

First, the Committee consists of more than two members and was appointed by the Town Supervisor.

Second, although no quorum was required of the Committee by the Supervisor, §41 of the General Construction Law may require the Committee to conduct its business by means of a quorum. That section indicates that 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 no quorum requirement was identified when the Committee was created, I believe that §41 of the General Construction Law imposed such a requirement.

Third, since the Committee conducts public business and performs a governmental function for a public corporation, the Town of Sardinia, it appears that the conditions precedent to a finding that the Landfill Discussion Committee is a public body are met.

Fourth, §102(2) of the Open Meetings Law also includes within the definition of "public body" committees, subcommittees or other similar bodies of a public body. Thus, committees formed by a public body, even if such committees are advisory and without authority to take formal action, are subject to the Open Meetings Law. It is noted, too, that case law indicates that an advisory body designated by a government official, rather than a public body, falls within the requirements of the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 964, app dis 55 NY 2d 995].

Finally, I would point out that §105 of the Open Meetings Law permits a public body to conduct an executive session, a meeting not open to the general public, for limited purposes. Section 105(1)(d) of the Law, which may be relevant to your situation, authorizes a public body to conduct an executive session to discuss "proposed, pending or current litigation". It must be emphasized, however, that an executive session must take place within an open meeting pursuant to the procedural guidelines set forth in §105 of the Law.

For the reasons stated above, I believe that the "Landfill Discussion Committee" is a public body subject to the Open Meetings Law.

Enclosed is a copy of the Open Meetings Law for your information.

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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3491
OML-AO-1085

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

September 26, 1984

Ms. Katherine Kerrizaer
[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. Kerrizaer:

As you are aware, your letter of September 11 addressed to the Assistant Attorney General in Binghamton has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

According to your letter and the materials attached to it, various issues have arisen regarding the expansion of a sewage treatment plant in the Village of Waverly. It appears that state agencies, the Village, and a commercial enterprise have been involved in relation to the matter. Nevertheless, you inferred that actions have been taken by the Village and state agencies without the knowledge of or disclosure to the public. In this regard, since I am unaware of the specific types of information that you are seeking, I would like to offer the following general comments.

First, as a general matter, the Freedom of Information Law is applicable to records of any agency of state or local government in New York. As such, rights of access granted by the Law would be applicable to records in possession of the Village, as well as records maintained by state agencies involved with the project.

Second, 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 (i) of the Law.

Third, to the extent that any contracts or agreements exist, I believe that they would be available, for no ground for denial could appropriately be asserted. Further, records reflective of financial transactions or the receipt, disbursement or expenditure of public monies would in my view similarly be available.

Fourth, in terms of procedure, each agency is required to have designated a "records access officer" who is charged with the duty of coordinating an agency's responses to requests made under the Freedom of Information Law. Consequently, if you are interested in seeking records from the Village of Waverly, a request should be directed to the designated records access officer. It is likely that the access officer for the Village is the clerk, for the clerk is the legal custodian of all Village records. To seek records from the Department of Environmental Conservation, the records access officer is Mr. Graham Greeley, whose office is at the Department's headquarters in Albany.

It is noted that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Consequently, when making a request, sufficient detail should be included to enable agency officials to locate the records sought.

Fifth, since you alluded to minutes of meetings of the Village Board of Trustees, I direct your attention to the Open Meetings Law. In brief, that statute is applicable to meetings of public bodies, such as the Village Board of Trustees. Further, the courts have construed the term "meeting" broadly to include 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 [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 Ad 2d 409 aff'd 45 NY 2d 947 (1978)]. Therefore, so-called "work sessions" or informal meetings fall within the requirements of the Open Meetings Law, even if there is no intent to take action, but rather only an intent to discuss public business.

Further, as in the case of the Freedom of Information Law, the Open Meetings Law is based upon a presumption of openness. The Law requires that meetings of public bodies be conducted open to the public except to the extent that a topic falls within one or more among eight grounds for entry into an executive session. The topics that may appropriately be considered during an executive session are limited and specified in paragraphs (a) through (h) of §105(1) of the Open Meetings Law.

The Open Meetings Law also contains what might be characterized as minimum requirements concerning the contents of minutes. With respect to minutes of open meetings, §106(1) states that:

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

In addition, as a general matter, a public body may vote during a properly convened executive session, unless the vote involves the appropriation of public monies. When action is taken during an executive session, minutes must be created which indicate the nature of the determination, the date and the vote. Subdivision (3) of §106 requires that minutes of open meetings be prepared and made available within two weeks of those meetings. With respect to minutes of action taken during an executive session, the Law requires that those minutes be prepared and made available within one week.

Lastly, with regard to the enforcement of the Freedom of Information and Open Meetings Laws, challenges may be initiated under the provisions of Article 78 of the Civil Practice Law and Rules.

As indicated earlier, a request made under the Freedom of Information Law should be directed to the records access officer. If that person denies access, the applicant may, according to §89(4)(a) of the Law, appeal to the head or governing body of the agency or whomever is designated to determine appeals. If the appeals person or body upholds the denial, a judicial proceeding may be commenced under Article 78. It is noted that when such a proceeding is brought under the Freedom of Information Law, the agency bears the burden of proving that the records withheld fall within one or more of the grounds for denial listed in §87(2) of the Law.

With respect to enforcement of the Open Meetings Law, §107(1) states in part that:

> "Any 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, since there may be issues involving minutes, I would like to point out that §107(3) states that:

> "The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public."

Enclosed for your consideration are copies of the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3492
OML-AO- 1086

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

September 27, 1984

Mr. Alvin W. White, President
Mr. J.C. Johnson, Vice President
Gateway Gardens Tenants and
Civic Association
P.O. Box 1637
Huntington Station, NY 11746

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 Messrs. White and Johnson:

I have received your letter dated July 28 in which you requested an advisory opinion concerning the Town of Huntington Housing Authority. I regret the delay in response; however, your letter was not received by this office until September 19.

According to your letter, you are interested in obtaining from the Huntington Housing Authority and its Board of Commissioners various public records, including minutes, operating guidelines, proposed budget and "changes in policy". However, you have been informed by the Chairman of the Board of Commissioners and the Executive Director that the Housing Authority is a "satellite Federal Agency" and that they claim "executive body privileges at all times". Moreover, you explained that on July 16, the Board held a session which you expressed an interest in attending. However, since the Chairman did not respond to your request, you were "effectively denied access".

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

First, with respect to the availability of the records maintained by the Huntington Housing Authority, I direct your attention to §87(2) of the Freedom of Information Law. That provision requires each agency to make all records available for public inspection and copying, except those records or portions thereof that fall within one or more of the nine grounds for denial appearing in §87(2)(a) through (i) of the Law. Generally, the language of many of the exceptions is based upon potentially harmful effects of dis-

Second, "agency" is defined in §86(3) of the Freedom of Information Law to include:

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

Since the Huntington Housing Authority was created by the State Legislature for the Town of Huntington and its operations and activities are governed by law (see Public Housing Law, §472), it is my opinion that the Authority is an agency as defined by the Freedom of Information Law, and that its records are presumed to be available in accordance with the Law.

Moreover, assuming the Board of Commissioners is the governing body of the Authority or was created by the Authority, the Board, in my view is also an agency as contemplated by the Law.

Thus, it is my belief that the records of the Authority and its Board should be made available pursuant to the Freedom of Information Law. It is noted, too, that the courts have required a housing authority to disclose its records as required by the Freedom of Information Law [see Westchester Rockland Newspapers, Inc. v. Fisher, Sup. Ct., Westchester Cty., May, 1983, affirmed __AD 2d__, App Div, Second Dept., NYLJ, May 21, 1984].

Similarly, it appears that the Board of the Authority is a public body subject to the Open Meetings Law. That Law generally requires that every meeting of a public body be open to the public, except to the extent that executive sessions may be conducted pursuant to §105 of the Law.

Section 102(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 opinion, the Board falls within this definition.

First, it is assumed that the Board consists of more than two members.

Second, although no quorum may be required of the Board in its by-laws, for example, §41 of the General Construction Law requires that it must conduct their business by means of a quorum. That section indicates that 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 be means of a quorum, a majority of the total membership. Consequently, even if no quorum requirement is specified, I believe that §41 of the General Construction Law imposes such a requirement.

Third, since the Board conducts public business and performs a governmental function for a public corporation, the Town of Huntington, it appears that the conditions precedent to a finding that the Board of Commissioners is a public body are met.

Fourth, §102(2) of the Open Meetings Law also includes within the definition of "public body" committees, subcommittees or other similar bodies of a public body. Thus, committees formed by a public body, even if such committees are advisory and without authority to take formal action, are subject to the Open Meetings Law. It is noted, too, that case law indicates that an advisory body desingated by a government official, rather than a public body, falls within the requirements of the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 964, app dis 55 NY 2d 995].

For the reasons stated above, I believe that the Huntington Housing Authority and its Board of Commissioners are public entities subject to the Freedom of Information and Open Meetings Laws.

Lastly, I have enclosed a copy of Westchester Rockland Newspapers case, supra, at your 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

cc: Huntington Housing Authority
A. Sutton, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1087

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

October 1, 1984

Mr. Edward W. Doyle
Town Attorney
Town of Philipstown
Doyle Building
1010 Park Street
P.O. Box 150
Peekskill, NY 10566

Dear Mr. Doyle:

I have received your letter of September 26 concerning notice of requirements imposed by the Open Meetings Law.

In this regard, enclosed is a copy of the opinion that you requested. It is also noted that the Open Meetings Law requires that notice of meetings be given to the news media, but that it does not specify which members of the news media must be contacted. From my perspective, since every law should be given a reasonable construction, consistent with its intent, the Open Meetings Law requires that notice be given to at least two representatives of the news media whose coverage area includes the public body providing the notice. Consequently, in my opinion, notice might be given to two or more newspapers or radio stations, for example, or any combination thereof.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1088

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

October 1, 1984

Mr. John Waters Eaton
Town Clerk
Town of Eastchester
40 Mill Road
Eastchester, NY 10709

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. Eaton:

I have received your letter of September 19 in which you requested an advisory opinion concerning the contents of minutes of meetings of the Town Board of the Town of Eastchester.

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

First, I direct your attention to §106 of the Open Meetings Law concerning minutes. That provision states:

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

> 3. Minutes 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."

Second, it is noted that the requirements for taking minutes of an executive session are less expansive than those regarding minutes of open meetings. Specifically, minutes are required to be taken at executive sessions only with respect to action that is taken by formal vote. The minutes need only consist of a record or summary of the final determination of such action. Thus, if no formal action is taken during an executive session, no minutes need be prepared.

Third, §106(3) requires that minutes of an open meeting be made available to the public within two weeks of the date of the meeting. However, minutes of an executive session must be made available within one week from the date of the session.

With respect to the Board's minutes, you asked whether it would be appropriate for the Board to produce the "instant minutes" based upon the format used for the meetings agenda. In my opinion, your idea of augmenting each subject heading listed in the agenda with "short sub-statements as to any actions taken" would comply with the requirements of §106, so long as all "motions, proposals, resolutions and other matters formally voted upon" are included.

Finally, you asked whether, following the production of the "instant minutes", other more detailed and less structured minutes may be prepared at a more leisurely pace for actual approval by the Board. In this regard, it has been suggested that, to comply with the Law, minutes should be prepared and made available within the appropriate time period, two weeks, but that they may be marked as "unapproved" or "non-final", for example. By doing so, the requirements of the Open Meetings Law can be met; concurrently, those who receive the initial minutes are aware that the contents may be changed.

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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1089

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

October 1, 1984

Ms. Mary F. Gleason
Managing Editor
Shelter Island Reporter
Box 1000
Shelter Island, NY 11964

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. Gleason:

I have received your letter of September 17 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, the Town Board of the Town of Shelter Island holds various types of meetings. Some are considered to be "regular"meetings, others are characterized as "caucuses", and, in addition, various closed meetings are apparently held by the Board with its attorney. You have requested advice concerning the status of those gatherings, and I would like to offer the following comments.

First, it is emphasized that the term "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 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 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, whether meetings are considered to be "regular" or otherwise, it appears that they would fall within the requirements of the Open Meetings Law.

Second, I would like to point out that §108(2) exempts political caucuses from the provisions of the Open Meetings Law. Nevertheless, several decisions indicate that gatherings commonly known as political caucuses are subject to the Open Meetings Law in all respects. The leading decision on the matter indicates that the exemption regarding political caucuses applies only to discussions of purely political party business. The court also found that a gathering held by a majority of the membership of a public body for the purpose of discussing matters of public business constituted a "meeting" subject to the Open Meetings Law, even though those in attendance might represent a single political party [see Sciolino v. Ryan, 103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 AD 2d 475, 440 NYS 2d 795 (1981)]. Therefore, I believe that the caucuses described in your letter are "meetings" that must be preceded by notice as required by §104 of the Open Meetings Law and convened open to the public.

Third, with regard to the gatherings during which the Town Attorney may be present, I would like to point out that matters that appropriately fall within the scope of an attorney-client relationship are likely outside the scope of the Open Meetings Law. Section 108(3) of the Open Meetings Law states that the Law does not apply to "any matter made confidential by federal or state law". When an attorney-client relationship is invoked, it is considered confidential under §4503 of the Civil Practice Law and Rules. Therefore, when an attorney and a client, which may include a municipal attorney and a municipal board, establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and exempt from the Open Meetings Law.

Nevertheless, the mere presence of an attorney does not in my opinion alone result in the initiation of a privileged relationship. From my perspective, the privilege is applicable only when a client seeks the professional, legal advice of an attorney acting in his or her capacity as an attorney.

A somewhat recent judicial determination described the parameters of the attorney-client relationship and the conditions precedent to its initiation. It was held by the Appellate Division that:

> "[I]n general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based upon the foregoing, it is reiterated that the presence of the Town Attorney at a gathering with the Town Board would not alone remove that gathering from the requirements of the Open Meetings Law. Rather, the key issue in my view is whether the Town Board meets with its attorney for the purpose of seeking legal advice. Only to that extent would an attorney-client relationship exist, and only to that extent would a discussion be exempt from the Open Meetings Law. Moreover, if, at the meeting between the attorney and the Town Board, a variety of issues arise, some of which fall within the scope of the attorney-client privilege while others might not be privileged, such a gathering would in my view constitute a "meeting" that must be preceded by notice and convened open to the public. Stated differently, if a gathering involves a mixture of privileged communications as well as matters falling outside the scope of the attorney-client relationship, such a gathering could in my opinion be closed only when an attorney-client relationship exists. I believe that the remainder of such a gathering would be required to be 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: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1090

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

October 1, 1984

Mr. Thomas Sullivan
[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. Sullivan:

I have received your letter of September 19 in which you requested an advisory opinion concerning meetings held by the Poland Central School District Board of Education.

According to your letter, individuals who attend a regular Board meeting are given a one page agenda while the board members work from "a prepared loose leaf notebook, which they have [obviously] had in advance". You explained that "when items come up, such as the personnel items... there is never any discussion". For example, you wrote, "The president of the board will say 'Item #4 of the personnel report' [and] a Board member will say 'So moved'." Moreover, you stated that "no effort is made to identify the material being voted on".

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

First, I direct your attention to §106 of the Open Meetings Law concerning minutes. That provision states:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> "2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; 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.
>
> "3. Minutes 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."

It is noted that the requirements for taking minutes of an executive session are less expansive than those regarding minutes of open meetings. Minutes taken at open meetings must consist of a record or summary of all motions, proposals and resolutions. Minutes are required to be taken at executive sessions only of action taken by formal vote but, nonetheless, must consist of a record or summary of the final determination of such action.

Second, by referring to specific items of the "personnel report", it appears that the Poland School Board may be acting to maintain the confidentiality of the personnel items. It is evident, however, from the copies of the Board's minutes that you provided, that the Board acted upon many of the items on the "personnel report" during open portions of the meeting, without entering into an executive session. To that extent, the Board's minutes should reflect a summary of all motions, proposals and resolutions which, in my view, should consist of more than an explanation that a particular item was approved unanimously. It is my belief that the Open Meetings Law requires each item be summarized.

Third, the Board may regard some personnel matters as confidential and their disclosure as a possible invasion of personal privacy. In this regard, I point out that §105(f) of the Open Meetings Law permits a public body to conduct an executive session for the purpose, among others, of discussing "the medical, financial, credit or employment history of a particular person...or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person...". Nevertheless, as noted above, the Open Meetings Law requires that minutes of an executive session refer to the final determination of any action taken by formal vote, and that such minutes be made available in accordance with the Freedom of Information Law.

It is noted that 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 opinion, 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). The courts have held that, while a school board may hold executive sessions for purposes of discussion, all formal, official action of the board must be taken during open meetings [see Kursch v. Board of Education, Union Free School District #1, 7 AD 2d 922; Sanna v. Lindenhurst, 107 Misc 2d 267, mod 85 AD 2d 157, aff'd 58 NY 2d 626]. Therefore, the Board's final action must generally be taken during an open meeting and recorded according to the provisions of the Open Meetings Law regarding minutes of open meetings.

In short, it is my opinion that the identification of each final determination of the Board by item number does not comply with the Open Meetings Law provisions concerning minutes. In my view, final determinations of the Board regarding personnel matters must be summarized and recorded in the Board's minutes, and must refer, by name, to the subjects of the Board's determination. By means of analogy, in a situation in which a person has applied for a position, the discussion of that person's employment history could be considered during a proper executive session. However, a vote to hire that person must in my view be taken during an open meeting. Further, I believe that the minutes must refer to the motion to hire, the vote by the Board and the identity of the person hired to fill the position.

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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1091

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

November 2, 1984

Mr. William A. Miller
President
Evans Neighbors Association
Box 176
Derby, NY 14047

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. Miller:

I have received your letter of October 27 in which you requested an advisory opinion.

According to your letter, the Evans Town Board failed to give public notice of an afternoon session it held prior to an evening meeting for which notice had apparently been given. A newspaper article concerning the meetings explained that the afternoon session "was called because of emergency conditions in the Highway Department" while the Town Attorney claimed that the meeting was legal "since Town Board members were notified two days in advance". Moreover, the subject of the afternoon session involved the Town's budget, which was amended to provide three fire companies with increased allotments.

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

First, it is unclear from your letter or the newspaper article whether any notice was given regarding the afternoon session. Nevertheless, I point out that §104 of the Open Meetings Law 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 all 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 §104(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 §104(2)]. In my view, the Open Meet-

ings Law requires that a reasonable effort be made to give notice of a meeting, even if such a meeting is called as an "emergency". The requirements of the Law relative to notice could be met by contacting the local news media by phone and by posting notice in the locations designated for posting.

Second, although the Town Attorney believes that the meeting was legal since all Town Board members were notified two days in advance, in my view, notice must be given to the media and to the general public in order to comply with the requirements of the Open Meetings Law.

Third, it is noted that the Open Meetings Law is silent with respect to meeting agendas. Thus, if notice of the afternoon meeting was given but the agenda of that meeting was changed, no violation of the notice requirements would, in my view, have occurred. Since the Law does not address the issue of agendas, I believe that a public body, in its discretion, may or may not choose to include an agenda as part of its notice.

For your information, I have enclosed a pamphlet which explains the requirements of the Freedom of Information and Open Meetings Laws.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

cc: Evans Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1092

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

November 2, 1984

Ms. Jody Adams
[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. Adams:

I have received your letter of October 20, in which you expressed consternation regarding the implementation of the Open Meetings Law by various officials of Suffolk County.

In your letter, you described problems that you encountered most recently with respect to meetings of a committee of the County Legislature. Specifically, you were informed by Ms. Patricia Reeve, an assistant to Lou Howard, Presiding Officer, that there is no requirement that notice of a meeting must be posted. When you read the applicable provision of the Open Meetings Law to her, she said that the County had no procedure for posting and that she was unaware of the manner in which such a procedure could be established. You added that, in your view, the attitudes of some public officials essentially preclude compliance with the Law.

Since we have communicated many times over the years, there is little that I can add to previous remarks. Nevertheless, I believe that the notice requirements of the Open Meetings Law could be accomplished with minimal effort. Moreover, the establishment of a "procedure" concerning the posting of notice could in my view be simply and readily adopted.

Relevant are the provisions of §104 of the Open Meetings Law, which states in 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."

The language quoted above indicates that a public body must post notice of the time and place of meetings "conspicuously" and in "one or more designated public locations".

In my opinion, the County Legislature, or any of its committees and subcommittees, could, by means of resolution, designate one or more conspicuous public locations where notices of meetings will routinely be posted. Such a resolution could require that the chariman of each such public body is responsible for ensuring that notice is posted.

To attempt to enhance the implementation of the Open Meetings Law, copies of this opinion will be sent to Ms. Reeve and Mr. Howard.

In addition, enclosed in "Your Right To Know", which describes the provisions of the Freedom of Information and Open Meetings Laws. If you would like additional copies for distribution to members of public bodies or others, I would be pleased to send them to you 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:ew

Enc.

cc: Ms. Patricia Reeve
Mr. Lou Howard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 3494
OML-AO - 1093

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

October 3, 1984

Mr. Murray Steyer
Law Offices
Steyer & Sirota
123 Main Street
Suite 700
White Plains, NY 10601

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. Steyer:

I have received your letter of September 18 in which you requested an advisory opinion from this office.

Your questions are:

> "1. Is a teacher's personnel file maintained by a School District open for examination, in whole or in part, by a parent or anyone else?
>
> "2. Does a parent who is present at a closed meeting of the Committee on the Handicapped with respect to her child have the right to tape record the meeting?"

With regard to these questions, I would like to offer the following comments.

First, as you are likely 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 (i) of the Law.

Second, there may be situations in which a single record may be both accessible and deniable in part. The introductory language of §87(2) states that all records of an agency are available, except that an agency may withhold "records or portions thereof" that fall within one or more grounds for denial that appear in the ensuing paragraphs.

Third, it appears that a possible ground for denial under the circumstances would be §87(2)(b), which states in general that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy".

Fourth, there have been several judicial interpretations of the privacy provisions to which reference was made earlier with respect to public employees. It is noted initially that the courts have found that public employees enjoy a lesser right to privacy than any other identifiable group, for public employees have a responsibility to be more accountable to the public than any group. In addition, the courts have found in essence that records that are relevant to the performance of the official duties of a public employee are available on the ground that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been held that records concerning public employees that are not relevant to the performance of their official duties may be denied on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981]

Based upon the standards described above, it is my opinion that documents such as a certification may be available under the Freedom of Information Law. A certification, for example, is the equivalent of a license and is based upon findings by the State Education Department that a particular individual is qualified to engage in a particular area of teaching. As such, a certificate appears to be a good source of determining a teacher's qualifications and would, in my view, be available.

In addition, other information contained within personnel records may be available. For example, if certain requirements must be met as a condition of employment (i.e., a master's degree in a particular area), a record indicating the receipt of such a degree would, in my view, be available, as it is relevant to the performance of the official duties of both the employee and employing board of education.

On the other hand, the source of a degree, teaching experience, grades, class ranking and similar personal details might justifiably be withheld. Disclosure of this type of information may, in my opinion, constitute an unwarranted invasion of personal privacy.

Another possible basis for denial is set forth at §87(2)(g), which permits an agency to 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..."

In essence, the provision contains a double negative. An agency may deny access to inter-agency or intra-agency materials, except to the extent that they consist of any of the items listed in subparagraphs (i.), (ii.), and (iii.). As such, statistical or factual data, including time sheets, payroll information and the like are accessible. Similarly, if, for example, an employee has been involved in disciplinary proceedings which have resulted in a determination, the determination would be accessible. Nevertheless, records or portions thereof in the nature of advice or impression appear to be deniable.

With respect to your second question, I point out that the Open Meetings Law is silent with regard to the issue of tape recording meetings. As you may know, however, it is the opinion of the Committee and several courts [see People v. Ystueta, 418 NYS 2d 508; Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984], that a portable, battery operated cassette tape recorder may be used to record an open meeting conducted by a public body.

Nevertheless, it is my opinion that the rationale which supports the right to tape record an open meeting does not support the right to tape record a closed meeting. By statute, the Legislature has, in some cases, granted public bodies discretionary authority and, in other cases, has required public bodies to close certain meetings or portions of meetings to the public. In my view, if a public body may or must hold a closed meeting, it may also prohibit the use of tape recorders during such meeting.

My opinion differs, however with respect to parents who attend a closed meeting of a Committee on the Handicapped. State and Federal regulations governing committees on the handicapped generally require that a parent be permitted to attend meetings whenever possible.

Section 4402(3)(c) of the Education Law provides that a committee on the handicapped shall:

> "[P]rovide written prior notice to the parents or legal guardian of the child whenever such committee plans to modify or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child and advise the parent or legal guardian of the child of his opportunity to address the committee, either in person or in writing, on the propriety of the committee's recommendations on program placements to be made to the board of education or trustees."

Moreover, as a condition precedent to the receipt of funds under the Education of the Handicapped Act, states and school districts that receive funding through the Act are required to comply with the regulations adopted by the United States Department of Education. In this regard, §121a.345 of the Department's regulations, entitled "parent participation" states that:

> "(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:
>
> (1) Notifying the parents of the meetings early enough to insure that they will have an opportunity to attend; and

(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 give the parent, on request, a copy of the individualized education programs."

Thus, it appears that a committee on the handicapped must make efforts to ensure that parents may attend meetings and that parents are fully aware of any discussions and deliberations that transpire at meetings pertaining to their children, [see e.g., Education Law, §4402(3)(c); regulations of the U.S. Department of Education, §121a.345]. In my opinion, tape recording a committee meeting is an extension of such "awareness" and a parent should not be prohibited from using a tape recorder at such a meeting. It is emphasized that I am unaware of any statute or case law that deals with the use of a tape recorder by a parent at a meeting of a committee on the handicapped. However, since the thrust of state and federal regulations involves an intent to enhance and encourage parental participation, a prohibition regarding the use of a tape recorder by a parent might be considered as contrary to the intent of these provisions.

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

Sincerely,

ROBERT J. FREEMAN

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1094

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

October 4, 1984

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 recent letter in which you requested assistance regarding an issue arising under the Open Meetings Law.

According to your letter, on September 20, you contacted the Superintnedent of the Hendrick School District for the purpose of obtaining a copy of minutes of a meeting of the Board of Education held on August 22. The Superintendent informed you that the minutes had to be approved prior to their release. Further, you indicated that the Board's next meeting would not be held until October 28.

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

It is noted that amendments to the Open Meetings Law that became effective on October 1, 1979, provided new and specific direction regarding the time limits within which minutes of meetings must be compiled and made available. Specifically, §106(3) of the Open Meetings Law states that minutes of open meetings must be compiled and made available within two weeks of such meetings; minutes of executive sessions reflective of action taken during an executive session must be compiled and made available within one week of an executive session. Prior to the effective date of the amendments, the Committee recognized that, in some instances, a public body might not meet within one or two weeks, as the case may be, to approve minutes. As a consequence, in a memorandum distributed to all public bodies in the state in August of 1979, it was suggested that if minutes cannot

be approved within the specified time limits, they be marked as "draft", "unofficial" or "non-final", for example. By so doing, the provisions of the Law may be followed while, concurrently, members of the Board are given a measure of protection by informing the public that minutes are subject to change.

In sum, I believe that minutes should be prepared and made available within two weeks of open meetings. If they cannot be approved within that period, I believe that they should nonetheless be made available, after having been marked as suggested in the preceding paragraph.

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:ew

cc: Charles Eible, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1095

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

October 4, 1984

Mr. Edwin V. Vedder, III
[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. Vedder:

I have received your letter of September 24 in which you requested an advisory opinion concerning meetings held by the Schoharie Central School District Board of Education.

According to your letter, it is your belief that "very little discussion is carried on in the public portion" of the Board's meetings. For example, you explained that following a brief public discussion on a reorganizational plan, a motion was made to table discussions of the Director of Education position until after an executive session. Moreover, you wrote that while the meeting's agenda was silent with respect to a particular contract, that item was acted upon following a five minute discussion in excutive session.

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

First, the Open Meetings Law requires that every meeting of a public body be open to the public except that executive sessions may be held pursuant to the procedures outlined in §105 of the Law. Section 105(1) provides 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.

Moreover,, it is emphasized that paragraphs (a) through (h) of §105(1) specify and limit the topics that may appropriately be considered during an executive session. Unless one or more of those topics are discussed, no ground for executive session exists.

Section 105(1)(f) may be relevant to your situation as it pertains to "personnel matters". That section permits public bodies to enter into executive session for the purpose of discussing:

> "...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..."

Thus, the language quoted above specifically limits the types of personnel matters which may be discussed during an executive session.

As noted above, a public body must indicate in general terms the subject to be discussed. In this regard, the courts have held 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 example, a court reviewed minutes containing motions for entry into executive sessions and stated that:

> "...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; see also, Becker v. Town of Roxbury, Sup. Ct., Cortland Cty., April 1, 1983].

Based upon the above cited cases, it is my opinion that the Board's identification of the subject to be discussed in executive session as "specific personnel" is an insufficient indication and fails to comply with the Law. In my view, a motion to enter into an executive session under §105(1)(f) should include reference to a "particular person", who need not be named, plus one of the topics in that provision. For example, an appropriate motion might be "I hereby move to enter into executive session to discuss the employment history of a particular person".

In short, only those subjects listed in §105 of the Open Meetings Law are permissible topics for discussion in executive session. I have enclosed a copy of the Law for your information.

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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm
Enc.
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1096

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

October 10, 1984

Mr. James E. Rooney
[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. Rooney:

As you are aware, I have received your letter of September 26 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, you are the attorney for the North Tonawanda City School District, and the Board has sought an opinion regarding the propriety of "scheduling of a seminar or conference which the Board is considering conducting to discuss informally in a seminar type situation the policy and goals of the City School District and this conference would include the Board of Education members and the Administrative Staff only." You also wrote that the Board "is considering conducting this seminar and conference outside the School District so that there will be a much more informal atmosphere and a freer exchange of ideas."

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

First, it is emphasized that the courts have construed the definition of "meeting" broadly [see Open Meetings Law, §102(1)]. In a landmark decision rendered in 1978, the Court of Appeals 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 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)].

Although you suggested that the gathering would be informal and that no action would be taken, it would appear that a discussion of the "policy and goals" of the School District could be equated with the conducting of public business and that, therefore, the proposed seminar would be a "meeting" required to be held in according with the provisions of the Open Meetings Law.

Second, assuming that the gathering in question could be characterized as a "meeting", I believe that it must be preceded by notice of the time and place, given to the news media and to the public by means of posting as specified in §104 of the Open Meetings Law.

Third, although you did not identify the site where the meeting might be held, I believe that such a meeting should be held in a location where members of the public who wish to attend could reasonably do so. It is noted that there is nothing in the Open Meetings Law, or any provision of the Education Law of which I am aware, that specifically deals with the location of a school board meeting, other than §103(b) of the Open Meetings Law pertaining to barrier-free access to the physically handicapped. Nevertheless, as suggested earlier, 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, I believe 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.

In sum, the gathering described in your letter would in my view be a "meeting" subject to the requirements of the Open Meetings Law. Further, if such a meeting is to be held, I believe that it should be held in a location that would reasonably permit interested members of the public to attend.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-
OML-AO-1097

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

October 10, 1984

Mr. Dennis Kociencki
Parliamentarian/Executive Assistant
Student Government Association
Erie Community College - North
Main & Youngs Road
Williamsville, New York 14221

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. Kociencki:

I have received your letter of September 26 in which you requested an advisory opinion.

According to your letter, the "Student Government of Erie Community College North funds several clubs on campus with money collected from Student Activity Fees". In addition, "club budgets were approved in an Executive Session of the Student Government Association". Your questions are:

> "1. Do the clubs funded by Student Government Association have a right to know the budgets of all other clubs on campus?
>
> 2. Is the practice of deliberating and approving club budgets in Executive Session a violation of the Open Meetings Law?"

With regard to these questions, I would like to offer the following comments.

With respect to club budgets, it is noted that the Freedom of Information Law generally requires that all records maintained by an agency be made available for public inspection and copying. The term "agency" is defined in §86(3) of the Law 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."

Thus, the Freedom of Information Law governs a broad range of governmental offices.

Moreover, the Court of Appeals has found that some not-for-profit entities are subject to the Freedom of Information Law [Westchster-Rockland Newspapers v. Kimball, 50 NY 2d 575]. For example, a volunteer fire company is a not-for-profit corporation that performs its duties for a municipality by means of a contractual relationship. Although a volunteer fire company is not itself government or a governmental entity, the Court found that it performs what traditionally might be considered a governmental function and therefore falls within the scope of the Freedom of Information Law.

Based upon the language of the Freedom of Information Law and its judicial interpretation, it is likely that the Student Government Association of Erie Community College North is an agency subject to the Freedom of Information Law. While it is assumed that the Association's Board is elected by the students of the college, you stated that the Association is responsible for allocating funds, obtained from mandatory student activity fees, to various campus clubs. The Association, in my view, performs a governmental function for the SUNY system; that is, it funds student organizations on campus with money that the college requires students to pay in the form of an activities fee. But for the Association, it appears that the Erie Community College North would be responsible for funding the campus clubs with the student activities fees. Therefore, it appears that the Association conducts public business and performs a governmental function and, as such, may be found to be subject to the Freedom of Information Law.

If the Association is subject to the Freedom of Information Law, all records maintained by it, including the budget of the campus clubs which it funds, would be available to the public. To that extent, the campus clubs funded by the Student Government Association would have a right to know or review the budgets of all other clubs.

With respect to the Association's practice of approving club budgets in Executive Session, I point out that the Open Meetings Law generally requires that meetings of public bodies be open to the public. "Public body" is defined in §102(2) of the Law to include:

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

By analyzing the elements of the definition, I believe that it may be concluded that the Association's board is a public body subject to the Open Meetings Law.

First, it is my view that the Student Government Association is an entity that must act by means of a quorum. If it is a public body, §41 of the General Construction Law may require it to perform its duties only by means of a quorum. If it is a not-for-profit corporation, it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law.

Second, to fall within the definition of "public body", an entity must conduct public business and perform a governmental function for the state. As discussed above with regard to the Freedom of Information Law, I believe that the Association conducts public business and performs a governmental function for the State University syste, or perhaps for Erie County, at Erie Community College North.

Therefore, it is my view that the Association is a public body subject to the Open Meetings Law. As such, its meetings must be open to the public, except when executive sessions may be held pursuant to §105 of the Law. That section sets forth procedural guidelines for entering into executive session and limits the subjects of discussion for which an executive session may properly be conducted. In short, only those topics specifically enumerated in §105 may be discussed in executive session. In my opinion, deliberation and approval of club budgets would not fall within any of the statutory purposes for holding executive sessions.

In addition, I point out that §106 of the Open Meetings Law requires that minutes be taken at all open meetings of a public body which shall include a record of all motions, proposals, resolutions and any matters formally voted upon. Moreover, minutes of executive sessions must include a summary of the final determination of any action taken by formal vote. Thus, the minutes of either an open meeting or executive session should reflect the final, approved budgets of the campus clubs. Pursuant to §106 (3) of the Law, the minutes must be made available to the public within specified time limts.

In sum, the application of the Freedom of Information Law and Open Meetings Law is unclear with respect to a student government association. However, to the extent that I am familiar with the function of the Association, it appears that it is an "agency" required to comply with the Freedom of Information Law. Further, it is clear in my view that its board is a "public body" subject to the Open Meetings Law. I have included copies of these laws for your information.

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 Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1098

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

October 15, 1984

Mr. Dean Betz
Staff Reporter
The Times Record
501 Broadway
Troy, New York 12181

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. Betz:

I have received your letter of October 1 in which you requested an advisory opinion concerning executive sessions held by the Mechanicville School District Board of Education.

According to your letter and the newspaper article, the Board entered into executive session to discuss two grievances filed by the Mechanicville Teachers Association. You wrote that the "board president said the district's contract with the Mechanicville Teachers Association mandated a closed session". The grievances concerned "teachers compiling materials that were requisitioned by grade levels" and "the method of posting teaching positions". In addition, you asked for "clarification of how much specific information about the nature of an executive session discussion members of a public body are obligated to make available before it takes place".

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

First, as you are aware, the Open Meetings Law generally requires that meetings of a public body be open to the public, except when an executive session may be conducted pursuant to §105 of the Law. Section 105 provides a procedure for entering into executive session and limits the purposes for which such a session may be held to specific subjects. As a general matter, the eight categories outlined in §105(1)(a) through (h) invblve subjects which, if discussed at an open meeting, would be damaging to a particular individual, corporation or the function of a public body.

Second, several of the enumerated purposes for holding an executive session may be relevant to a discussion of grievances. Section 105(1)(d) of the Law permits an executive session to discuss "proposed, pending or current litigation". In my view, however, the term "litigation" involves a judicial contest and I believe that the discussion of a grievance does not involve a judicial context.

Paragraphs (e) and (f) of §105(1) pertain respectively to discussions of collective negotiations or particular individuals and corporations under certain circumstances. Since the grievances, as described in your article, do not concern collective bargaining or "particular" teachers, I do not believe those provisions could have been cited to enter into an executive session. In short, I do not believe the subject matter of the grievances constituted permissible grounds for entering into executive session under §105 of the Open Meetings Law.

Third, I point out that §108(1) of the Open Meetings Law exempts, among other matters, quasi-judicial proceedings from the scope of the 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 actions, and to exercise discretion of a judicial nature."

Thus, to the extent that the Board "hears" the grievances filed by the Teachers Association and renders a final and binding determination, the Board might have engaged in a quasi-judicial proceeding. If that was so, the proceeding would not be subject to the Open Meetings Law and could have been closed. If the grievances, however, were merely discussed by the Board and were not "quasi-judicial", such a discussion would have been subject to the Law and, in my view, improperly conducted in executive session. You

referred to a provision of the collective bargaining agreement that might require a closed session. In my view, the provisions of a contract cannot conflict with the requirements of a statute, such as the Open Meetings Law. Therefore, unless the Board engaged in a quasi-judicial proceeding outside the scope of the Open Meetings Law, the topics, in my opinion, should have been considered during an open meeting, notwithstanding the terms of the contract.

Finally, you asked how specific must a public body be in identifying the subjects to be discussed in executive session. Section 105(1) of the Law requires a public body to identify "the general area or areas of the subject or subjects to be considered" in executive session. The courts have interpreted this provision to require more than a mere reiteration of one or more of the grounds for executive session [see Doolitte v. Board of Education, Sup. Ct., Chemung Cty., Oct. 20, 1981; Becker v. Town of Roxbury, Sup. Ct., Cortland Cty., April 1, 1983]. In my view, if a public body entered into executive session to discuss a personnel matter, an appropriate motion would include a reference to a "particular person", who need not be named, and one of the topics in that provision. For example, a proper motion might be "I hereby move to enter into executive session to discuss the employment history 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

cc: Superintendent Anthony L. Cocozzo
President C. Mark Seber
Simeo Gallo, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1099

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

October 15, 1984

Mr. Jim Switzer
School District Clerk
Wayne Central School District
Ontario Center, New York 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 note of October 2 concerning the Open Meetings Law.

According to your letter, a member of the board of the school district that you serve was recently advised that the Open Meetings Law had been changed "with respect to the record in school board minutes on the conclusion of an executive session".

In this regard, I am unaware of any such change in the Open Meetings Law. As you may be aware, however, the capacity of a school board to vote during an executive session may differ from that of other public bodies. Section 105 of the Open Meetings Law generally permits a public body to vote during a properly convened executive session, unless the vote involves the appropriation of public monies. Nevertheless, various judicial interpretations of the Education Law, §1708(3), indicate that a school board can vote only during an open meeting, except in situations where a statute requires that action can be taken during an executive session [see e.g., §3020-a; 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 58 NY 2d 626 (1982)].

Further, with respect to the other issue raised in your letter, I would agree that, at the end of a discussion occurring in executive session, there need not be a motion made to return to an open meeting. In short, it is my view that a public body may simply terminate its executive session by returning to an open meeting.

As requested, enclosed are five copies each of the Freedom of Information and Open Meetings Laws. You may reproduce them as you see fit.

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-
OML-AO-1100

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

October 15, 1984

Mr. Sam Roberts
The New York Times
229 West 43rd Street
New York, NY 10036

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. Roberts:

I have received your letter of September 29 in which you requested an advisory opinion.

According to your letter, the New York Times "intends to submit a Freedom of Information request for any and all records reflective of the discussion and action taken by the Administrative Board of the New York State Courts at its regular September meeting."

The question involves the application of the Freedom of Information Law with respect to the records in question. In this regard, I would like to offer the following comments.

First, the Freedom of Information Law (Article 6, Public Officers Law) includes within its scope records of an "agency", which is defined in §86(3) 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."

Further, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

From my perspective, which is based upon judicial interpretations of the Freedom of Information Law, as well as other statutes and the New York State Constitution, the Administrative Board is "an agency" subject to the requirements of the Freedom of Information Law.

Section 210 of the Judiciary Law in subdivision (2) states that:

> "[T]he administrative board of the courts shall consist of the chief judge, who shall serve as chairman, and the presiding justices of the appellate divisions of the supreme court. The members of the administrative board shall serve without compensation but shall be entitled to reimbursement for expenses actually and necessarily incurred by them in the performance of their duties."

Article VI, §28 of the Constitution contains similar language regarding the Administrative Board of the Courts and in subdivision (c) states that:

> "[T]he chief judge, after consultation with the administrative board, shall establish standards and administrative policies for general application throughout the state, which shall be submitted by the chief judge to the court of appeals, together with the recommendations, if any, of the administrative board. Such standards and administrative policies shall be promulgated after approval by the court of appeals."

In view of the language quoted above, it would appear that the Administrative Board performs an administrative function and does not exercise a judicial function whereby determinations are made relative to justiciable issues.

Further, in a determination that was later affirmed unanimously by the Appellate Division, it was found that the Office of Court Administration is not a court exempted from the requirements of the Freedom of Information Law, but rather that it is an "agency"that falls within the scope of the Freedom of Information Law [see Quirk v. Evans, 116 Misc. 2d 554, 455 NYS 2d 918, aff'd 97 AD 2d 992 (1983); see also, Babigian v. Evans, 104 Misc. 2d 140, 427 NYS 2d 668, aff'd 97 AD 2d 992 (1983)]. In its discussion of the issue, the

Supreme Court in Quirk, supra, cited prior authority which alluded to the Administrative Board of the Judicial Conference, stating that:

> "[T]here is some judicial authority for the proposition that the Administrative Board of the Judicial Conference, most of whose powers devolved on the OCA and the Chief Administrator, was merely an administrative agency. Justice Silverman, formerly of this court, commented:
>
> 'Pursuant to section 28 of article VI of the State Constitution, and section 212 of the Judiciary Law, the Administrative Board has the authority and responsibility for the administrative supervision of the unified court system, including the adoption of standards and policies of general application throughout the State relating to the appointment and promotion of employees. As such, it performs the functions formerly performed by the State Civil Service Commission and the Department of Personnel in relation to the non-judicial positions in the unified court system.
>
> '...the Administrative Board, like any administrative agency, is bound by its own rules.' [Matter of English v. McCoy, 51 Misc. 2d 311 [273 N.Y.S. 2d 171], mod. other grounds, 27 A.D. 2d 280 [278 N.Y.S. 2d 449], mod. other grounds 22 N.Y. 2d 356 [292 N.Y.S. 2d 857, 239 N.E. 2d 614], application for reargument denied 22 N.Y. 2d 973 [295 N.Y.S. 2d 1033, 242 N.E. 2d 499]" (455 NYS 2d at 921).

In view of the foregoing, it appears that the Administrative Board is subject to the Freedom of Information Law.

Second, assuming that the Administraitve Board is an "agency", its records would in my view be accessible in accordance with the provisions of the Freedom of Information Law. 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Third, at this juncture, I direct your attention to the Open Meetings Law (Public Officers Law, Article 7). That statute is applicable to meetings of public bodies. Section 102(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 viewing the definition quoted above by means of its components, it appears that the Administrative Board is a "public body". The Administrative Board is an entity consisting of more than two members. I believe that it conducts public business and performs a governmental function for the state. Further, it would appear that the Administrative Board must conduct public business by means of a quorum pursuant to §41 of the General Construction Law. The cited provision states that:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public 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."

While neither the Judiciary Law nor the Constitution might refer specifically to any quorum requirement, it would appear that the Board may carry out its duties only by means of a quorum as described in §41 of the General Construction Law.

If the Administrative Board is a "public body", of potential relevance to your question is §106 of the Open Meetings Law concerning minutes. The cited provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; 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.
>
> 3. Minutes 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."

If the Administrative Board is a public body, it would appear that minutes reflective of action taken would be accessible in accordance with 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:ew

cc: Honorable Lawrence H. Cooke, Chairman, Administrative Board of the Courts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1101

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

October 16, 1984

Mr. Jerry Brixner
[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. Brixner:

I have received your letters of October 1 and October 6.

The first letter once again pertains to the use of tape recorders at meetings of the Town Board of the Town of Chili, upon which you serve. According to the news articles attached to your letter, the Town Board has rescinded its ban on the use of tape recorders by members of the public and the news media. However, the ban apparently continues to exist with respect to the capacity of Town Board members to use tape recorders.

In this regard, I do not believe that I can add anything to previous comments written on your behalf relative to the use of tape recorders.

In short, it was emphasized, based upon case law, that any person should have the capacity to use a portable, battery-operated tape recorder at open meetings, for the presence of such devices would not detract from the deliberative process. I would like to add that, in my opinion, it makes no sense for the Board to permit the use of tape recorders by the public generally, while concurrently prohibiting a Board member from using a tape recorder. Stated differently, if the use of tape recorders by members of the public would not

detract from the deliberative process, it is difficult if not impossible to envision how the use of a tape recorder by a Board member would be more distracting or would have a different effect. It is noted, too, that the Committee will likely recommend legislation guaranteeing the right to use an unobtrusive tape recorder at open meetings. Further, you may distribute or reproduce any opinion written by this office as you see fit.

Your letter of October 6 concerns a meeting scheduled by the Town Board with the Town's budget director to discuss the proposed budget. You asked whether interested residents of the Town may attend such a meeting.

Here I would like to point out that the definition of "meeting" appearing in §102(1) of the Open Meetings Law has been expansively interpreted by the courts. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering 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)]. The decision dealt with so-called "work sessions" that were conducted solely for the purpose of discussion and without any intent to take action. Even though there was an absence of an intent to take action, it was stressed that the entire deliberative process is intended to be covered by the Open Meetings Law.

In sum, a meeting of the Town Board held to discuss the budget would in my view clearly fall within the requirements of the Open Meetings Law. As such, I believe that any person would have the right to attend such a 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: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1102

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

October 16, 1984

Mr. Lewis A. Grell
Superintendent of Schools
Hamburg Central School District
Hamburg, NY 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 Mr. Grell:

I have received your letter of October 4 as well as the materials attached to it. Your interest in complying with the Open Meetings Law is much appreciated.

Your letter was apparently prepared in response to an opinion written at the request of a resident of the District. The advisory opinion prepared on August 27 involved what was characterized as a "consensus vote" taken by the School Board which involved several items considered on an agenda that were dealt with by means of a single vote of the members. You enclosed a variety of materials regarding a so-called "consent agenda", which is used for the purpose of making more efficient use of time by a school board at its meetings. Having reviewed the materials attached to your letter, particularly a model agenda as well as minutes prepared in relation to the agenda, it would appear that the use of the techniques described would be consistent with the Open Meetings Law.

From my perspective, crucial to the use of a "consent agenda" would be an explanation of its purpose. Specifically, as indicated in a guide included in materials distributed by the School Boards Association:

> "[W]hen a consent agenda is to be a part of the regular agenda, adequate time must be taken to explain its use before it is used. At periodic intervals after a consent agenda is implemented, it might be prudent to

> explain its use and purpose. The basic purpose is a more efficient use of time. Sometimes board critics claim that boards are trying to hide things by using consent agendas. This certainly is not the case. Items on the consent agenda are as open to discussion and public record as any other item."

With respect to the requirements of the Open Meetings Law, it is noted that there is nothing in the Law that deals specifically with an agenda. Similarly, there is nothing in the Law pertaining to the amount of time that must be devoted to issues that arise during meetings. Further, as suggested in the opinion of August 27, perhaps most relevant are the provisions concerning the contents of minutes. To reiterate, §106(1) states that:

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

Consequently, it is clear in my view that minutes must consist at a minimum of all motions, proposals, resolutions and matters formally voted upon.

According to the sample materials attached to your letter, the agenda contains brief references to "consensus items". However, the minutes relative to the consensus items indicate the specific nature of action taken with respect to each item. Consequently, it appears that the minutes contain appropriate references to action taken by a Board by means of consensus votes. Further, the minutes refer to attachments, which presumably would be incorporated and made a part of the minutes.

If my assumptions are accurate, it would appear that the proposal that you have suggested would be consistent with 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1103

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

October 17, 1984

Ms. Jody Adams
[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. Adams:

As you are aware, I have received your letter of October 5 as well as the materials attached to it.

Your inquiry concerns a special meeting conducted by the Public Safety Committee of the Suffolk County Legislature on September 25. Although you have raised questions with that Committee regarding compliance with the Open Meetings Law relative to notice, those questions apparently remain unanswered. In terms of the meeting itself, as I understand the facts, a special meeting of the Public Safety Committee was conducted at 9:15 a.m. on September 25, immediately prior to a meeting of the County Legislature. During the Public Safety Committee meeting, a resolution was adopted to approve legislation, which was later acted upon by the County Legislature.

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

First, §102(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 sections 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, which includes specific reference to committees, subcommittees and similar bodies, I believe that the Public Safety Committee is clearly a "public body" required to comply with the Open Meetings Law.

Second, §104 of the Open Meetings Law requires that notice of the time and place be given prior to every meeting of a public body.

Subdivision (1) of §104 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. Subdivision (2) of §104 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.

Based upon the foregoing, even if it is necessary to convene a meeting of a public body quickly, I believe that the Law nonetheless requires that notice be given.

Lastly, in terms of the enforcement of the Open Meetings Law, §107(1) indicates that if action is taken by a public body in violation of the Law, a court may, upon good cause shown, nullify such action. Nevertheless, it is emphasized that the cited provision states in part 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."

Consequently, if a public body inadvertently fails to fully comply with the notice requirements imposed by §104, that alone would not constitute a basis for invalidating action taken by a public body. If, however, there was a willful failure to provide notice, I believe that a court could, depending upon the circumstances surrounding the meeting, impose the sanction described above.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patrick Mahoney, Chairman, Public Safety Committee
Paul Sabatino, Counsel to the Legislature
Theodore Sklar, Office of the County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-
OML-AO-1104

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

October 18, 1984

Honorable Warner H. Strong
Mayor
Village of Palmyra
Palmyra, NY 14522

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 Strong:

I have received your letter of October 4 in which you requested advice regarding memoranda written by departmental employees to other departmental employees.

In your letter you asked the following questions:

> "[A]re these memos subject to the 'Open Meetings Law' - or any other law of which you are aware? May these memos be considered private, departmental business - and what, if any, would be the legal implications of them being made public by a third party; what would occur should public access to them be denied?"

In response to your questions, I would like to offer the following comments.

First, I point out that the Freedom of Information Law is based upon a presumption of access. In other words, an agency must make all records available for inspection and copying except to the extent that an agency may withhold records or portions thereof enumerated in §87(2) of the Law. Relevant to your question is paragraph (g) of §87(2) which permits an agency to deny records which:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

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

Conversely, to the extent that inter or intra-agency materials contain advice or opinion, I believe that they would be deniable.

Second, it should be noted that while §87(2) permits an agency to deny records based upon one or more of the deniable grounds, the section does not require an agency to withhold such records. Thus, in response to your question concerning the legal implications of disclosure by a third party, the Freedom of Information Law does not prohibit or make it unlawful to disclose records. There may be other statutes concerning particular records that require confidentiality.

Third, the Open Meetings Law generally requires that all meetings of a public body be open to the public except when an executive, or closed, session may be held pursuant to §105 of the Law. That section lists eight subjects which may properly be discussed in a closed session. None of the enumerated subjects cover discussions of inter or intra-agency memoranda in general.

It is emphasized that even though a record might justifiably be withheld under the Freedom of Information Law, a discussion related to that record might nonetheless be required to be conducted open to the public. For example, if the Village Highway Superintendent writes to you and recommends that a road be repaired, the memorandum would be advisory and, therefore, deniable under the Freedom of Information Law. However, when, at a meeting, the Board of Trustees seeks to discuss the recommendation, the discussion must be open, for none of the grounds for executive session would be applicable.

Finally, you asked what would occur should public access to the memoranda be denied. I point out that both the Freedom of Information and Open Meetings Laws include provisions for reviewing an agency's denial of records or closure of a meeting. In brief, an aggrieved person may initiate an Article 78 proceeding to review such decisions by a public body.

I have enclosed a copy of the Freedom of Information Law and the Open Meetings Law for your information. I hope that I have been of some assistance to you. Should any further questions arise, please feel free to call this office.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Encl.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3513
OML-AO-1105

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

October 19, 1984

Mrs. Dorothy E. Petrucelli
Board of Education
Eastchester Union Free
School District
580 While Plains Road
Eastchester, NY 10707

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. Petrucelli:

I have received your letter of October 9, in which you requested an advisory opinion.

As a member of the Board of Education of the Eastchester Union Free School District, you have questioned various practices of the Board. Specifically, you wrote that "as of July of this year we no longer have minutes of action taken in Executive Session". It is your belief that some of the actions that were voted upon during executive sessions should have been "ratified" during open meetings. Apparently several of your questions involve the initiation of an investigation relative to a staff member that has resulted in a proceeding commenced under §3020-a of the Education Law. You indicated further that "Our attorney has advised us that any discussion of Probable Cause relating to §3020-a must be held in Executive Session, and that a vote for Probable Cause must also be taken in Executive Session with no minutes being taken." You also expressed the belief, however, that minutes should be taken, even though action might appropriately be taken during an executive session.

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

First, it is emphasized that your questions involve a variety of provisions of law, including the Education Law, Open Meetings Law, and the Freedom of Information Law.

Second, as a general matter, a public body subject to the Open Meetings Law may vote during a properly convened executive session, so long as the vote does not involve the appropriation of public monies. Nevertheless, various judicial interpretations of the Education Law, §1708(3), indicate that a school board can vote only during an open meeting, except in situations where a statute requires that action can be taken during an executive session [see e.g., United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et at 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 58 NY 2d 626 (1982)].

Based upon the review of §3020-a of the Education Law, it would appear that the actions taken by a board pursuant to that provision must occur during an executive session. As such, §3020-a is in my view a statute that requires voting by a school board to be taken behind closed doors. For instance, subdivision (2) of the cited provision concerning the disposition of charges states in part that:

> "Upon 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."

Based upon the language quoted above, I believe that a school board would be required to vote during an executive session in relation to a determination relative to charges made against a tenured individual.

Third, of significance is §106 of the Open Meetings Law, which provides guidance regarding the contents and disclosure of minutes. Subdivisions (1)and (2) of the cited provision state that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> "2. Minutes shall be taken at executive session 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, if a school board votes during an executive session, I believe that minutes reflective of the determination and the vote by the members must be prepared. Therefore, I agree with your contention that, even though the Board might in some instances vote behind closed doors, it must nonetheless prepare minutes reflective of its actions.

Nevertheless, as stated in §106(2), minutes of an executive session would be available to the extent provided by the Freedom of Information Law, which is Article 6 of the Public Officers Law. I would like to point out in this regard that a judicial determination regarding records prepared, including charges, in conjunction with a proceeding initiated under §3020-a of the Education Law, may be withheld under the Freedom of Information Law [see Harold Company v. School District of the City of Syracuse, 430 NYS 2d 460 (1980)]. In brief, since charges are not proven and are not indicative of a final determination relative to a tenured person, it was found that disclosure would at that juncture constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)].

As such, while I believe that minutes relative to action taken during an executive session must be prepared, in the context of the situation involving charges made under §3020-a of the Education Law, I do not believe that the minutes would have to be made available under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1106

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

October 24, 1984

Mr. Anthony J. Adamis
Editor
The Millerton News
P.O. Box A.D.
Millerton, NY 12546

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. Adamis:

I have received your letter of October 12, in which you raised a series of questions regarding the Open Meetings Law as it affects the operation of village government.

In your first area of inquiry, the question is as follows:

> "[M]ay a board, having met as scheduled and duly advertised for public hearings, then convene itself in regular session for the purpose of discussing or acting upon public business if such a regular session has not been advertised to the public and the press?"

In this regard, I believe that there may be a distinction between a public hearing and a meeting. From my perspective, a public hearing is generally held to enable members of the public to express their views with respect to a particular issue. Further, often a notice of a public hearing is required to be published as a legal notice prior to a hearing. A "meeting" subject to the Open Meetings Law represents a gathering of a public body for the purpose of conducting public business as a body. The requirements concerning notice relative to a meeting subject to the Open Meetings Law do not include publication as a legal notice. Consequently, legal requirements concerning notice as well as the intent for conducting meetings and public hearings may differ.

You also asked whether a board may "delegate decision-making authority to any number of its members for the purpose of deciding, for instance, the placement of parking spots relative to an existing regulation in Village Law?" In all honesty, I do not have sufficient expertise relative to the Village Law to provide a precise response. Nevertheless, §4-412(1) of the Village Law, concerning the general power of the Village Board of Trustees, states in part that:

> "The board of trustees may create or abolish by resolution offices, boards, agencies and commissions and delegate to said offices, boards, agencies and commissions so much of its powers, duties and functions as it shall deem necessary for effectuating or administering the board of trustees duties and functions."

It is emphasized that I do not know of the extent to which a board may delegate its authority. Nevertheless, the language quoted above indicates that authority may be delegated only by means of a resolution.

Lastly, you asked what subjects may be considered by a board during an executive session. Rather than listing the eight grounds for entry into executive session, I have enclosed a copy of the Open Meetings Law, which in §105(1) specifies and limits the topics that may appropriately be discussed during an executive session.

It is noted, too, that a public body must accomplish a procedure during an open meeting before it may enter into an executive session. Specifically, the introductory language of §105(1) states that:

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

As such, it is clear in my view that a public body cannot 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 those topics listed in paragraphs (a) through (h) of §105(1). In addition, a motion to enter into an executive session must indicate the subject to be discussed and be carried by a majority vote

In my opinion, if a board provides legal notice of a public hearing, it indicates an intent to enable the public to speak in relation to a particular issue. If the same board after the hearing decides to discuss public business or act as a body, I believe that notice of a meeting should be given in accordance with §104 of the Open Meetings Law. Stated differently, if only a legal notice is given regarding an issue to be considered for the purpose of holding a public hearing, the public might be led to believe that only that topic would be considered. Therefore, if a public body seeks to hold a meeting as well as a public hearing, in addition to a legal notice of a public hearing, a public body should in my view give notice as required by the Open Meetings Law.

With respect to notice, §104(1) of the Open Meetings Law, which pertains to meetings scheduled at least a week in advance, requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 104(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 §104(1), "to the extent practicable" at a reasonable time prior to such meetings.

Your second question is whether a board may meet "either in quorum or in subcommittee, for the purpose of reviewing a site within its jurisdiction pertinent to public business without advertising such a meeting to public and media?" As indicated earlier, §104 in my opinion requires that notice of the time and place of meetings be given to the news media and to the public prior to every meeting, whether a meeting is regularly scheduled or otherwise.

The next question is whether a board may hold a meeting "advertised or otherwise, without making such meeting open to the public?" Here I would like to point out that the definition of "meeting" has been expansively construed by the courts. In a landmark decision rendered in 1978, by the Court of Appeals, the state's highest court, it was found that the term "meeting" encompasses 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 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)]. Further, §103 of the Law requires that every meeting be convened as an open meeting.

of the total membership of a public body during an open meeting before an executive session may 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-
OML-AO-1107

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

October 26, 1984

Mrs. Vivian Giambo
[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. Giambo:

I have received your letter and a variety of correspondence attached to it.

The materials describe a series of problems concerning issues involving the use of real property in the Town of Phillipstown. Related to those issues are questions involving the responsiblities of the Town under the Freedom of Information and Open Meetings Laws. Your inquiry focuses upon a series of requests for records maintained by the Planning Board. You wrote that, although some materials pertaining to a specific situation fully described in your correspondence were made available, various documents were absent from the file.

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

First, it is noted at the outset that the Freedom of Information Law is expansive in its scope. The coverage of the Law is determined in part by the term "record" which is defined in §86(4) to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regu-

Based upon the breadth of the language quoted above, it is clear in my view that all records maintained by the Town are subject to rights of access granted by the Law.

Second, if a request for records is submitted, but all of the records are not made available, some would have been withheld. Here I point out that, when records are withheld, a reason for a denial must be stated in writing. Further, when records are denied, an applicant must be informed of his or her right to appeal.

Third, in terms of rights, 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 (i) of the Law.

Fourth, it is emphasized that the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of Law, 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business 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 ten 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)].

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Other issues involve the implementation of the Open Meetings Law relative to notice of meetings. Section 104 of the Open Meetings Law requires that notice of the time and place be given prior to every meeting of a public body, including a planning board. Section 104(1) 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 in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings.

Section 104(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 in the same manner as prescribed in §104(1) "to the extent practicable" at a reasonable time prior to such meetings.

It is important to note, in the context of the materials, that there may be a distinction between notice requirements relative to a meeting of a public body as opposed to a public hearing conducted by a public body. In the case of a meeting, although a public body must provide notice as described in the preceding paragraphs, §104(3) indicates that the notice of a meeting to be held pursuant to the Open Meetings Law need not consist of a paid legal notice. However, often a public hearing must be preceded by a paid legal notice.

The correspondence indicates that issues have arisen in relation to whether or not action might have been taken by the Planning Board relative to particular issues. From my perspective, action may be taken by a public body only at a duly convened meeting and only by means of a majority vote of its total membership.

Enclosed for your consideration are copies of the Freedom of Information and Open Meetings Laws.

As suggested to you during our telephone conversation, it is suggested that you confer with an 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
Exeuctive Director

RJF:ew

Enc.

cc: Mr. Anthony A. Constantino, Clerk of Phillipstown Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1108

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

October 29, 1984

Mr. Donald P. Moore
[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. Moore:

I have received your letter of October 17 concerning meetings held by the City of Rye Board of Architectural Review, (the "BAR").

According to your letter, the BAR generally meets in a board room in City Hall as opposed to a nearby, larger council chamber also located in City Hall. You explained that, after meeting "behind closed doors" while applicants and other interested parties wait in the council chamber, those persons are later "called in for one case at a time to sit around the table with the BAR members". You stated that problems arose when you went before the Board of Appeals regarding a matter considered at the previous closed BAR meetings due to a lack of knowledge of the matters discussed at the BAR meetings. In addition, you wrote that the Secretary of the BAR informed the Board of Appeals that the Board is not required to give notice of its meetings.

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

First, the Open Meetings Law requires that every meeting of a public body be held open to the public, except to the extent that executive sessions may be conducted pursuant to §105 of the Law. Further, §102(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 denined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based upon this definition, it is my belief that the Board is a public body subject to the provisions of the Open Meetings Law. It is assumed that the Board consists of more than two members and according to Chapter 53 of the Rye City Code, the Board is required to conduct its business by means of a quorum. Moreover, the Board performs a governmental function for a public corporation, the City of Rye.

Second, the grounds for entry into executive session are limited to those enumerated in §105. As a general matter, the eight grounds for entry into executive session listed in §105(1)(a) through (h) involve subjects which, if discussed at an open meeting, would be damaging to a particular individual, corporation or the function of a public body. In my opinion, none of the categories would permit the Board to routinely conduct executive sessions to discuss each application for building permits.

Third, with respect to notice, the Open Meetings Law 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 all meetings (see §104 of the Open Meetings Law). 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. 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.

In sum, it is my view that the Board of Architectural Review is a public body required to comply with the Open Meetings Law. As such, I believe that the Board must provide notice and conduct its meetings open to the public, except to the extent that an executive session may appropriately be held pursuant to §105 of the Open Meetings Law. I have enclosed, for your information, a pamphlet which generally describes the scope of both the Freedom of Information Law and 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Architectural Review Board
City of Rye

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 1109

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

November 7, 1984

Ms. Suzanne Johnson
[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. Johnson:

I have received your letter of October 29 in which you requested clarification with respect to executive sessions held by a board of education.

According to your letter, executive sessions are routinely called for the purpose of discussing "a personnel issue", "negotiations", "a real estate matter", or "a legal issue". You asked whether the board should "give additional, more precise clarification of the purpose for those executive sessions". In addition, you asked whether executive sessions are permitted for the purpose of "study sessions" and whether a meeting at which a budget is discussed, prepared or "studied" must be open to the public.

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

First, as you are likely aware, the Open Meetings Law generally requires that meetings of a public body be open to the public, except when an executive session may be conducted pursuant to §105 of the Law. Section 105 provides a procedure for entering into executive session and limits the purposes for which such a session may be held to specific subjects. As a general matter, the eight categories outlined in §105(1)(a) through (h) involve subjects which, if discussed at an open meeting, would be damaging to a particular individual, corporation or the function of a public body.

Second, §105 of theLaw requires a public body to identify "the general area or areas of the subject or subjects to be considered" in executive session. The courts have interpreted this provision to require more than a mere reiteration of one or more of the grounds for executive session [see Doolittle v. Board of Education, Sup. Ct., Chemung Cty., Oct. 20, 1981; Becker v. Town of Roxbury, Sup.Ct., Cortland Cty., April 1, 1983]. For example, if a public body entered into executive session to discuss a personnel matter, an appropriate motion would include a reference to a "particular person", who need not be named, and one of the topics listed in §105(1)(f). For instance, a proper motion might be "I hereby move to enter into executive session to discuss the employment history of a particular person".

Third, with respect to discussions of negotiations, §105(1)(e) of the Open Meetings Law permits a public body to enter into executive session for the purpose of discussing only those collective negotiations which are held pursuant to article fourteen of the Civil Service Law, which is commonly known as the Taylor Law. In my view, a public body may not enter into executive session for the purpose of discussing negotiations in general but rather must limit discussions to negotiations under the Taylor Law. For that type of situation, a proper motion might be "I hereby move to enter into executive session to discuss collective negotiations with a public employee union pursuant to the Taylor Law".

Fourth, with respect to real estate matters, I point out that the only provision of the Open Meetings Law which permits a public body to conduct an executive session to discuss a matter related to real estate is §105(1)(h). That section provides that a public body may enter into 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."

Thus, the above-cited paragraph does not permit a public body to discuss general real estate matters in executive session. Rather, it permits a closed session only in the limited situation where a proposed acquisition, sale or lease of real property by the public body would substantially affect the value of such property. In such a situation, I believe a proper motion might be "I hereby move to enter into executive session to discuss the possible purchase of real property because publicity may affect its value".

Finally, you asked whether executive sessions are permitted for the purpose of "study sessions". In this regard, I point out that the term "meeting" has been construed by the courts to include any gathering of a quorum of a public body for the purpose of conducting public business. The courts have specified that every step of the decision-making process is necessary to formal action and, although no formal action may be contemplated at a "working meeting", such a gathering is subject to the provisions of the Law [see Matter of Orange County Pubs. Div. of Ottoway Newspapers v. Council of City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947; Binghamton Press Co., Inc. v. Board of Education of the City School District of the City of Binghamton, 67 AD 2d 797]. Therefore, in my opinion, "study sessions", during which a quorum is present, are meetings subject to the Open Meetings Law and may only be closed as provided in §105 of the Law. In my view, study sessions concerning the budget in general could not properly be discussed in executive session.

For your information, I have enclosed a copy of the Open Meetings Law and a pamphlet wihch may be helpful in explaining when a meeting of a public body may properly be closed to the public.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 3532
OML-AO - 1110

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

November 9, 1984

Mr. Ron Patafio
Editor
The Reporter Dispatch
Westchester Rockland Newspapers
1 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 Mr. Patafio:

I have received your letter of November 1 in which you requested advisory opinions in relation to two separate issues.

The first pertains to a meeting held on October 30 by the Putnam County Solid Waste agency, which is chaired by David P. Bruen, Putnam County Executive. According to your letter and the news article attached to it, the meeting was held "to discuss where to bring the county's garbage and where to look for sites of transfer stations as part of the countywide garbage program". Mr. Bruen ordered that the meeting be closed without either a motion or a vote taken to enter into an executive session. When the proposed executive session was challenged, a reporter offered a copy of the Open Meetings Law to Mr. Bruen, who refused to review the Law and closed the meeting. The article indicates that Mr. Bruen stated that he believed that he knew "the intent of the Law", which in his view, "is to keep people in public life from hiding anything from the people or the press... When we get to negotiations, it will all come out anyway." Following the meeting, Mr. Bruen indicated that an executive session was proper, for the issue discussed behind closed doors involved "contract negotiations".

From my perspective, there was no basis for closing the meeting. Further, Mr. Bruen's comments in my view indicate that he is not completely familiar with either the intent or the letter of the Open Meetings Law.

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

First, a public body cannot exclude the public simply by declaring that an executive session will be held. Section 105(1) of the Open Meetings Law requires that a public body complete a procedure, during an open meeting, before it may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

Based upon the language quoted above, prior to entry into an executive session, a motion to do so must be introduced during an open meeting. The motion must identify, in general terms, the subject to be considered during an executive session. Further, the motion must be carried by a majority vote of the total membership. None of those steps was apparently taken prior to entry into the executive session.

Second, as indicated above, §105(1) does not permit a public body to enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of the cited provision specify and limit the topics that may appropriately be considered behind closed doors. Unless one or more of those topics arises, a public body must in my view conduct its business during an open meeting.

Third, under the curcumstances, I do not believe that any ground for entry into an executive session could properly have been asserted. Although "negotiations" might have been the topic of discussion, that topic in this instance would not in my opinion have qualified for entry into an executive session. It is noted that the term "negotiations" appears in one of the grounds for executive session, §105(1)(e). That provision, however, enables a public body to enter into an executive session to discuss collective bargaining negotiations under the Taylor Law. Stated differently, §105(1)(e) may be asserted to consider collective bargaining negotiations between a public employer and a public employee union. Based upon your letter and the news article, the negotiations considered at the meeting in question were unrelated to collective bargaining. In short, it is my view that none of the eight grounds for executive session could have been cited to close the meeting.

Fourth, with respect to the intent of the Law, the legislative declaration appearing in §100 of the Open Meetings Law states in its first sentence that:

> "It 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."

Based upon the declaration of legislative intent, it is clear in my view that the entire decision making process is intended to be open. Further, the courts have confirmed that the discussions leading to determinations are at the heart of the Law. For instance, in a decision rendered by the Appellate Division, Second Department, that was later unanimously affirmed by the Court of Appeals, it was 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" [Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, 415, aff'd 45 NY 2d 947 (1978)].

Consequently, while it may be true that the result of negotiations will be made known, I believe that the Open Meetings Law nonetheless requires that the deliberations leading to the result of the negotiations must, under the circumstances, be open to the public.

The second situation, which is also described in your letter and another news article, pertains to a refusal on the part of officials of the Town of Greenburgh to make available the Town's tentative budget. Although the tentative budget was filed with the Clerk by the state deadline, she refused to make it available until it was presented to the Town Board. In addition, the Town Attorney contended that the tentative budget is an "interdepartmental document", which until given to the Town Board, may be withheld. Further, the Town Attorney apparently stated that the "law governing towns says nothing about making the budget available to the public before it was presented to the Town Board".

While the Town Law might not direct that the tentative budget be made available, it does not provide either that the tentative budget must be kept confidential. Relevant portions of the Town Law regarding the tentative budget do not specifically direct that it be made available or withheld. That is the case with respect to numerous records maintained by government. Stated differently, often there is no statute specifically pertaining to particular records that requires that they be made available or denied. In those instances, I believe that the provisions of the Freedom of Information Law, as well as other laws that deal generally with access to records, govern.

With respect to the Freedom of Information Law, that statute is based upon a presumption of access. In other words, all records of an agency, such as a town, 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 (i) of the Law.

I concur with the Town Attorney's characterization of the tentative budget as an "interdepartmental document". Further, §87(2)(g) of the Freedom of Information Law permits an agency to withhold inter-agency or intra-agency materials, except certain types of information described in the Law. For instance, within inter-agency or intra-agency materials, an agency must grant access to those portions consisting of "statistical or factual tabulations or data" [see §87(2)(g)(i)]. Therefore, the Freedom of Information Law in my opinion requires that those portions of the tentative budget reflective of statistical or factual information must be made available.

Moreover, the fact that the tentative budget might not have been served upon the Town Board is in my opinion of no relevance with respect to rights of access. Once such a record exists, I believe that it is subject to rights of access.

Lastly, it is possible that the entire tentative busget may be accessible when the Freedom of Information Law is read in conjunction with another statute. Section 89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records."

Therefore, if rights of access granted by some other provision of law exist, those rights could not be limited or abridged by the Freedom of Information Law. Of possible significance is §51 of the General Municipal Law, which has for decades granted access to:

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

In sum, since there is nothing in the Town Law that specifically enables a town to withhold a tentative budget, I believe that the tentative budget should be made available in conjunction with the provisions of the Freedom of Information Law, as well as §51 of teh General Municipal 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:ew

cc: David Bruen, Putnam County Executive
Anthony Veteran, Town Supervisor, Town of Greenburgh
Susan Tolchin, Town Clerk, Town of Greenburgh
Alan Moller, Town Attorney, Town of Greenburgh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 1111

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

November 13, 1984

Mr. Edward J. Tully, Jr.
Trustee
East Brentwood Fire Department
[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. Tully:

I have received your letter of October 30 in which you requested advice concerning the East Brentwood Fire Department.

According to your letter, a Special Fire Department meeting was called by the Fire Department Chief by telephoning "everyone about the meeting". You asked whether this was legal notice, since the by-laws of the Department require that the Secretary notify each member by mail forty-eight hours prior to a meeting. You also wrote that the Chief proposed a resolution to amend the by-laws and took a vote on the resolution at the same meeting. You explained that the by-laws provide for a different procedure for such amendments.

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

First, the Open Meetings Law requires that public notice of all meetings held by a public body be given to the news media and posted in designated public locations. Section 102(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 func-

> tion 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 complany 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 minicipalities. 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 volumteer 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.

Second, §104 of the Law requires that public notice of a meeting scheduled at least one week in advance be given to the news media and conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting. When a meeting is scheduled less than one week in advance, public notice must be given "to the extent practicable" in the manner described above at a reasonable time prior to the meeting. Thus, in my opinion, the telephone calls to "everyone" were not public notice as required by the Law.

Finally, neither the Freedom of Information Law nor the Open Meetings Law concern the procedure for amending the by-laws of a public body. The authority of the Fire Chief to amend the by-laws by resolution is likely governed by the Not-For-Profit Corporation Law and the Department's own by-laws. You may wish to consult an attorney regarding the validity of the vote taken at the meeting in question.

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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3542
OML-AO-1112

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

December 3, 1984

Mr. George G. Warner
Business Manager
Poland Central School
P.O. Box 8
Route 8
Poland, NY 13431

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. Warner:

I have received your letter of October 22 in which you requested an advisory opinion regarding agendas and minutes produced regarding meetings held by the Poland Central School District Board of Education.

According to your letter, the minutes of Board meetings often refer to attachments which are available for public inspection. You provided examples of those records and requested an advisory opinion in light of another opinion written at the request of Mr. Thomas Sullivan on October 1. In addition, you asked for comments regarding the agendas of Board meetings to the public and meetings provided to the Board members.

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

First, I appreciate your effort to more fully explain the method in which the Board maintains the minutes of its meetings. When I wrote to Mr. Sullivan, I was not aware that the attachments referred to in the Board minutes were available to the public.

Second, if the minutes and the attachments are together made available to the public as the Board's minutes, it is my opinion that they meet the requirements of §106 of the Open Meetings Law concerning minutes. However, I do not believe that the requirements of §106 would be met if the minutes are provided without the attachments. In short, if the minutes are made available with the attachments physicially affixed to them, together, I believe that they would comply with the Law.

Third, it is unclear from your letter and enclosures whether the public is made aware of the content of, for example, personnel item #1, during the course of the Board meeting. It was my understanding of Mr. Sullivan's letter that those attending the meeting were not provided with copies of the "Personnel Report". If that is the case, I would suggest that such reports be made available to the public or, in the alternative, that those items which are acted upon be read aloud at the meeting. Such action would avoid the aura of a "closed meeting" that might otherwise exist.

Fourth, the Open Meetings Law is silent with respect to meeting agendas. I agree with your understanding that there is no requirement that an agenda be prepared and made available for a meeting. However, if agendas are prepared, they constitute agency records and, as such, are subject to the Freedom of Information Law.

Relevant to the two agendas prepared by the Board for each meeting is §87(2)(g) of the Law, which permits an agency to withhold certain inter or intra-agency materials. Having reviewed the public agenda and Board agenda which you provided, it appears that the Board agenda includes discussions of the issues, opinions, suggestions and recommendations. However, to the extent that the Board agenda includes statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations, such portions of the agenda would be available under §87(2)(g)(i)(ii) or (iii) of the Freedom of Information Law. On the other hand, those portions of the agenda which are opinions, advice or recommendations may be withheld under 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Mr. Thomas Sullivan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3541
OML-AO-1113

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

December 3, 1984

Mr. Irving Silver
[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. Silver:

I have received your letter of November 6 in which you requested additional information in conjunction with our pamphlet, "Your Right to Know".

Specifically, you asked whether an agency, acting in response to a request made under the Freedom of Information Law, properly deleted tha name of an individual wherever it appeared in a report. Since you supplied the agency with the name of the individual, you do not believe that disclosure of the name would have constituted an unwarranted invasion of personal privacy.

In addition, you asked whether a public body must have a quorum to meet in executive session. Further, you inquired, "Does the MTA have the right to hold a closed discussion, where the public is barred, then call an open meeting, where the public may attend, then hold an executive session without revealing their deliberation and come back to an open session for a vote?" Finally, you asked whether the Open Meetings Law applies to a meeting of two MTA members.

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

First, §89(2)(c) of the Freedom of Information Law provides that when identifying details are deleted, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy. Since you supplied the name of

the individual to the agency, it appears that there would be no personal privacy to protect. However, the agency may have deleted the name for a number of reasons. For example, a name other than the one supplied by you could possibly be included in the report. Alternatively, the agency may regard the individual as an informant or complainant and may have chosen not to confirm his or her identity. In short, without further details, it is difficult to advise whether disclosure of the individual's name would have been considered an unwarranted invasion of personal privacy.

Second, with respect to the scope of the Open Meetings Law, §105 of that statute requires that a majority of the members of a public body vote to enter into executive session. It is noted, too, that a quorum would be present since a majority of the membership of a public body generally constitutes a quorum.

Third, the procedure for entering into executive session is set forth in §105 of the Open Meetings Law. That section provides that a majority vote of a public body must occur at an open meeting in order to enter into an executive session. The vote must be taken pursuant to a motion which identifies the general area of the subject to be discussed. The subjects which may properly be considered in executive session are limited to those enumerated in §105(1)(a) through (h) of the Law. It is further provided that no formal vote can be taken in executive session to appropriate public monies.

Fourth, you asked what is covered by the Law. In short, all meetings of a public body are subject to the provisions of the Open Meetings Law. A public body includes any governmental entity constituting of two or more members for which a quorum is required in order to conduct public business. Further, the definition of "public body" [§102(2)] specifies that committees and subcommittees are also subject to the Law.

A "meeting" has been defined by the courts as any gathering of a quorum of a public body for the purpose of conducting public business. Thus, if only two members of a public body meet, but they do not constitute a quorum, the Open Meetings Law would not be applicable. However, if the two persons constitute a quorum of a committee or subcommittee designated by a governing body, their gathering to discuss public business is, in my view, a meeting subject to the Open Meetings Law.

Lastly, minutes are required to be prepared for all open meetings and are available to the public pursuant to §106 of the Law. Moreover, if a record is prepared concerning a pbulic body's meeting, such record is available in accordance with the Freedom of Information Law. In other words, if minutes of a meeting are not required to be taken, any record which is prepared may be available in accordance with rights of access granted by the Freedom of Information Law.

At your request, I have enclosed copies of the Freedom of Information and Open Meetings Laws. I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1114

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
ALFRED DELBELLO
JOHN C. EGAN
MICHAEL FINNERTY
WALTER W. GRUNFELD
MARCELLA MAXWELL
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 6, 1984

Ms. Roberta C. Nelson
[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. Nelson:

I have received your letter of November 8 in which you requested an advisory opinion concerning meetings held by the Superintendent's Parents Advisory Committee in the Saratoga Springs School District.

According to your letter and the attachment, the Committee was organized to "bring to the Superintendent's attention, concerns that have District-wide implications as perceived by parents". Additionally, "the Committee [is] used as a sounding board for the administration when new programs and/or procedures are in the formative stages to get an early reading on any potential problems as seen by parents on the committee". The Saratoga Springs Superintendent of Schools has maintained that, since the group has no policy making capacity and is only advisory in nature, it need not conduct open meetings.

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

First, the Open Meetings Law generally requires that all meetings of a public body be open to the public. Section 102(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 my view, the Committee is a public body subject to the provisions of the Law.

It is assumed that the Committee consists of more than two members. Further, it appears that §41 of the General Construction Law requires the Committee to conduct its business by means of a quorum. Moreover, the Committee performs a governmental function for a public corporation, the Saratoga Springs School District.

Second, in Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982), it was held by the Appellate Division that even "advisory" bodies, those without authority to adopt binding policy, rules or law, are public bodies subject to the Open Meetings Law. Thus, while the Committee may have no policy making capacity and is merely advisory in nature, it appears that it serves a governmental purpose and must conduct its meetings open to the public pursuant to the Law.

Finally, I point out that §414 of the Education Law provides that when meetings pertaining to the welfare of the community are held on school grounds, such meetings shall be "non-exclusive" and open to the general public. Therefore, it appears that the Committee's meetings would be required to be open to the public if held in a school building or on school grounds, even if the Open Meetings Law does not apply.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1115

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

December 13, 1984

Mr. Clifford Chirls
[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. Chirls:

I have received your letter of November 11 in which you requested comments concerning a letter written by the Building Inspector for the City of Rye.

In Mr. Graefenecker's letter to Donald P. Moore, it was explained that notification of Board of Architectural Review meetings was given by sending the Daily Item a copy of the agenda and by posting notice in the lobby of City Hall and the Building Department Office. In addition, Mr. Graefenecker explained why meetings were held in the conference room, even though the larger council room was available. Finally, he wrote that the "Board has found that a quick review of all the plans before the meeting starts will allow applicants with uncomplicated proposals to go home sooner."

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

First, the Open Meetings Law requires that public notice of the time and place of a meeting be given to the news media and conspicuously posted in one or more designated public locations. In my opinion, the requirement that notice be given to the news media means at least two news media be notified. Thus, I believe that notification should be given to another news outlet in addition to the Daily Item.

Second, the only requirement under the Open Meetings Law related to the site of open meetings is §103(b) which directs that public bodies make all reasonable efforts to ensure that meetings are held in facilities accessible to the physically handicapped. However, I believe that the spirit of the Law would be served by holding a meeting in a facility where all interested persons could attend when such a facility is available. While a smaller meeting room may have advantages, a larger meeting room would be preferred to comply with the intent of the Open Meetings Law if it is the only facility which would permit all interested parties to attend and observe a meeting of the public body.

Third, while the Board's "quick review" of all plans before the meeting may expedite the process, if such review is conducted in a closed session, I believe that such a session would violate the Open Meetings Law.

It is noted that the term "meeting" has been construed to include any gathering of a quorum of a public body for the purpose of conducting public business [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978]. Therefore the "quick review" session, in my opinion, must be held open to the public, for it is a "meeting" as defined by the Law. Further, §105 of the Freedom of Information Law sets forth the procedure and the exclusive grounds for entry into executive session. In other words, the only instances in which a public body may close its meetings to the public would involve discussions of one or more of the subjects listed in §105(1)(a) through (h). In my opinion, none of the categories would permit the Board to routinely conduct closed or executive sessions to discuss each application for a building permit.

Lastly, I have enclosed, for your information, a pamphlet which outlines the scope of the Freedom of Information Law and 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

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew
Enc.
cc: D.M. Graefenecker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1116

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

December 18, 1984

Mr. Thomas Miller
Colton, NY 13625

Dear Mr. Miller:

I have received your letter of November 15 in which you raised two questions.

The first concerns a member of the town board who is also a member of a fire department. It is your view that the vote by that member to approve a town appropriation for the fire department represents a conflict of interest. The second question is whether a town supervisor has the right to vote, unless there is a tie vote by a town board.

In this regard, it is noted that the Committee on Open Government is responsible for advising with respect to the Open Meetings Law. Although your questions pertain to situations involving meetings, they cannot be answered by means of the Open Meetings Law. Nevertheless, in an effort to assist you, I would like to offer the following information.

As a general matter issues involving conflicts of interest are determined under the provisions of Article 18 of the General Municipal Law. Further, numerous opinions interpreting Article 18 have been issued by the state Comptroller. Attached is a copy of case notes which include summaries of opinions of the Comptroller that deal with the issue that you raised concerning a conflict of interest.

With respect to the status of a town supervisor in relation to a town board, the first clause of §60 of the Town Law states that:

> "In every town the supervisor and the Town councilmen shall constitute the town board and shall be vested with all powers of such a town and shall possess and exercise all the powers and be subject to all the duties now or hereafter imposed by law upon town boards..."

Based upon the language quoted above, I believe that a town supervisor is a member of a town board and, therefore, may vote on all issues that come before 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:ew

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1117

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

December 18, 1984

Mr. Sanford J. Liebschutz
Law offices of
Mousaw, Vigdor, Reeves,
Heilbronner & Kroll
600 First Federal Plaza
Rochester, NY 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 Mr. Liebschutz:

I have received your letter of November 14 in which you requested advice with respect to the applicablility of the Open Meetings Law to town zoning boards of appeals.

According to your letter, counsel for a town zoning board of appeals informed you that the board was permitted to deliberate in a closed session on the ground that the deliberations constituted a quasi-judicial proceeding. Moreover, when you pointed out that the Open Meetings Law excepts zoning boards of appeals from quasi-judicial proceedings exempted from its provisions, he responded that case law held to the contrary.

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

First, Chapter 80, §3 of the Laws of 1983 amended to the Open Meetings Law as follows:

> "Nothing contained in this article shall be construed as extending the provisions hereof to:
>
> 1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeal; ..." (emphasis added regarding amendatory language).

Section 108(1) exempts judicial and quasi-judicial proceedings from the scope of the Law. The amendment provides that the exemption no longer applies to zoning boards of appeals,

which are now treated in the same manner as public bodies in general. Thus, all meetings of zoning boards of appeals are presumed to be open, except when executive sessions may be appropriately held pursuant to §105 of the Law.

In addition, §267(1) of the Town Law and §7-712 of the Village Law were amended to provide that the meetings of town and village zoning boards of appeals be open to the public. The cited provisions now state that board meetings "shall be open to the public to the extent provided in article seven of the public officers law", which is the Open Meetings Law.

Second, to my knowledge, two Appellate Division cases hold that the deliberations of zoning boards of appeals are quasi-judicial and thus exempt from the Open Meetings Law. [Concerned Citizens Against Crossgates v. Town of Guilderland Zoning Board of Appeals, 91 AD 2d 763 (1982); Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. It is noted, however, that both of these cases were decided prior to the effective date, May 10, 1983, of the amendment discussed above. Therefore, I believe that a court would reach a different result in light of the present 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1118

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

December 20, 1984

Ms. Claudia Little
[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. Little:

I have received your letter of November 20, which pertains to the implementation of the Open Meetings Law by the Elba Central School District Board of Education.

According to your letter, on November 12, you attended a meeting of the Board of Education that began at 7:30 p.m. At 9:00 p.m., the Board entered into an executive session. At that time, you left the school until 10:15 "to wait in the hall for the board meeting to be reopened". You wrote, however, that when you returned "the doors to enter the school were locked." You also indicated that the same problem occurred in the past, and that the President of the Board assured you "that the custodian staff had accidentally locked it and he would make sure that this never happened again."

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

First, it is emphasized that §102(3) of the Open Meetings Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Therefore, while the public may appropriately be excluded from an executive session, I believe that it should generally be assumed that an executive session is both preceded and followed by an open meeting.

Second, it may be proper to lock the door of the room where an executive session is being conducted. However, if it can be assumed that the executive session will be followed by an open meeting, I believe that it would be inappropriate for a public body to exclude the public from the building in which the meeting is being held. If the building is locked, obviously, the public is effectively barred from attending the open meeting that may follow 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:ew

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1119

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

December 27, 1984

Mr. Edward L. Cuddihy
Assistant 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 December 6 in which you complained with respect to the exclusion of a reporter from a gathering held by Democratic members of the Erie County Legislature.

Specifically, on December 5, Peter Grant of the Buffalo News "was refused permission to attend a meeting of the Democratic caucus on proposed cuts to the Erie County budget." Apparently, the County legislature consists of seventeen members and, therefore, a convening of nine would constitute a quorum. After eight members had gathered, "Mr. Grant saw the ninth Democrat head toward the caucus room and accompanied him with the intention of attending the meeting." At that time, a member of the Legislature, Barry Robinson, said "We're making it eight, so you can't come in."

It is your view that the Democratic majority "is deliberately acting to circumvent the law of the state" and the determination rendered in Sciolino v. Ryan [81 AD 2d 475 (1981)].

If indeed there was an intent to evade the requirement of the Open Meetings Law, I would agree that such action is reprehensible, for it does damage to the public's confidence in government and, in my view, is demeaning to the public. Nevertheless, in good faith, I cannot advise that such action represents a violation of law.

As you are aware, the Court in Sciolino, supra, found that the exemption from the Open Meetings Law regarding political caucuses is inapplicable when a majority of the membership of a public body convenes to discuss public business, rather than political party business. Further, it was determined that a gathering of a majority to discuss public business is a "meeting" that falls within the requirements of the law, even though those present might represent a singly political party.

However, in a decision involving a situation similar to that described in your letter, it was concluded "that when no quorum of the Board is present at a caucus of either party, such caucus is not subject to the provisions of the Open Meetings Law" [Oneonta Star v. County of Schoharie, Sup. Ct., Albany County, July 19, 1984].

In support of its conclusion, the Court determined that:

> "[A] declaration supporting petitioner's contention would be contrary to the philosophy and scope of previous decisions. The cornerstone upon which Sciolino, supra, is based rests upon the premise that a majority of the City Council were in fact present and able to make decisions concerning the transaction of public business. Likewise, Matter of Orange County Pub., Div. of Ottaway Newspapers v. Council of City of Newburgh, (60 AD2d 409), premises its similar determination upon the gathering of a public body 'whenever a quorum is present for the purpose of transacting public business', (p. 412).
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> "[T]he issue raised hereby has been directly addressed in Britt v. County of Niagara, (82 AD2d 64). Therein, the court held that 'the statutory requirement of a quorum is paramount because the existence of a quorum at an informal conference or agenda session [allows] 'the crystallizationof secret decisions to a point just short of ceremonial acceptance' (Adkins, Government in the Sunshine, Federal Bar News, vol 22, No. 11, p 317)... Since no quorum of the Legislature was present at the caucuses..., the trial court erred in finding that these meetings violated the Open Meetings

> Law.' (p 69). Thus, petitioner's assertion that statutory compliance is mandated when a majority of the members of the caucus are present has been squarely rejected."

In sum, while the intent of the Open Meetings Law might have been flaunted, based upon the decisions cited above a closed gathering conducted by less than a quorum of a public body, would in my opinion fall outside the scope of the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew