DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1120

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

January 2, 1985

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 December 10, in which you requested advice concerning the Open Meetings Law.

According to your letter:

> "The members of a board of education want to get together for the purpose of having a self evaluation session in which they will talk about their relationship with each other as board members; who shall act as spokesperson for the board; the need to respect the confidentiality of matters taken in execitive sessions and the like. There will not be any formal act of voting."

In an effort to determine the status of such a gathering, you wrote that you have been unable to locate any decision that provides clear direction, except perhaps Puka v. Greco, (119 Misc. 2d 696 46 NYS 2d 349), in which it was held that "Not every assemblage of the members of a public body is intended to fall within the definition of 'meeting' under the Open Meetings Law."

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

First, although the judgment rendered by the Supreme Court in Puka, supra, was affirmed, the Appellate Division, Second Department, found that there was a violation of the

Open Meetings Law (NYLJ, August 9, 1984). Specifically, it was found that:

> "Under the circumstances of this case, it is clear that a violation of the 'Open Meetings Law' (Public Officers Law, Sec. 95, et seq.) did occur as a matter of law (see Matter of Orange County Pub., Div. of Ottaway Newspapers v. Council of City of Newburgh, 60 AD 2d 409, aff'd. 40 NY 2d 947).
>
> However, we affirm the judgment since petitioner failed to make the required showing of good cause, which would entitle him to the discretionary remedy of invalidation (see Matter of New York Univ. v. Whalen, 48 NY 2d 734; Matter of Jefferson Val. Mall (concerned Citizens to Review) v. Town Board, of Town of Yorktown, 88 AD 2d 612)."

Second, based upon case law, I believe that the type of gathering that you described would constitute a "meeting" that falls within the requirements of the Open Meetings Law. In a landmark decision rendered in 1978, the Court of Appeals held that any convening of a quorum of a public body for the purpose of conducting public business constitutes a "meeting", whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Since the Court of Appeals' decision is brief, it is suggested that you review the Appellate Division decision, which was affirmed, and which details both the rationale and the parameters of the definition of "meeting" as it appeared in the Open Meetings Law as originally 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1121

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

January 2, 1985

Ms. Barbara MacDonald
Chairman
[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. MacDonald:

I have received your letter of November 21 in which you requested an advisory opinion regarding the status of the Adirondack Regional Hospital under the Open Meetings Law.

According to your letter, the Hospital is a municipal hospital jointly owned by the towns of Corinth, Lake Luzerne, and Hadley. The Board of Managers is appointed by the Town Supervisors of the three towns. On November 20, you attended a meeting of the Planning Committee of the Board of Managers, which is composed of three members of the Board of Managers and three members of the medical staff.

At that meeting, a discussion took place regarding a meeting to be held in the future with the hospital's auditors, the Board of Managers and the Town Supervisors. In response to your question, the hospital administrator informed you that that meeting would not be open to the public and that the hospital's attorney had advised that committee meetings need not be open to the public.

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

First, it is my opinion that the Board of Managers is a public body subject to the Open Meetings Law. Section 102(2) of the Law defines a public body to include:

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

It appears that the Board consists of more that two members and is required to conduct its business by means of a quorum pursuant to §41 of the General Construction Law. Moreover, the Board performs a governmental function for three public corporations, the Towns of Corinth, Lake Luzerne, and Hadley. As such, the Board is a public body subject to the Open Meetings Law.

Second, the definition of "public body" also includes committees and subcommittees. Thus, even if a committee of only two members of the Board of Managers met with the hospital's auditors and the Town Supervisors, the committee would be a public body conducting a meeting which must be held pursuant to the Open Meetings Law. Thus, the meeting discussed on November 20 should be open to the public. Further, an executive session may be held only as provided by §105 of the Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Board of Managers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1122

162 WASH... ...W YORK, 12231
...74-2518, 2791

January 7, 1985

Mrs. 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 Mrs. Eisner:

I have received your letter of December 10 in which you raised a series of questions pertaining to the Open Meetings Law and its implementation by the Board of Trustees of the Village of Valley Stream.

First, you asked whether a "Village Board work session" may be "announced by no more than a notice on Village Hall door, with no newspaper notices?"

In this regard, it is noted that, based upon judicial decisions, there is no distinction between a "work session" and a formal "meeting". 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" 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 [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)].

With respect to notice, I direct your attention to §104 of the Open Meetings Law (see attached). In brief, 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 prior to all meetings. Therefore, the posting of notice alone would not in my view represent compliance with the Open Meetings Law.

Second, you asked whether it is "proper and legal for the Mayor and Board of Trustees to hold a work session without keeping minutes of the proceedings when actions are taken, decisions are made, and resolutions decided."

Section 106 of the Open Meetings Law pertains to minutes and contains what might be characterized as minimum requirements of the contents of minutes. Relevant to your question is §106(1), which 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, if motions are made and action is taken, minutes must be prepared in accordance with §106.

The third question is whether it is proper "for the Mayor and Village Board of Trustees to hold executive sessions by planning and announcing it on an agenda prior to a work session."

I point out 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 Law prescribes a procedure that must be accomplished by a public body during an open meeting, before it may enter into an executive session. Specifically, §105(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..."

Based upon the provisions cited above, I do not believe that a public may, in a technical sense, schedule an executive session in advance of a meeting, for it cannot be known whether a motion to enter into an executive session will be carried by a majority vote of the total membership of a public body.

Fourth, you asked whether executive sessions may be held "without keeping minutes of the proceedings".

Section 106(2) concerns 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."

It is emphasized that minutes of executive sessions must be prepared only when action is taken during an executive session. If a public body discusses an issue, but takes no action during an executive session, there is no requirement that minutes of the executive session be prepared.

Lastly, you questioned the propriety of the consideration during an executive session of three topics identified in an agenda under "executive meeting". The three topics were listed as "DPW Personnel Movements", "Computer Trainees" and "Tree Trimmer".

As indicated earlier, motion to enter into an executive session must indicate, in general terms, the subject or subjects to be considered. Further, a public body cannot enter into an executive session to discuss the topic of its choice; on the contrary, paragraphs (a) through (h) of §105 (1) of the Open Meetings Law specify and limit the topics athat may appropriately be discussed during an executive session. Without greater description of the actual subjects, I believe that it would be impossible for the public, or perhaps the members of the Board, to ascertain whether or not there was a basis for entry into an executive session. In short, without more, the three topics listed, would not constitute adequate bases for going into an executive session.

The first two topics " DPW Personnel Movements" and "Computer Trainees" appear to have involved Village employees. In this regard, §105(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."

The provision quoted above could properly be cited if the discussion involved a "particular" person or persons in relation to §105(1)(f). If, however, the issues involved matters of policy, rather than any "particular person", it does not appear that any ground for executive session could properly have been 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:ew

Enc.

cc: Mayor, Village of Valley Stream
Board of Trustees, Village of Valley Stream

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1123

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

January 8, 1985

Ms. Marian T. DelVecchio
Commissioners of Elections
Saratoga County
Ballston Spa, NY 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 Ms. DelVecchio:

I have received your letter of December 12 in which you requested an advisory opinion.

According to your letter, the Town Board of the Town of Clifton Park has delegated its authority to alter election districts to two individuals comprising a committee. Pursuant to §4-100(2) of the Election Law, the creation, consolidation, division or alteration of election districts shall be done by the legislative body of the city or town within which the election district is contained. Upon the request of the legislative body, the creation, consolidation, division or alteration of election districts shall be done by the board of elections. You asked whether the meetings of the two individuals to whom the Town Board delegated its authority to alter election districts should be held open to the public pursuant to the Open Meetings Law.

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

Assuming that the Town Board has the authority to delegate the duty of altering election districts, it is my opinion that any meeting held by the two individuals for the purpose of discussing such alteration would be subject to the Open Meetings Law and should be open to the public.

The Open Meetings Law requires that every meeting of a public body shall be open to the general public. "Public body" is defined in §102(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."

It appears that the two individuals are authorized to work together as an entity toward altering the election districts and may not act individually. Moreover, they are performing a governmental function for a public corporation, the Town of Clifton Park. Furthermore, if the two individuals are members of the Town Board they would constitute a committee or subcommittee of the Board. Such committees are also considered public bodies subject to the Open Meetings Law.

In sum, the committee of the two individuals, in my view, is a public body and its meetings must be open to the public. Executive sessions, however, may be held, when appropriate, pursuant to §105 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: Town Board

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1124

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

January 8, 1985

Mr. Evan J. Kelley
[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. Kelley:

I have received your letter of December 12 in which you requested an advisory opinion concerning the Fredonia Zoning Board of Appeals.

According to your letter, at a recent meeting, the Board "took at least seven recesses to decide on variances, without call for an executive session in each case." Even after the Board was informed by another reporter that its action was illegal, "the [B]oard responded obliviously without heeding the information." You asked whether such recesses are unlawful under the Open Meetings Law and whether a closed meeting is even necessary when issuing a variance or a determination concerning action taken.

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

First, in 1983, the Legislature amended the Open Meetings Law to include within its provisions the proceedings of zoning boards of appeals [§108, Open Meetings Law]. Prior to this amendment, zoning boards of appeals could exempt their deliberations from the Open Meetings Law on the ground that the deliberations were "quasi-judicial proceedings". The amendment prohibits such a board from closing its deliberations on that basis. Thus, the Board must conduct its meetings open to the public, except when an executive session may be held pursuant to §105.

Second, §105 provides that a public body may enter into executive session upon a majority vote of its total membership taken at an open meeting and pursuant to a motion identifying the general subject to be discussed. Only those subjects listed in §105 may properly be discussed in

an executive session. Generally, only matters which, if discussed in public, would be harmful to an individual or to the function of a governmental entity are proper topics for executive session.

In sum, if the Board has recessed during a meeting to deliberate the issuance of a variance, I believe it was acting in violation of the Open Meetings Law. A public body must follow the procedure set forth above for entry into executive session. Moreover, decisions relating to the issuance of variances, in my view, do not generally fall within any of the subjects listed in §105 which may properly be discussed in executive session. Therefore, I believe that, in most cases, deliberations of the Board should be held open to the public.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Frank Pagano, Chairman, Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1125

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

January 8, 1985

Mr. Richard Konrad
[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. Konrad:

I have received your letter of December 19 in which you raised a question regarding the status of deliberations of the Zoning Board of Appeals of the Village of Valley Stream.

You referred to two earlier opinions on the subject addressed to you in 1977 and 1978. Further, during a recent meeting of the Board, the Village Attorney apparently informed the Chairman that the Board's deliberations could be closed.

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

In terms of background, as you may be aware, numerous problems and conflicting 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 deliberated toward a decision, its deliberations were often 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 as renumbered, September 1, 1984, §108(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 §105(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.

Enclosed are copies of the current Open Meetings Law and a memorandum sent to all zoning boards of appeals in May of 1983, shortly after the amendment became effective. The same materials as well as this opinion will be sent to the Village Attorney and the Chairman of the Zoning Board of Appeals.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: Chairman, Zoning Board of Appeals
Village Attorney

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1126

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

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

January 14, 1985

Mr. Carl G. Scalise
Village Attorney
Village of Herkimer
Herkimer, NY 13350

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. Scalise:

I have received your letter of December 19 in which you requested guidance concerning minutes of meetings held by the Village of Herkimer Board of Trustees.

According to your letter, a Village Trustee requested that the minutes of a prior meeting of the Board be amended to reflect that you were asked a question in a capacity other than that indicated in the original minutes. When that request was challenged, the Trustee responded that she had "it on tape". You believe that, based upon her statement, the Board voted to amend the minutes. You explained that the tape was not replayed nor it is in the possession of the Village Clerk, whose record of the meeting is, in your view, the "official record".

In addition, you questioned the propriety of attaching a typewritten statement of the same Village Trustee to the minutes of the Board meeting. You explained that the statement, her position on a particular vote, was not read to the other Trustees to give them a chance to agree or refute the statement.

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

First, it is my view that any person may tape record an open meeting of a public body. Recently, the Appellate Division, Third Department, indicated that a reporter has the authority to tape record a public meeting in an unobtrusive manner [Feldman v. Town of Bethel, __AD 2d__, December 6, 1984].

Second, in my opinion, the use of a tape recording to determine the accuracy of minutes of a meeting is appropriate. The ultimate responsibility of preparing the minutes is with the Village Clerk. However, in my opinion, a public body has the authority to include any related matter discussed at a meeting in the minutes. Furthermore, as a matter of practice, it appears that a public body may vote to amend minutes prepared by a clerk. Where the amendment is based upon an inaccurate recollection of the meeting or, in this case, upon a tape recording which is not played for the public body, the body should be made aware of the specific inaccuracy. I suggest that you request that the Board listen to the Trustee's tape recording if there is any uncertainty as to the accuracy of the minutes.

Likewise, with respect to the typewritten statement of the Trustee, I believe that the content of the minutes are the responsibility of the Clerk. The Open Meetings Law requires that, at a minimum, the minutes include a summary of all motions, proposals, resolutions and any other matter formally voted upon [see Open Meetings Law, §106(1)]. If the Board wishes to include personal statements of its members, I believe that it may do so. If the statement of the Trustee was attached to the minutes without the approval of the Board, I suggest that you raise the matter with the Board.

In sum, the problems which you cite are not matters that fall directly within the scope of the Open Meetings Law. In my view, they are generally within the authority of the Board and its Clerk, who should resolve them in their discretion and in a manner consistent with 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: Phoebe Meranus
Village of Herkimer Board of Trustees

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1127

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

January 14, 1985

Honorable Don Reile
Mayor
The E.J. Willis Company, Inc.
Marine Equipment
Middleville, NY 13406

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 Reile:

I have received your letter of December 26 in which you asked:

> "1. Must minutes be kept verbatim, covering every minor and insignificant detail?"
>
> 2. Are prepared Statements [allowed] to be entered into the minutes that have not been read at the time of the board meeting, so that other board members, the people at the meeting or the media have the opportunity to voice their opinion?"

In response to your questions, I would like to offer the following comments.

First, §106(1) of the Open Meetings Law 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 my view, the provision quoted above does not require that minutes consist of a verbatim record of the discussion which takes place during an open meeting of a public body.

Second, the requirement of the Open Meetings Law concerning the preparation of minutes requires that, at a minimum, a summary of motions, proposals and matters formally voted upon be prepared. It is my opinion that any additional details of the meeting, such as portions of a debate or prepared statements, may be included in the minutes in the discretion of the Board. If a statement was included in the minutes without the Board's knowledge or consent, I suggest that you raise the issue with the Board, which I believe has the authority to amend the minutes if it determines that an amendment is appropriate.

I hope 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: Village of Herkimer Board of Trustees

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1128

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

January 14, 1985

Ms. 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 Ms. Thompson:

I have received your letter of December 24 and the materials attached to it, which pertain to the meetings of the Binghamton Housing Authority.

The focal point of your inquiry concerns the posting of notice by the Board of the Authority. Speicifically, on July 30, 1984, the by-laws of the Board were amended to state that:

> "Regular meetings of the Authority shall be held without notice on the fourth Monday of each month at 4:15 PM at the office of the Authority at North Shore unless otherwise provided by resolution of the Authority."

It is your contention that the Board must provide notice of its meetings.

In this regard, although it is possible that the by-law might have been misconstrued, I would like to offer the following comments.

First, I believe that the Binghamton Housing Authority is a "public body" as defined by §102(3) of the Open Meetings Law. As such, it is required to comply with the Law.

Second, it is possible that the quoted provision of the by-laws is intended to avoid the necessity of providing notice to the members of the Board by establishing a schedule of regular meetings. Nevertheless, notice of the time and place of its meetings must also be given in accordance with the Open Meetings Law.

Section 104(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 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) 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, I agree with your contention that the Authority is required to post notice prior to all of its meetings.

You also referred in your letter to a statement attributed to me appearing in a news article published in November of 1983. My statement was that "if the board discussed anything other than a personnel matter, the board violated state law".

It is emphasized that the statement was made in conjunction with facts presented to me at that time. Under the Open Meetings Law, a public body may enter into an executive session only after having passed a motion that describes the subject or subjects that it seeks to discuss during the executive session. In terms of the context of my statement in the article, the motion for execution apparently referred to only one topic, a "personnel matter". If only one subject is described in a motion for entry into an executive session, a public body cannot legally discuss any other topics during the executive session.

However, my statement should not be generally construed to mean that only personnel matters may be discussed during executive sessions. The Open Meetings Law in §105(1) lists eight possible grounds for entry into an executive session. If, for example, a public body seeks to discuss two issues, each of which may legally be considered during an executive session, the motion for executive session would have to include reference to both of those subjects.

To provide you with additional information regarding the Open Meetings Law, enclosed for your review is an explanatory pamphlet that may be useful. A copy of this opinion will also be sent to John D. Lake, executive director of the Housing Authority.

I hope that 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: John D. Lake

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1129

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

January 23, 1985

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 January 8, as well as a tape recording of a portion of a meeting conducted by the Town of Southold Police Committee.

According to the tape, you attended a meeting of the Committee in question. The purpose of the meeting was to consider proposed rules and regulations concerning the Police Department. Prior to the Committee's discussion of the proposals, you were asked to leave. When you protested your exclusion, you were told that the rules and regulations would be available to the public when they are "finalized". Further, a member of the Committee attempted to justify a closed session because the discussion would deal with "personnel", and because an open meeting might result in problems between the "Department and the Administration".

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

First, I believe that the Committee is clearly a "public body" as defined by §102(2) of the Open Meetings Law, for it was established by the Town Board.

Second, under the circumstances, I do not believe that the Committee could have asserted any ground for entry into an executive session. The Committee was apparently involved in a discussion of policy that was the equivalent of legislative action. Based upon its legislative declaration (see Open Meetings Law, §100), I believe that the Law is intended to ensure that the type of discussion conducted by the Committee must be open to the public. 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. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Although the Committee indicated that the discussion would relate to "personnel", the capacity to enter into an executive session regarding "personnel" is limited. Section 105(1)(f), the so-called "personnel" exception, permits a public body to convene an executive session to discuss:

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

As such, a motion generally identifying the subject to be considered must be made and carried during an open meeting before a public body may enter into an executive session.

You raised another issue regarding the same meeting. You wrote that:

> "[P]rior to the convening of the meeting, Mr. Murphy (Supervisor), the police chief and one of the two council who made up the three person Committee isolated themselves and chatted - which [you] suggest was also improper - they claimed they were waiting for the third member".

If indeed two of the three members merely "chatted" and did not conduct public business as a body while awaiting the arrival of the third member, it does not appear that their

conversation constituted a "meeting". If, however, two members constituting a quorum of a three person public body intended to meet, as a body, for the purpose of conducting the business of the Committee, the Open Meetings Law would in my view have been applicable.

The remaining issue concerns a contract approved "without any public input at all". You added that the contract was negotiated "in secrecy". Please be advised that §105(1)(e) permits a public body to enter into an executive session concerning collective bargaining negotiations under the Taylor Law, which pertains to negotiations between a public employer, such as the Town, and a public employee union, such as the PBA. It is also noted that the Open Meetings Law is silent with respect to public participation. Consequently, the public may have had no right to provide "input" at a meeting.

Lastly, as you requested, enclosed are ten copies of the booklet regarding the Freedom of Information and Open Meetings Laws, as well as one copy of each of those statutes, which you may reproduce as you see fit. In addition, enclosed is the copy of your letter that you requested.

I hope that 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: Town of Southold Police Committee
Supervisor Murphy
Town Attorney

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1130

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

January 28, 1985

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 January 10 in which you requested an advisory opinion.

According to your letter, the Schoharie Central School Board of Education held a meeting in a restaurant. However, no public notice was given, nor were minutes taken. You were told by the Board President that it was a "social meeting" and that since it was held outside of the school district, it was not an "official" meeting. The Superintendent added that the Board took her out to dinner for the purpose of discussing the renewal of her contract. You would like to know whether the meeting described above was held in violation of the Open Meetings Law. In addition, you asked whether it would be proper to bill the school for a dinner meeting.

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

First, I am aware of no statute which requires school board meetings to be held within the school district. Thus, I do not believe that a meeting held outside of the district is necessarily an "unofficial" meeting.

Second, the Court of Appeals has held that a "meeting" within the meaning of the Open Meetings Law includes any gathering of a quorum of a public for the purpose of discussing public business, whether or not there is an intent to take action and regardless of the manner in which a gathering is 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)]. In my view, if the Board met at the restaurant for the purpose of the

discussing the renewal of Superintendent's contract, the Board was, during that discussion, conducting a meeting subject to the Open Meetings Law. However, if there was no intent to discuss public business or other matters pending before the Board, I believe that the gathering would fall outside of the scope of the Law.

It is sometimes difficult to determine when meetings of a public body are "official" and, therefore, subject to the Open Meetings Law or when they are social gatherings. However, if a public body intends to gather for a social event, such a meeting would not be subject to the Open Meetings Law even though public business may inadvertently be discussed. For example, if a school board attends a School Boards Association meeting where topics relating to the function of a school board may be discussed, I believe that the meeting is not subject to the Open Meetings Law because there is no intent to conduct the public business of the individual school board at such a meeting.

To comply with the Open Meetings Law and safeguard the rights of public body members to engage in social activities, it is advised that the public body avoid scheduling social gatherings for the purpose of informally discussing public business. When the body consciously strives to keep public business and social activities separate, less public suspicion will, in my opinion, be aroused.

Finally, you asked whether the Board may properly bill the School District for the dinner meeting. No provision of the Freedom of Information Law nor the Open Meetings Law concerns the expenditures of public bodies. Moreover, I am unable to advise you as to whether any other statute or regulation outside of the Committee's authority would prohibit this 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

cc: Schoharie Central School Board of Education
Superintendent Gregory

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1131

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

January 29, 1985

Mr. Dominic P. Tom, Jr.
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 recent letter as well as the materials attached to it.

According to your letter and a news article, a member of the Duanesburg Town Board, Adrian Breitenstein, Jr., requested that minutes of meetings remain unavailable to the public until the Town Board has "had a chance to make corrections, if necessary, and approve of the minutes at its next regularly scheduled meeting". Your question is:

> "may the board withhold minutes of public meetings even though they are not approved by the board members until the next regularly scheduled meeting---one month later."

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

First and most important, the Open Meetings Law contains time limits regarding the preparation and disclosure of minutes. I direct your attention to §106 of the Law. Subdivision (1) of §106 concerns minutes of open meetings; subdivision (2) pertains to minutes when action is taken during an executive session. With respect to public access, subdivision (3) of §106 states that:

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

> such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the language quoted above, minutes of open meetings must be prepared and made available within two weeks of such meetings; minutes of executive sessions must be prepared and made available in accordance with the Freedom of Information Law within one week.

Second, prior to the effective date of provisions concerning the timely compilation and disclosure of minutes, October 1, 1979, the Committee recognized that in some instances public bodies might not meet within two weeks and, therefore, cannot approve minutes within that period. As a consequence, in a memorandum distributed to many public bodies, including all town boards, it was suggested that, to comply with the law, unapproved minutes of open meetings should be made available within two weeks, but perhaps after having been stamped or marked "unapproved" or "unofficial", for example. By so doing, the public can know generally what transpired at a meeting; concurrently, the public is effectively informed that the minutes are subject to change.

Lastly, as you may be aware, §30 of the Town Law requires that the town clerk prepare the minutes. Although approval of minutes is a common practice, I am unaware of any law that requires that minutes be approved.

In sum, whether or not approved by a town board, I believe that minutes of open meetings must be prepared and made available to the public within two weeks pursuant to §106(3) of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

cc: Town Board, Town of Duanesburg

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1132

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

January 31, 1985

Mrs. Carol W. LaGrasse, P.E.
[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. LaGrasse:

I have received your letter of January 15 in which you requested an advisory opinion.

You wrote that the Executive Committee of the Warren County Cooperative Extension Board of Directors met to censure you, resulting in a letter of reprimand. At a meeting of the full Board, you requested that the letter be rescinded, but the Baord affirmed the action of the Executive Committee. You asked whether the letter is "legal" under the Open Meetings Law. In addition, you asked what matters related to hiring an architect can be discussed in an executive session.

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

First, the provisions of the Open Meetings Law generally pertain to the meetings of public bodies. 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 Board of Directors of the Cooperative Extension Association of Warren County, and its committees, are public bodies as defined by §102. Apparently, the Board consists of more than two members and is required to conduct public business by means of a quorum. According to §224(8)(b) of the County Law, a county extension service association is a "subordinate governmental agency" whose organization and administration are "approved by Cornell University as agent for the state". The association cooperates with two statutory colleges of Cornell University to provide programs in the fields of agriculture, home economics, 4-H and community betterment to the people of New York. Thus, I believe that the Board performs a governmental function for the State and a public corporation, Warren County.

Second, it is unclear from your letter and the attachments how the Executive Committee conducted its meeting. While an executive session may be held to discuss matters leading to the discipline of a particular person (see §105(f) of the Open Meetings Law), an executive session must be conducted within an open meeting. Section 105 of the Law provides the procedure for entering into executive sessions. In brief, a majority vote of the total membership of a public body must be taken in an open meeting pursuant to a motion which identifies the general area to be discussed. In other words, an executive session is a part of an open meeting. Further, all meetings must be preceded by public notice as required under §104 of the Law.

In addition, §106 of the Open Meetings Law provides that minutes of an executive session must be taken of any action that is taken by formal vote. The minutes must include a record or summary of the final determination of such action and the date and vote thereon. Thus, if the Executive Committee voted to prepare the letter at issue, minutes should have been prepared to reflect such action. It is noted, however, that if a public body discusses an issue during an executive session but takes no action, minutes of the executive session need not be prepared.

Third, there is no provision in the Open Meetings Law which prohibits or limits the authority of the Committee to prepare a letter of the type which was written to you. While the letter itself in not "illegal", the Committee's procedure for holding the meeting might not have complied with the provisions of the Open Meetings Law previously described.

Finally, you asked what matters related to hiring an architect can be discussed in an executive session. Section 105(1)(f) provides that an executive session may be held to discuss:

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

Based upon the language quoted above, it is my view that matters pertaining directly to the appointment or employment of an individual or firm to be hired could properly be discussed in executive session. However, if the discussion involved whether or not to hire an architect, in general, without consideration of a particular person or corporation, I believe that such a discussion must be open to the public.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Warren County Board of Cooperative Extension

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1133

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
FRED 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

February 1, 1985

Mr. Alvin Gordon
[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. Gordon:

I have received your letter of January 14 in which you requested clarification of several items contained in the pamphlet entitled Your Right to Know.

In your letter, you asked several questions regarding the availability of minutes of an executive session. In this regard, I would like to offer the following comments.

First, §106 of the Open Meetings Law requires that a public body take minutes at executive sessions when any action is taken by formal vote. The minutes must consist of a record or summary of the final determination of such action and the date and vote thereon, except that the body need not disclose any matter which may be withheld under the provisions of the Freedom of Information Law. In addition, the minutes of an executive session must be made available to the public within one week from the date of the executive session.

Second, if a topic, such as the employment of a particular person, is merely discussed in executive session but no action is taken by formal vote, no minutes of the executive session need be prepared. However, if a vote is taken with respect to hiring or firing the individual, minutes must be prepared to reflect the result of the vote. In addition, the Freedom on Information Law requires that a record be prepared of the final vote of each member.

Finally, with respect to executive sessions held by school boards, I direct your attention to §1708(3) of the Education Law. That provision has been interpreted as prohibiting a school board from taking action during an

executive session except in situations in which action during a closed session is permitted or required by statute [see Sanna v. Lindenhurst, 107 Misc 2d 267, mod 85 AD 2d 157, aff'd 58 NY 2d 626 (1982); 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)]. Based upon the decisions cited above, I do not believe that the School Board may properly vote in executive session to include an appointment of an individual on the agenda.

As you requested, I have enclosed a copy of Your Right to Know. I hope 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-3617
OML-AO-1134

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

February 8, 1985

Mr. Robert McNary
Fulton County Community
Development Corporation
86 North Main Street
Gloversville, NY 12078

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, except as otherwise indicated.

Dear Mr. McNary:

I have received your letter of January 9 in which you requested an advisory opinion.

Your inquiry concerns the application of the Freedom of Information and Open Meetings Laws to the Fulton County Community Development Corporation. Although I tried to reach you several times by phone without success in an effort to learn more about the Corporation, yourassistant informed me that the corporation is a "local development corporation".

Based upon that assumption, I would like to offer the following comments with respect to your inquiry.

Questions regarding local development corporations have arisen in the past, and, based upon the direction provided by §1411 of the Not-for-Profit Corporation Law and the judicial interpretation of the Freedom of Information Law, it is possible that such corporations are subject to the provisions of the Freedom of Information Law. Further, meetings of the boards of such corporations in my view fall within the scope of the Open Meetings Law.

Section 1411(a) of the Not-for-Profit Corporation Law, which describes the purposes of local development corporations, states in part 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."

In view of the statutory language quoted above, it is in my opinion clear that if the Fulton County Community Development Corporation is a local development corporation, it performs a governmental function, presumably for a public corporation, such as Fulton County.

What is not entirely clear, however, is whether a local development corporation falls within the definition of "agency" appearing in §86(3) of the Freedom of Information Law. In this regard, "agency" is defined 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 a local development corporation 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.

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. Nevertheless, the status of local development corporations under the Freedom of Information Law remains open to question and judicial review.

With respect to the Open Meetings Law, I believe that the meetings of the board of a local development corporation would be subject to that statute, for the definition of "public body" appearing in §102(2) of the Open Meetings Law may be more expansive than the definition of "agency" in the Freedom of Information Law.

"Public body" 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."

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 a public corporation, in this instance, Fulton County.

With respect to your more specific areas of inquiry, assuming that the Freedom of Information and Open Meetings Laws are applicable, it is noted that both statutes are based upon a presumption of openness. In brief, the Freedom of Information Law states that all records are available, except to the extent that records or portions thereof may be withheld in accordance with one or more among nine grounds for denial listed in §87(2). Similarly, the Open Meetings Law requires that all meetings of public bodies be open, except to the extent that an executive session may be convened in accordance with the grounds for executive session appearing in §105(1).

Perhaps the most relevant grounds for denial in the Freedom of Information Law in relation to the types of records that the Corporation might maintain would be §87(2)(c) and (d). Those provisions state that an agency may withhold records or portions thereof that:

> "(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
>
> (d) are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

It is likely that the exception regarding entry into an executive session of greatest potential significance is §105(1)(f). The cited provision enables a public body to convene an executive session to discuss:

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

With regard to the nature of a motion to enter into an executive session under §105(1)(f), it is suggested, based upon case law, that two components be present. For instance, in the event that the Board seeks to review the financial history of a specific corporation, a motion for entry into an executive session should indicate that the subject matter to be discussed will involve a "particular" corporation. The motion should also indicate one of the topics within §105(1)(f). By means of example, an appropriate motion might be "I hereby move to enter into executive session to discuss the financial history of a particular corporation". In my view, the name of the corporation need not be identified or included in the motion.

To provide you with additional information, enclosed are copies of the Freedom of Information and Open Meetings Laws, as well as an explanatory pamphlet that deals with both statutes. If you would like additional copies of the pamphlet, I will be happy to make them available upon request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3620
OML-AO-1135

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

February 8, 1985

Ms. Maxine S. Palczynski
[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. Palczynski:

I have received your letter of January 29 in which you requested an advisory opinion regarding time limitations for responding to requests for records.

According to your letter, your local school board has repeatedly denied your requests for minutes of board meetings until four weeks after each meeting. You wrote that "[w]hen asked for the local procedure under the Freedom of Information Act, the Superintendent told us to contact PERB". You would like to know how to insure that the school district will comply with the Law with respect to your requests for public information.

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

First, the Committee on Open Government has promulgated regulations with which all agencies, including school boards, must comply. Moreover, §87 of the Freedom of Information Law requires each agency to adopt uniform rules and regulations pursuant to the general rules promulgated by the Committee. Included in the Committee's regulations is the requirement that an agency respond to a request within certain time limits.

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 536, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

Second, with respect to minutes of a meeting held by a public body, the Open Meetings Law requires that minutes be taken at all meetings of a public body. The minutes must consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon [see Open Meetings Law, §106(1)]. In addition, the minutes must be made available, in accordance with the provisions of the Freedom of Information Law, within two weeks from the date of an open meeting [see §106(3)]. Minutes of an executive session must be made available within one week of such session but need only be prepared if action by formal vote is taken. The minutes of an executive session must include a record or summary of the final determination of such action.

Finally, copies of the Freedom of Information Law, the Open Meetings Law and the Committee's regulations promulgated under the Freedom of Information Law, and an explanatory pamphlet concerning both laws have 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

JF:CAM:ew

Enc.

cc: Superintendent, Herkimer Central School District

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1136

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

February 15, 1985

Hon. Jerome F. Brixner
Councilman
Town of Chili
[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 Councilman Brixner:

I have received your letter of January 28, which is addressed to myself and James D. Cole, Assistant Attorney General.

In conjunction with the materials that you forwarded, you asked whether there is any "recourse" that you "as a Councilman have on any of the aforementioned matters other than public disclosure".

In this regard, it is emphasized that the authority of the Committee to advise pertains to issues involving the Freedom of Information, Open Meetings and Personal Privacy Protection Laws. The Personal Privacy Protection Law is applicable only to records of state agencies.

It appears that the only issue that may be addressed by this office involves requirements pertaining to the time within which minutes of meetings of the Town Board must be made available. Although the facts are unclear, it appears that minutes might not be made available until they are reviewed and approved by the Town Board. Here I direct your attention to §106 of the Open Meetings Law. Subdivision (1) of §106 pertains to the contents of minutes of open meetings. Subdivision (2) concerns minutes that must be prepared in situations in which a public body takes action during an executive session. Subdivision (3) 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."

Based upon the language quoted above, I believe that a public body must prepare and make available minutes of open meetings within two weeks. When action is taken during an executive session, minutes must be prepared and made available, to the extent required by the Freedom of Information Law, within one week of an executive session.

It has been contended by some that minutes need not be made available until they have been approved. In this regard, I am unaware of any statutory requirement that minutes must be approved. Further, in recognition of the possibility that a public body might not meet for two weeks and, therefore, might not have the capacity to approve minutes within that period, it has consistently been recommended that minutes be prepared and made available as required by the Law within two weeks, whether or not they have been approved. If they have not been approved, it has been suggested that the minutes be marked "unapproved", "draft", or "unofficial", for example. By so doing, the public can learn generally what transpired at a meeting; concurrently, notice is effectively given that the minutes are subject to change.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James D. Cole
Town Board, Town of Chili

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1137

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

February 19, 1985

Mr. Danny L. Duprey
Executive Director
Ogdensburg Bridge and
Port Authority
Ogdensburg, NY 13669

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. Duprey:

I have received your letter of February 13, which concerns the status of standing committees of the Ogdensburg Bridge and Port Authority under the Open Meetings Law.

According to your letter, in a conversation with Cheryl Mugno of this office, you were advised that the Authority's standing committees are indeed subject to the requirements of the Open Meetings Law. You wrote, however, that "the Port Authority has the opposite interpretation of Committee meetings based upon...Daily Gazette Co., Inc. against North Colonie Board of Education, 412 NYS 2d 494." You added that your "research does not disclose that this case has been overruled by any other cases."

Due to the conflicting views of Ms. Mugno and the Authority, you have requested my opinion on the matter. In this regard, I would like to offer the following comments.

First, Ms. Mugno and I have discussed the issue on many occasions, and the opinion that she provided to you was consistent with my own.

Second, in brief, as you know, the Daily Gazette decision indicates that committees with only the authority to recommend fall outside the scope of the Open Meetings Law.

It is noted that 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)].

Here I point out, as you may be aware, that 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 legislative intent, prior to the passage to 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, subcommittees 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, it might be 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.

Lastly, the phrase "public body" is currently defined in §102(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 Ms. Mugno may have advised, 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. Moreover, 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 Authority. 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 §102 (2) refers to committees and subcommittees.

I would also like to stress that the term "transact" which appeared in the original definition of both "meeting" and "public body", was replaced with "conduct". Therefore, although the original language of the Open Meetings Law referred to entities that "transact" public business, the amendments enacted in 1979 refer to entities that "conduct" public business. Even under the original language of the Law, the term "transact" was accorded its ordinary dictionary definition, i.e., to carry on business, in a decision of the Appellate Division that was later unanimously affirmed by the Court of Appeals [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)]. It is

noted, too, that various judicial determinations indicate that advisory bodies are subject to the requirements of 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)].

It is my hope that the foregoing will provide you with sufficient rationale and background information to conclude that the committees of the Port Authority 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
Executive Director

RJF:ew

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1138

COMMITTEE MEMBERS

THOMAS H. COLLINS
FRED 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

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

February 21, 1985

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 February 8 in which you requested and advisory opinion under the Open Meetings Law.

According to your letter, in an effort to deal with problems involving the delivery of legal services, Suffolk County Executive Peter Cohalan "asked Mr. Martin Ashare, the Suffolk County attorney, to form a committee of six... to study the delivery of legal services to the indigent in Suffolk County".

Although you have contacted various County officials in an effort to learn of the meetings of the Committee in question, you have apparently received no helpful response.

In my view, based upon the facts that you presented, the committee is a "public body" subject to the Open Meetings Law for the following reasons.

With respect to the application of the Open Meetings Law generally, the issue is whether the Committee is a "public body" subject to the 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 bodies that have only the capacity to advise and no authority to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 102(2) of the Law now defines "public body" to include:

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

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

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

In my view, such a conclusion can also be reached by viewing the definition of "public body" in terms of its components. First, a committee would, under the circumstances, be an entity consisting of at least two members. Second, even though there may be no specific direction that the committee must act by means of a quorum, §41 of the General Construction Law has long required that any entity consisting of three or more public officers or persons can perform their duties only by means of a quorum, a majority vote of its total membership. Third, the committee in question conducts public business and performs a governmental function for a public corporation, in this instance, Suffolk County. 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 (1981)].

Assuming that the committee is a public body, notice of the time and place of its meetings must be given to the news media and posted "in one or more designated public locations" prior to every meeting in accordance with §104 of the Open Meetings Law. Moreover, minutes must be prepared pursuant to §106 of the Law and made available under the Freedom of Information Law (see Syracuse United Neighbors, supra).

As you requested, copies of this opinion will be sent to the County Executive, the County Attorney and the others designated in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Peter Cohalan, County Executive
Martin Ashare, County Attorney
Howard di Martini
Laure Nolan
Ms. Signarelli
Gregory Blass
John Middlemiss, Legal Aid Society
Editor, Suffolk Life

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1139

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

February 21, 1985

Ms. Carol W. LaGrasse
[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. LaGrasse:

I have received your letter of February 5 in which you requested comments concerning the Executive Committee of the Warren County Cooperative Extension Service.

You explained that, in 1983, a new clause amending the Extension's by-laws was adopted which states, "The executive committee shall have authority to act on behalf of the board of directors and shall consist of officers, coordinator and chairpersons of standing committees." In addition, you explained that, with respect to the action of the Executive Committee which resulted in the letter of censure to you, the Committee did not post notice of the meeting nor was it conducted as a result of a vote taken at a meeting of the Board of Directors.

You asked for my views on the legality of the clause in the by-laws quoted above and on the legal function of an Executive Committee in the organization of an agency, such as the Cooperative Extension.

First, the Open Meetings Law does not regulate the organization of public bodies, nor does it include any limitations or prohibitions with respect to the authority of individuals to act on behalf of the public body. Thus, the legality of the by-laws is more appropriately determined under County Law §224, which creates the Cooperative Extension system, and the Extension's Constitution. As such, it is beyond the authority of the Committee on Open Government to provide advice in this matter since the question does not fall within the scope of the Open Meetings Law.

Second, assuming that the authority of the Executive Committee granted in the clause is permissible, the Open Meetings Law nevertheless requires the Committee to comply with the provisions of the Law. The defintion of "public body" includes committees and subcommittees of a governing body, for example. Specifically, the Committee must give notice of its meetings in accordance with §104 and must conduct its meetings open to the public, except when executive sessions may be held as provided under §105 of the Law. Thus, although denoted an "Executive Committee", its meetings are presumed open unless an executive session may properly be held pursuant to §105.

I hope 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: Glenn Rearsall, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1140

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

February 27, 1985

Ms. Louise F. Jamieson
Deputy Editor
The Riverdale Press
6155 Broadway
Riverdale, NY 10471

Mr. George Shebitz
Fisher & Fisher
Attorneys at Law
189 Montague Street
Brooklyn, NY 11201

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. Jamieson and Mr. Shebitz:

I have received requests for an advisory opinion regarding the same facts from each of you acting in your capacities, respectively, as deputy editor of the Riverdale Press and attorney for Community School Board 10. Rather than preparing separate opinions concerning one event, please consider the ensuing remarks to serve as a response to both inquiries. Further, for purposes of clarity, your correspondence will be referred to as the letters from the Press and the Board attorney.

It is noted at the outset that the letter from the Press which is dated November 21, 1984, reached this office on February 4, 1985.

The issue involves the propriety of an executive session held by the Board at the end of a meeting conducted on October 15. According to the letter from the Press:

> "[A]t the time, Martin Wolpoff, president of the Board, called the closed door meeting, he informed the audience at a regular public session that the Board was meeting in private to discuss a lease. When later asked if the discussion would affect the value

> of a lease, which it apparently would not, Mr. Wolpoff responded that the executive session was called because the discussion of a controversial subject could result in litigation."

It was also added in the letter from the Press that, based upon "informal discussions with Board members", the focus of the executive session "was a matter involving the separation of church and state."

The Board attorney in his letter, based upon his knowledge of the circumstances, wrote that:

> "[A]t the outset of the executive session the Board and administrative staff were advised that the Archdiocease had demanded the inclusion of new and additional lease provisions to its proposed agreements with the Board of Education regarding use of Church space.
>
> "These lease provisions focused upon restrictions on the educational curriculum in the public schools including, but not limited to, prohibitions against discussions of abortion and family planning. During this meeting extensive debate regarding both the legality of the Church's conduct and the legal option available to the district transpired. The discussion included the strategy of filing a lawsuit against the Archdiocese or urging the City to commence the action."

In this regard, since an opinion has been sought by the Press and the Board attorney, I would like to offer the following comments.

First, as you are aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, every meeting of a public body must be conducted open to the public, except to the extent that a topic or topics may appropriately be discussed during an executive session.

Second, §105(1) of the Open Meetings Law prescribes a procedure that must be accomplished during an open meeting before a public body may convene 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

As indicated above, prior to entry into an executive session, a public body must indicate by means of a motion, the "general area or areas of the subject or subjects to be considered." The letters appear to indicate that two subjects might have been discussed, but only one reason was stated in a motion to enter into an executive session. In my opinion, if a public body seeks to discuss more than one subject during an executive session, the motion to enter into an executive session should indicate each subject to be considered during the ensuing closed session.

Third, I believe that two of the grounds for entry into an executive session listed in the Open Meetings Law are relevant to the facts. One pertains to the lease of real property. Here I direct your attention to §105(1)(h), which permits a public body to convene an executive session to discuss:

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

It is emphasized that §105(1)(h) does not permit a public body to conduct an executive session to discuss all matters that pertain to the proposed acquisition, sale or lease of real property. On the contrary, the specific terms of the cited provision permit a public body to discuss such issues behind closed doors only when "publicity would substantially affect the value" of the property. As I understand the

situation, publicity would have had little or no impact upon the value of the property that was being discussed. Consequently, I do not believe that §105(1)(h) could justifiably have been cited as a basis for entry into an executive session.

The remaining ground for entry into an executive session of significance is §105(1)(d). That provision permits a public body to hold an executive session to discuss "proposed, pending or current litigation."

There have been various judicial interpretations concerning the scope of §105(1)(d). It has been held, for example, that a discussion of "possible litigation" would not alone qualify as a basis for entry into an executive session. For instance, if a controversial topic arises and there is a likelihood or threat that litigation will ensue, §105(1)(d) could not, based upon case law, be invoked, if the public body discusses the substance of the issue rather than legal issues relevant to the topic [see e.g., Weatherwax v. Town of Stony Point, 97 AD 2d 840 (1983)]. It has also been found that the purpose of §105(1)(d) is to permit a public body to discuss its litigation strategy behind closed doors in order that it may engage in a private discussion without baring its litigation strategy to its adversary, who might be present at the meeting [see Weatherwax, supra; also Concerned Citizens to Review the Jefferson Mall, Matter of v. Town Board of the Town of Yorktown, 84 AD 2d 612, appeal dismissed 54 NY 2d 957 (1981)].

In view of the facts described in your letters, to the extent that the Board discussed the lease, overcrowding or perhaps the separation of church and state, I do not believe that any ground for executive session was present. However, to the extent that the Board discussed its legal strategy in relation to a lawsuit that might ensue, §105(1)(d) could in my view have been appropriately cited as a basis for entry into an executive session.

Lastly, it is emphasized that in many instances it may be difficult to draw a line of demarcation between a series of related issues in terms of the propriety of entry into an executive session. Optimally, if possible, I feel that the Board should have discussed issues regarding the

lease and those relative to public policy in public. Assuming that a line between the issues could have been drawn in the deliberative process, that portion of the meeting during which the Board discussed its litigation strategy could in my opinion have been conducted properly 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3641
OML-AO-1141

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

February 28, 1985

Ms. Sally Webb
President
Albany County Chapter
League of Women Voters
[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. Webb:

I have received your note of February 15, as well as the Rules of the Albany County Legislature. You have asked that I review the Rules and comment.

In this regard, having read the Rules, there are several points that I would like to offer. It is emphasized that the Rules, from my perspective, are reasonable. Therefore, please consider my comments not as criticisms but rather as observations or considerations upon which you might focus.

Several of the provisions, such as Rule 3 concerning special meetings, refer to notice to the members, which must be served personally or by mail upon the members at least forty-eight hours prior to the date of a special meeting. Since those requirements pertain to notice to members, the Open Meetings Law does not apply. Nevertheless, §104 of the Open Meetings Law requires that notice of the time and place be given to the public and to the news media prior to every meeting, whether regularly scheduled or otherwise.

More specifically, §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 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 by posting in the same manner as prescribed in §104(1) "to the extent practicable" at a reasonable time prior to such meetings.

Rule 5 states that "Cameras, microphones or similar equipment may be permitted in the Chambers with the permission of the Chairman". It also requires that requests to use such equipment "shall be made in writing prior to the commencement of each meeting". "Similar equipment" might be construed to include tape recorders. There are several judicial determinations which indicate that any person may use a portable, battery operated cassette tape recorder at an open meeting of a public body [see e.g., People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979) and Mitchell v. Johnston, Supreme Ct., Nassau Cty., April 6, 1984]. In my opinion, with respect to the use of tape recorders, a prior written request to use such equipment might not, based upon case law, be necessary.

Rule 13 states in part that "The minutes of each meeting of this Legislature shall be prepared in full and mailed to each member within three weeks of the date thereof". Here I direct your attention to §106 of the Open Meetings Law, which pertains to minutes of meetings. In brief, the cited provision requires that minutes of open meetings be prepared and made available within two weeks of the date of such meetings. If action is taken during an executive session, the Law requires that minutes reflective of the nature of the action taken be made available in accordance with the Freedom of Information Law within one week. It is noted, too, that if minutes have not been approved by vote or otherwise, I believe that the time limitations imposed by the Open Meetings Law nonetheless apply. If minutes have not been approved within the time limits specified in the Law, it has been suggested that they be made available, but that they may be marked "unapproved" or "draft", for example. By so doing, the public can learn generally what transpired at a meeting; concurrently, the public is effectively informed that the minutes are subject to change.

Rule 15 states in part that "The ayes and nays shall be taken on any question whenver so required by law". I believe that the Freedom of Information Law requires that a record be kept indicating the manner in which each member cast his or her vote. Section 87 (3)(a) requires that each agency shall maintain:

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

As such, the Freedom of Information Law generally prohibits secret ballot voting or its equivalent on the part of the members of public bodies.

Lastly, Rule 24 pertains generally to standing committees, as well as subcommittees. Here I point out that §102(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 consturction law, or committee or subcommittee or other similar body of such public body."

Based upon the language quoted above and its specific reference to committees and subcommittees, those bodies created by the County Legislature are subject to the requirements of the Open Meetings Law to the same extent as the County Legislature itself.

In a related area, Rule 36 refers to the capacity of the County Legislature to "resolve itself into a Committee of the Whole...for the purpose of informal discussion..." Once again, a committee of the whole would in my view clearly be a "public body" subject to the Open Meetings Law. Further, if a public body seeks to conduct an "informal discussion", such a discussion, according to the state's highest court, would constitute a "meeting" within the scope of the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I hope that 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1142

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

March 5, 1985

Mr. Glen D. Johnson
Trustee
Village of Hilton
[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. Johnson:

I have received your letter of February 15 in which you requested advice concerning attendance at executive sessions.

According to your letter, the Mayor and the Board of Trustees of the Village of Hilton appoint members to the Village zoning board of appeals, planning board and recreation commission. In addition, a Village trustee or the Mayor attends each meeting of the appointed boards as "liaisons". You asked: "When an executive session is called by the Chairperson of the appointed board what authority/ responsibility is allowed the elected liaison to ensure his or her inclusion in the executive session". In this regard, I offer the following comments.

First, §105 of the Open Meetings Law sets forth the purposes for which an executive session may be held and establishes the procedure for entering into such session. In general, a public body may enter into executive session upon a majority vote of its total membership, taken in an open meeting, pursuant to a motion identifying the general subject matter to be considered.

Second, §105(2) provides 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."

In my view, the public body conducting an executive session has the authority to include or exclude any individual, other than a member of such public body, in or from an executive session. Thus, I do not believe that an elected official has special authority to attend an executive session of a public body whose members are appointed by elected officials. On the contrary, it is my opinion that every public body, in its discretion, may authorize the attendance of other persons as the body deems proper.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1143

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

March 5, 1985

Ms. Judy G. Schoenthal
Town Clerk
Town of Hornby
R.D. 1
Beaver Dams, NY 14812

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. Schoenthal:

I have received your letter of February 18 and appreciate your interest in complying with the Open Meetings Law.

According to your letter, the Hornby Town Board has encountered difficulty with respect to the Town's official newspaper, the Corning Leader, relative to notice of meetings. For example, when the newspaper is notified that a special meeting has been scheduled for a particular purpose, the Board has asked that the published notice also state that the Board "would handle any other necessary business". Nevertheless, you wrote that more often than not, the newspaper does not add that information to the printed news item. As a consequence, "the Town Board is unsure as to the legality of taking action on business aside from the special purpose of the meeting". You also indicated that "the Leader has been notified of a special meeting or change of a meeting and has not published this in the paper."

You requested guidance concerning these matters.

It is emphasized at the outset that the Open Meetings Law merely requires that notice of the time and place of meetings be given. Nothing in the Law requires that the notice must include the topic or topics that might be considered. Further, although §62(2) of the Town Law provides some direction regarding special meetings of town boards, that provision does not require that the subject or subjects to be considered must be cited in a notice of a special meeting.

The notice requirements of the Open Meetings Law, §104, are as follows:

> "1. [P]ublic notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> "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."

Based upon the language quoted above, once again, a public body must give notice of the time and place of its meetings to the news media and to the public by means of posting in one or more designated, conspicuous public locations prior to all meetings, whether regularly scheduled or otherwise. However, it is reiterated that the notice need not include reference to the topics of discussion that will be considered at meetings.

Further, please note that §104(3) specifies that the notice required by the Open Meetings Law is not a legal notice. Stated differently, while a public body must provide notice to the news media, it is not required to pay to place a legal notice in a newspaper.

Lastly, often public bodies comply with the Open Meetings Law by providing notice to the news media and posting a notice, but a newspaper, for example, might not publish the notice. In this regard, there is nothing in the Open Meetings Law that requires a newspaper to print a notice of a meeting that it receives. Therefore, although a public body does all that it must to comply with the notice requirements, there is no guarantee that a notice given to a newspaper will be printed. Therefore, so long as the Town Board complies with the notice requirements, a failure on the part of the newspaper to print the notice would not in my view have any adverse effect upon the legality of action taken by the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1144

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

March 6, 1985

Ms. Maureen R. Berger
[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. Berger:

As you are aware, I have received your letter of February 28 in which you raised a series of questions concerning the Open Meetings Law.

Your first area of inquiry is whether questions or comments may be offered by members of the public who attend meetings "on items or expenditures being discussed or voted upon by the Board."

In this regard, the Open Meetings Law is silent with respect to public participation. Consequently, it has been advised that the Open Meetings Law does not confer upon the public the right to speak or otherwise participate at a meeting of a public body. Nevertheless, there is nothing in the Law that prohibits a public body from enabling members of the public body to speak. As such, if a public body determines to permit public participation, it may do so in my view based upon reasonable rules that treat members of the public equally.

It is noted, too, that in some situations members of the public are given the right to speak. For example, often a public hearing must be held prior to the adoption of a municipal budget. In such a situation, I believe that public hearings are conducted for the purpose of enabling members of the public to express their views.

Second, you wrote that you have asked to have your comments included in minutes of a meeting. However, you were "told this was not possible". Here I direct your attention to §106(1) of the Open Meetings Law, which pertains to 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."

In my opinion, §106(1) provides what might be characterized as minimum requirements concerning the contents of minutes. While a public body must include in its minutes reference to motions, proposals, resolutions and action taken, there is no requirement that minutes consist of a verbatim account of the proceedings or that they include reference to comments made during open meetings. Therefore, although minutes may include reference to your comments, there is no requirement that they must be included.

Your last question involves "the role of the Chairperson", whether the chairperson may vote and under what circumstances "should the Chairperson express his/her opinion on the matter being discussed prior to voting." Without knowledge of the particular board that is the subject of your question, I cannot provide specific direction. As a general matter, however, a chairperson presides over a meeting and has the same authority to vote or express his or her views as the other members of the body. In short, unless a law provides to the contrary, I believe that a chairperson, as a member of a public body, has the right to vote on issues before the body and may speak to the same extent as other members.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1145

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

March 7, 1985

Mr. Stanley J. Sendlenski
[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. Sendlenski:

I have received your letter of February 27 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, you attended a meeting of the Board of Fire Commissioners of the Rocky Point Fire District on February 26. You indicated that, after the Board had begun to review its agenda, you were asked by the Chairman to leave. You expressed the belief that it was your right to remain in the room and that the Board should have gone to a different location for the purpose of holding an executive session. You also indicated that no reason for entry into an executive session was stated, no motion was made to convene the executive session, and that nobody but the Chairman of the Board spoke in relation to your request to remain present.

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

First, I believe that the Board of Fire Commissioners is a "public body" required to comply with the Open Meetings Law. Section 102(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 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."

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], the Board in my view clearly contains all of the components necessary to a finding that it is a public body.

Second, 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. Please note that in a situation in which a public body properly convenes an executive session, the Law does not specify whether the public or the public body is required to leave the meeting room; the Law merely indicates that the public may be excluded from an executive session. From my perspective, the location where a public body conducts an executive session or where the public may remain during an executive session would be dependent upon specific circumstances, such as the nature of the building in which a meeting is held. Therefore, I do not believe that your exclusion from the meeting room was necessarily improper.

Third, it appears that the Board failed to comply with certian requirements of the Open Meetings Law prior to its entry into executive session. Specifically, §105 (1) contains a procedure that must be accomplished during an open meeting before an executive session may be conducted. 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 ares of the subject or subjects

> to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, a motion to enter into an executive session must be made during an open meeting; the motion must indicate in general terms the subject or subjects to be considered; further, the motion must be carried by a majority vote of its total membership of a public body. According to your letter, none of those steps was taken prior to the Board's executive session.

Fourth, as suggested in the language of §105(1) a public body cannot 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 properly be considered during an executive session. Therefore, until a topic arises that may validly be discussed during an executive session, a public body must conduct its discussions in public.

Lastly, with respect to the enforcement of the Open Meetings Law, §107(1) states in part that:

> "[A]ny aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

Enclosed for your review are copies of the Open Meetings Law and an explanatory pamphlet that may be useful to you. In addition, in an effort to enhance compliance with the Law, a copy of this opinion will be sent to the Board of Fire Commissioners.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1146

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

March 7, 1985

Honorable Maurice D. Hinchey
Member of the Assembly
ATT: Ms. Shirley Andersen
Administrative Assistant
243 Fair Street
Kingston, NY 12401

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. Andersen:

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

Attached to your letter are copies of three sets of minutes of meetings held by the Rondout Valley Central School District Board of Education. The first set of minutes pertains to a "Special Executive Work meeting" held by the Board on December 4. The constituent who precipitated your inquiry wrote that the Board considered a school closing at the meeting of December 4, even though no prior notice of the school closing was given. The minutes of that meeting also indicate that "two essential subjects" were discussed, including "short and long range district plans". The remaining minutes pertain to a "work meeting" held on December 11, during which members of the public in attendance were not permitted to speak, and a regular meeting of the Board of Education conducted on December 18.

You have requested my views concerning the meetings and, in this regard, I would like to offer the following comments.

First, by way of introduction, it is emphasized that the term "meeting" has been construed broadly by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the State's highest court, found that the term "meeting" indludes 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 is 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, each of the three gatherings described in the correspondence attached to your letter would in my opinion have clearly constituted a "meeting" subject to the requirements of the Open Meetings Law, including the "executive session work meeting" held on December 4.

Second, every meeting of a public body must be preceded by notice of the time and place of the meeting. Section 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) 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 §104(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 regularly scheduled or otherwise, and notwithstanding the manner in which a gathering is characterized.

Third, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Therefore, an executive session is not separate and distinct from an oepn meeting; on the contrary, it is a portion of an open meeting. I point out, too, that a public body is required to accomplish a procedure 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..."

Based upon the minutes of the "Special Executive Work meeting" conducted on December 4, the School Board conducted a closed or "executive session" without having first convened an open meeting and without following the procedures required by §105(1).

Fourth, as suggested in §105(1), a public body cannot enter into an executive session to discuss the subject of its choice. Paragraphs (a) through (h) of §105(1) specify and limit the topics that may be discussed during an executive session. Unless and until one of those topics arises, a public body in my opinion is required to conduct its business open to the public. Further, the topics to which reference has been made, a "school closing" and "short and long range district plans", would not in my view have constituted subjects that could have properly been discussed during a closed meeting. Rather, I believe that those issues should have been discussed in full view of the public.

Fifth, the constituent referred to the inability of the public to speak at the "work meeting" held on December 11. Here it is noted that the Open Meetings Law is silent with respect to public participation. As a consequence, it has been advised that a public body may permit the public to speak; however, there is no requirement that the public be given the authority to speak or otherwise participate at meetings.

Lastly, in terms of the enforcement of the Open Meetings Law, §107(1) states in part that:

> "[A]ny aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

I hope that 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, Rondout Valley
Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1147

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

March 12, 1985

Mr. Paul M. Bray
Attorney at Law
159 Brevator Street
Albany, NY 12206

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. Bray:

As you are aware, your correspondence of February 19 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The materials include your letter to Ms. Mary Hays, executive director of the New York State Council on the Arts.

In your letter to the Attorney General, you suggested that a regulation adopted by the Council on the Arts may be contrary to the public interest. You alluded to §6403.2(b) of the regulations, which states that "Meetings of the Advisory Panels may be conducted in private pursuant to the Council's authority under Arts and Cultural Affairs Law section 3.05(4)." The advisory panels apparently consist of outside experts who serve the Council by recommending the amounts of grants that may be awarded by the Council. The statutory authority upon which the regulation is based, §3.05(4) of the Arts and Cultural Affairs Law, states that:

> "The council shall have the following powers and duties...
>
> 4. To hold public or private hearings..."

From my perspective, the regulation in question may be void for the following reasons.

First, the specific language of §3.05 refers to the powers and duties of the "Council". The regulations, however, pertain to advisory panels rather than the Council. In addition, the statutory language quoted above refers to the capacity of the Council "to hold public or private hearings". The regulation, however, refers to "meetings".

Second, in this regard, I believe that there is often a distinction between a "meeting" and a "hearing". The term "meeting" as it appears in the Open Meetings Law is defined to mean "the official convening of a public body for the purpose of conducting public business" [see §102(1)]. As such, a meeting involves a situation in which a quorum of a public body seeks to conduct business or deliberate as a body. I believe that the term "hearing" generally refers to situations in which members of the public are given an opportunity to express their views, as in the case of a public hearing, or to a situation in which a person or entity seeks testimony from witnesses or interested parties, or investigates in a quasi-judicial manner. Since the statute refers to hearings, it appears that the regulation, which pertains to meetings, may exceed and be inconsistent with the terms of the enabling legislation.

Third, I do not believe that a regulation, such as that adopted by the Council on the Arts, can serve to nullify the requirements of a statute. Further, §110(1) of the Open Meetings Law states that:

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

Based upon the language quoted above, the regulation adopted by the Council is in my view "more restrictive with respect to public access" than the Open Meetings Law. Therefore, in my opinion, it is void to that extent.

In sum, the regulation in question is in my view inappropriate because the statute upon which it is based pertains to the Council on the Arts, rather than the advisory panels that are the subject of the regulation, because the statute refers to hearings of the Council, rather than meetings of the advisory panels and because the regulation is more restrictive with respect to public access than 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

cc: Mary Hays, Executive Director
Richard Redlo, Assistant Attorney General

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3654
OML-AO-1148

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

March 12, 1985

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

Secretary of State Shaffer has asked that I respond to your letter of March 2 on her behalf. You have raised a series of issues, some of which I can address directly; with respect to others, I hope to be able to provide appropriate direction to other state agencies.

With respect to strengthening the Freedom of Information and Open Meetings Laws, it is true that there is always room for improvement, and the Committee has recognized that teeth should be added to both laws. Please note that the Governor has recommended legislation which, if enacted, would give a court the authority to fine members of public bodies who engage in flagrant violations of the Law or a pattern of violations. The Governor's recommendation is based upon a proposal offered by the Committee in its annual report. In addition, legislation has been introduced that would include criminal penalties for violations of the Freedom of Information Law. If, for example, an agency official, in dealing with a request made under the Freedom of Information Law, responds knowingly and willingly, and with an intent to injure or defraud, that person could face criminal penalties as well as a civil penalty of $1,000 per violation. As such, efforts are being made to deter violations of both statutes.

You have recommended that a public body be required, at least a week prior to a meeting, to describe "the intent of the meeting" and why the meeting would or would not be open to the public. Although your suggestion might have merit, I am not sure that it would work. Having attended various meetings over the course of years, even though an agenda may be prepared, public bodies often move into topics

that are not referenced on an agenda. In addition, there may be situations in which public bodies must conduct emergency meetings on short notice. It is also noted that the Open Meetings Law as it currently exists provides that, even though a ground for executive session may be cited, there is no obligation on the part of a public body to convene an executive session. Moreover, it has been advised that, in a technical sense, a public body cannot predict or schedule an executive session. In short, prior to entry into an executive session, a motion to do so must be made during an open meeting and carried by a majority vote of the total membership. Unless the vote is affirmative, a public body cannot enter into an executive session. Further, until the vote is taken, it cannot be known whether a closed session will indeed be conducted. Once again, due to the nature of municipal bodies, it may be impossible for the members to know a week in advance of the specific nature of the topics to be considered at an upcoming meeting or to be sufficiently knowledgeable with respect to the issues to determine in advance whether a meeting will be open or justifiably closed.

With regard to communications with attorneys, I would like to emphasize that the Committee has made efforts to communicate with attorneys in a variety of ways. In addition to speaking before attorneys at meetings of various government associations, such as the New York State Association of Counties, Association of Towns, Conference of Mayors, the School Boards Association, and the New York State Bar Association Clinical Legal Education Program, several articles have also appeared in the New York Law Journal. That periodical is likely the most widely read legal publication in New York. Further, the opinions of the Committee are summarized by the Consolidated Law Service, which publishes statutes.

The other area of inquiry concerns relationships with the medical profession. Please note that legislation has been introduced on a yearly basis that would generally grant patients direct rights of access to medical records pertaining to them. Nevertheless, the legislation has never been approved by both houses. If you have a complaint regarding the actions of a particular physician, it is suggested that you contact the Office of Professional Medical Conduct at the State Health Department, which is located at the Empire State Plaza, Corning Tower, Albany, New York 12237. Issues involving ethics in the medical profession

are dealt with, in part, by regulations adopted by the Board of Regents, which licenses physicians. To obtain additional information on the subject, it is suggested that you contact the Professional Licensing Board for Physicians, which is located at the Education Department, 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
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1149

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

COMMITTEE MEMBERS
THOMAS I. 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

March 20, 1985

Ms. Patricia T. Finkle
[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. Finkle:

I have received your letter of March 12 in which you requested an advisory opinion under the Open Meetings Law.

Enclosed with your letter is a copy of minutes of a meeting of the Board of Education of the Lansingburgh School District held on February 26. You asked that I review the minutes for the purpose of advising with respect to the propriety of an executive session held by the Board without having stated the reasons for conducting a "private meeting".

According to the minutes, a motion was made and seconded "that the Board go into executive session". The minutes state that "The Board went into executive session at 8:25 p.m. and ended at 9:44 p.m.". The meeting then resumed and was adjourned at 9:46.

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

First, §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.

Second, the Law contains a procedure that must be completed during an open meeting before a public body 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..."

Based upon the language quoted above, it is clear in my opinion that a motion to enter into an executive session must indicate in general terms the subject or subjects to be considered behind closed doors. Consequently, a failure to provide that information in the motion, in my view, represented a failure to comply with the requirements of the Law.

Lastly, as suggested in the language of §105(1), 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.

As you requested, enclosed are copies of the Open Meetings Law and "Your Right to Know", an explanatory brochure pertaining to both the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: Board of Education

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1150

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

March 21, 1985

Mr. David M. Eischens
Coordinator of Special Education
East Syracuse-Minoa Central Schools
Administration Building
407 Fremont Road
East Syracuse, NY 13057

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. Eischens:

I have received your letter of March 13 which pertains to the status of a Committee on the Handicapped under the Open Meetings Law.

As you suggested, a Committee on the Handicapped is a "public body" as defined by §102(2) of the Open Meetings Law. Nevertheless, it is apparently your view that the exemption from the Law appearing in §108(3) often prevails, thereby removing some aspects of Committee meetings from the Law. In view of the exemption, you indicated that "confusion still exists" concerning various procedural requirements of the Open Meetings Law.

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

First, as you may be aware, the definition of "meeting" has been construed broadly by the courts. In brief, in a landmark decision rendered in 1978, the state's highest court found that the term "meeting" includes any gathering of a quorum 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)]. If a gathering is a "meeting", I believe that it must be preceded by notice given in accordance with §104 of the Law and convened open to the public.

Second, §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 accomplished during an open meeting before a public body may enter into an executive session. Specifically, the cited provision states that:

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

I point out that a condition precedent for entry into an executive session is a motion. It is noted that, if a motion is made, reference to the motion must be made in the minutes required to be prepared pursuant to §106(1) of the Open Meetings Law.

Third, as suggested by the language quoted above, 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 subjects that may appropriately be considered during an executive session.

From my perspective, it is likely that only one of the grounds for entry into an executive session could be cited by a Committee on the Handicapped in the context of its duties. Section 105(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,

> promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

In some instances, the Committee might discuss the "medical history" of a particular student, in which case, §105(1)(f) would be applicable as a basis for entry into an executive session. However, I do not believe that §105(1)(f), in terms of its specific language, would permit the Committee to enter into an executive session to discuss all matters that might arise with respect to particular students. As such, there might not be any basis for entry into an "executive session" to consider some issues arising before the Committee, even though the issues relate to a specific student or students.

Fourth, for that reason, it may be more appropriate to consider that certain matters pertaining to students should be discussed in private not by means of an executive session, but rather by means of an exemption from the Open Meetings Law.

As you are aware, §108(3) of the Open Meeitngs Law states that "[N]othing contained..." in the Law "shall be construed as extending the provisions hereof to...any matter made confidential by federal or state law". Federal acts dealing with student records generally, as well as handicapped students in particular, require that the records identifiable to students remain confidential, except with respect to the parents of the students. When a Committee on the Handicapped is involved in reviewing records identifiable to particular students, it is my view that the Committee deals with a "matter made confidential by federal ...law". To that extent, I do not believe that the requirements of the Open Meetings Law would apply, for the exemption from the Law would be applicable.

Therefore, if, for example, the only business to be conducted by a Committee on the Handicapped concerns particular students, I believe that its discussions would in their entirety be outside the scope of the Open Meetings Law, thereby negating the requirements of the Open Meetings Law. On the other hand, if the Committee seeks to discuss other matters, such as procedural issues, administrative or perhaps budgetary concerns, the Open Meetings Law would be applicable. In such a situation, I believe that notice would have to be given, and that the other requirements of the Law would be present. However, if and when, at the same meeting, the Committee initiates its discussions of particular students and records pertaining to them, the exemption from the Law would render that portion of the meeting outside the scope of the Open Meetings Law.

Lastly, in situations in which the Open Meetings Law does not apply, there may be no requirement that minutes be prepared in conjunction with §106 of the Law. However, I believe that various other provisions of Law infer that records be kept relative to actions of the Committee, which are likely taken at its meetings.

For instance, §4402(3)(c) of the Education Law requires 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."

Further, the federal regulations promulgated pursuant to the Education of the Handicapped Act, §121a.345, state in part that:

> "(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 program."

Therefore, even though requirements concerning minutes found in the Open Meetings Law might not apply, it appears that other provisions of law require that records be prepared and made available to parents.

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

FOML-AO-1151

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

March 22, 1985

Mr. Andrew Como
[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. Como:

I have received your recent letter in which you requested "clarification" regarding the Open Meetings Law.

According to your letter, the Library Expansion Committee of the Brentwood Public Library in the past had held open meetings. However, you indicated that "for the past several months, the Library Board has been discussing expansion in Executive session only". You expressed the belief "that the concept of the Open Meetings Law was to allow the public to hear all discussions that lead to official action coming before the public board".

I agree with your view of the Open Meetings Law and, in this regard, I would like to offer the following comments.

First, the Open Meetings Law is applicable to meetings of a "public body", which is defined in §102(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 a board of trustees of a school district library as well an any committees that may be designated by the school board or the library board constitute "public bodies" required to comply with the Open Meetings Law.

Second, the scope of the term "meeting" has been expansively construed by the courts. In a landmark decision rendered in 1978, the state's highest court determined that any convening of a quorum of a public body for the purpose of conducting public business is a "meeting" subject to the Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409; aff'd 45 NY 2d 947 (1978)].

Third, the phrase "executive session" is defined in §102(3) of the Law to mean a portion of an open meeting during which the public may be excluded. Moreover, a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the topics that may appropriately be considered during an executive session.

Under the circumstances, it appears unlikely that any ground for entry into an executive session could justifiably be cited to discuss the expansion of the library. If that is so, I believe that the holding of executive sessions would represent a failure to comply with the Open Meetings Law.

Lastly, with respect to your comment concerning the intent of the Law, §100 of the Law contains a statement of legislative intent. The first sentence of the legislative declaration 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 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..."

As requested, enclosed is a copy of the Open Meetings Law. Attached to it is "Your Right to Know", an explanatory brochure concerning 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.

cc: Board of Trustees, Brentwood Public Library

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 3674
OML-AO - 1152

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

March 25, 1985

Mr. William A. Miller
President
Evans Neighbors 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 Mr. Miller:

I have received your letter of March 15 in which you requested an advisory opinion.

In your letter, you asked the following questions:

> "1. What is the policy for citizens taping town board meetings for news-letters for neighbor associations news-letters?
>
> 2. Can associations who pay taxes for Fire Protection by Volunteer fireman Districts, request monthly reports of financial items which tax money pays for?"

In this regard, I offer the following comments.

First, with respect to tape recording town board meetings, I point out that the Open Meetings Law is silent regarding the use of tape recorders. Nevertheless, the Committee on Open Government has consistently advised that the use of tape recorders should not be prohibited in situations in which the devices are inconspicuous. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not detract from the deliberative process.

Second, the Committee's position has been confirmed in a decision rendered in 1979. The Court, in People v. Ystueta, 99 Misc. 2d 1105 (1979), rejected a school board's contention that it could prohibit the use of tape recorders at its meetings. More 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, Supreme Ct., Nassau Cty., April, 1984]. In addition, the Attorney General has reversed earlier opinions on the subject and now advises that a town board may not preclude the use of tape recorders at public meetings of such board (1980 Op Atty Gen 145). Thus, it is my opinion that an individual may use a portable, battery-operated cassette tape recorder to record the open portions of a town board meeting to assist in preparing a neighborhood newsletter.

Third, with respect to the records of volunteer fire companies, the Court of Appeals, in 1980, found volunteer fire companies to be agencies subject to the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. Thus, I believe that the records of a volunteer fire company are available in accordance with the provisions of the Law. Specifically, if monthly reports of items funded by tax money exist, I believe that they should be made available to you. I point out that if such records do not exist, the fire company need not create the records. However, you may be entitled to records which relate to the information described above. Further, it is suggested that you direct your request to the records access officer of the Town.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3676
OML-AO- 1153

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

March 26, 1985

Honorable Sondra Bachety
Legislator
County of Suffolk
County Legislature
655 Deer Park Avenue
North Babylon, NY 11703

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. Bachety:

I have received your letter of March 6, as well as the correspondence attached to it. Please accept my apologies for the delay in response. Prior to the preparation of an opinion, in an effort to obtain additional information, I contacted Gregory M. Hensas, Assistant County Attorney, who forwarded relevant materials to me. Those materials led to additional research concerning the status of the Suffolk County Vanderbilt Museum.

Your inquiry concerns a request for minutes of meetings of the Board of Directors of the Suffolk County Vanderbilt Museum. According to your letter, the attorney for the Board advised "that they do not have to respond under the provisions of the Freedom of Information Act..." Mr. Hensas has advised, however, that the minutes are subject to the Freedom of Information Law.

You have requested assistance in resolving the issue and, in this regard, I would like to offer the following comments.

First, the Freedom of Information is applicable to records of an "agency", which is defined in §86(3) 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."

In my opinion, based upon the legislative history involving the role of Suffolk County in relation to the Vanderbilt Museum, I believe that the Board of Trustees of the Vanderbilt Museum is an "agency" required to comply with the Freedom of Information Law.

In terms of background, the establishment of the museum arose by means of a bequest made in the will of William K. Vanderbilt, II. In response to the bequest, a series of actions was initiated by the Suffolk County Legislature, the first of which was a resolution adopted on June 27, 1949. Later, the County Legislature acted in 1959 in accordance with §221 of the County Law, which pertains to the establishment of a county park commission, by means of resolution No. 55. Section 2 of Local Law No. 1 of 1966 states in part that:

> "(a) That the name of the Suffolk county park commission, created by resolution of the board of supervisors on June twenty-seventh, nineteen hundred forty-nine for the purpose of carrying out the educational purposes of the Vanderbilt museum, shall be changed to the Suffolk county Vanderbilt museum commission and the said commission shall carry on and have the same powers, functions and purposes as set forth in the said resolution of June twenty-seventh, nineteen hundred forty-nine. The Suffolk county Vanderbilt museum commission shall have the management and control of the Vanderbilt museum and not other county parks or lands."

Section 2 of Local Law No. 7 enacted in 1976 states that "The County Legislature has the sole power and control over the museum property and the funds provided for its operation, care and perpetuation subject only to the contractual

conditions under which the County accepted the Vanderbilt bequest". Section 3 of that Local Law states in part that "The Suffolk County Vanderbilt Museum Commission shall be the operating agency and the appointing body with respect to personnel except the director..." The most recent enactment of the County Legislature of which I am aware is Local Law No. 3, which was enacted in 1979. Section 6 of that Local Law states that:

> "The Suffolk County Vanderbilt Museum Commission devolved from the former Suffolk County Park Commission (which was established by a resolution of the Board of Supervisors adopted on June 27, 1949 and enlarged pursuant to Section 221 of the County Law by a resolution of the Board of Supervisors adopted on December 28, 1959) pursuant to the provision of Local Law No. 1, 1966 by Section 2(a) of which it was given the management and control of the Vanderbilt Museum."

Section 7 of the same Local Law states in part that "the County Legislature shall appoint members of the Suffolk County Vanderbilt Museum Commission." Section 11 of Local Law No. 3 of 1978 generally reiterates the language of an earlier Local Law, stating in part that:

> "The County of Suffolk is the sole and exclusive owner of the real and personal property, maintenance fund, tangible and intangible of the Vanderbilt Museum received from the Trustees under the will of William K. Vanderbilt, II..."

Based upon the history of the legislative activities relative to the Vanderbilt Museum, it is my view that the County has for a lengthy period had custody and control of the Museum. Consequently, I believe that the Museum is an agency of the County and that its records, therefore, are subject to rights of access granted by the Freedom of Information Law.

I point out that a different statute may also be relevant to rights of access to minutes. Specifically, the Open Meetings Law 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."

In view of the legislative history, I believe that the Board of Directors of the Vanderbilt Museum is a "public body" required to comply with the Open Meetings Law, for its Board of Directors is designated by the Suffolk County Legislature. Further, it appears that the Board of Directors conducts its business for or on behalf of Suffolk County, a public corporation. It is noted that in a somewhat similar situation, a town in Nassau County was given property by means of a will. The board of supervisors of the County was given authority to designate trustees responsible for carrying out the will. In that case, the Appellate Division, Second Department, found that the trustees constituted a "public body" required to comply with the Open Meetings Law [Burgher v. Purcell, 87 AD 2d 888 (1982)].

Assuming that the Board of Directors is a public body, §106 of the Open Meetings Law requires that minutes be prepared and made available to the public in accordance with the Freedom of Information Law.

Enclosed are copies of the Freedom of Information and Open Meetings Laws. In an effort to resolve the issue, this opinion will also be sent to Mr. A.J. Brandshaft, Executive Director of the Vanderbilt Museum.

I hope that 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: A.J. Brandshaft
Gregory Hensas

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1154

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

April 1, 1985

Ms. Maxine Palczynski
[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. Palczynski:

I have received your letter of March 18 in which you requested an advisory opinion.

According to your letter, two members of the Concerned Citizens of Herkimer Central School attempted to tour school buildings with five of seven School Board members. You explained that the Board members were evaluating the buildings in connection with a Building Committee report. The board members asked the citizens to leave, explaining that "the tour was actually the board's annual building inspection." You beleive, as Mr. Freeman discussed with you, that a quorum of the board's membership inspecting school buildings relative to a building program would be considered a public meeting under the Open Meetings Law. You have requested a written advisory opinion on the matter.

In this regard, I offer the following comments.

First, §102(1) of the Law defines a meeting as "the official convening of a public body for the purpose of conducting public business." The Court of Appeals has adopted an expansive construction of the statutory definition. In Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh [60 AD 2d 409 aff'd 45 NY 2d 947 (1978)], the Court affirmed the Appellate Division's interpretation of the term "meeting" to include:

> "a gathering, by a quorum, on notice, at a designated time and place, where public business is not only voted upon but also discussed."

Moreover, the Appellate Division explained that:

> "not every assembling of the members of a public body was intended to be included within the definition [of meeting]. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'."

Based upon the language quoted above, I believe that an inspection of school buildings by a quorum of the school board for the purpose of considering a Building Committee report constitutes a gathering held to conduct public business and, therefore, would be a "meeting" subject to the Open Meetings Law.

Second, as you are aware, notice is required to be given of all meetings conducted by a public body. Timely notice to the news media and to the public by means of posting in a designated public location must be given in accordance with §104 of the Law.

Third, a public body may close its meetings to the public and conduct an executive session only when it intends to discuss a matter described in §105(1)(a) through (h) of the Open Meetings Law. In my opinion, only when one of those topics arise may a public body enter into an executive session. Section 105(1)(h) permits an executive session to be held to discuss the "proposed acquisition, sale or lease of real property...but only when publicity would substantially affect the value thereof." Thus, if the school board is not planning to buy or sell the building, I do not believe that it may bar interested individuals from the board's inspection of school buildings.

Finally, I point out that if Federal or State law makes inspections of school buildings by board members confidential, §108(3) would exempt such an inspection from the provisions of the Open Meetings Law. However, I am aware of no such 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1155

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

April 2, 1985

Mr. Francis X. Tucker
Cook, Tucker, Netter &
Cloonan, P.C.
Attorneys and Counselors
at Law
85 Main Street
UPO Box 3939
Kingston, NY 12401

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. Tucker:

Thank you for your letter of March 19 and your interest in compliance with the Open Meetings Law.

You alluded to an opinion prepared at the request of Assemblyman Maurice D. Hinchey on March 7 concerning a series of gatherings held by the Board of Education of the Rondout Valley Central School District. You have requested clarification of the earlier opinion "as it relates to the traditional 'workshop' meetings held by many school boards." Further, you asked whether it is my view that "the gathering of a quorum of the school board would constitute a meeting if they had not informally approved the film for showing in the elementary schools." For purposes of background, a meeting held by the board was apparently conducted to consider a variety of issues and to view a film in order to determine whether the film should be shown in the schools.

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

First, to provide a historical perspective, I point out that the Open Meetings Law became effective in 1977. At that time, the term "meeting" was defined to mean the formal convening of a public body for the purpose of "officially transacting public business". That language resulted in conflicting interpretations. In short, it was

considered by many that the definition of "meeting" included only those gatherings where a public body intended to take action, thereby "transacting" public business. Nevertheless, in view of the legislative declaration expressive of the intent of the Law, as well as the ordinary dictionary definition of "transact", the Committee had consistently advised that the term "transact" should be construed in accordance with its ordinary dictionary definition, i.e., "to carry on". The Committee's position was adopted unanimously by the Appellate Division in Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh (60 AD 2d 409), whose decision was later unanimously affirmed by the Court of Appeals [45 NY 2d 947 (1978)]. In its discussion, the Appellate Division held that:

> "[U]nder subdivision 1 of section 97 of the Public Officers Law, the word 'meeting' is defined as 'the formal convening of a public body for the prupose of officially transacting public business.' This definition contains several words of limitation such as 'public body', 'formal convening' and 'officially transacting public business'. Special Term construed these terms to mean that one of the minimum criteria for a meeting would include the intent to adopt, then and there, measures dealing with the official business of the governmental unit. Unfortunately this narrow view has been used by public bodies as a means of circumventing the Open Meetings Law. Certain practices have been adopted whereby 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 any action. Thus, the deliberative process which is at the core of the Open Meetings Law is not available for public scrutiny (see First Annual Report to the Legislature on the Open Meetings Law, Committee on Public Access to Records, Feb. 1, 1977).

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (id. at 414-415).

The Court also determined that the phrase "officially transacting public business" pertained "not only to the taking of an official vote, but also to peripheral discussions surrounding the vote" (id.). In its discussion of the status of so-called "work sessions", the Appellate Division determined that:

> "[I]n further support of the fact that the Open Meetings Law was intended to apply to all discussions by a public body of matters pending before it, we need only look to the provisions made for executive sessions (Public Officers Law, §100). Common sense alone dictates that the provisions for executive sessions are meaningless, or at best superfluous, if a public body can hold a 'work session' without paying heed to the Open Meetings Law. If the legislative intent was to permit public bodies to convene at gatherings that they themselves interpreted to be informal, during which they would discuss the business of the public body, then the New York State Legislature would not have provided for executive ses-

> sions. The very mechanism for an executive session, in and of itself, suggests that the Legislature wanted to provide for the possiblity of a private working session in the absence of the public eye, but only under the express conditions and enumerated purposes contained therein" (id. at 417).

In short, I believe that the decisions of the Appellate Division and Court of Appeals in Orange County Publications, supra, indicate that when a quorum of a public body convenes to discuss public business, there is no distinction between a "workshop" and a meeting characterized as "formal" or "official".

I point out, too, that one among a series of amendments to the Open Meetings Law enacted in 1979 redefined "meeting" to include the formal convening of a public body "for the purpose of conducting public business" [see Open Meetings Law, §102(1)]. Based upon the current language, if a public body convenes for the purpose of carrying out its official duties, i.e., to "conduct" public business, such a gathering in my opinion constitutes a meeting subject to the Open Meetings Law in all respects.

In the context of your question, if a quorum of a school board gathers to view a film for the purpose of later determining whether or not a film should be shown to students, I believe that the board would be acting in the performance of its official duties and, therefore, "conducting" public business. As such, that type of gathering would in my view fall within the requirements of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1156

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

April 3, 1985

Mr. William Rowen
Chairperson
New York State Tenant and
Neighborhood Coalition
198 Broadway
New York, New York 10038

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

Dear Mr. Rowen:

I have received your letter of March 25 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter and the materials attached to it, the New York State Division of Housing and Community Renewal has established three bodies for the purpose of advising the Commissioner concerning policies relative to rent administration. A news release attached to your letter indicates that Commissioner Scruggs-Leftwich created a Tenant Advisory Committee, a Landlord Advisory Committee and an Executive Advisory Board. The Commissioner has designated the members of each of those three bodies. You also attached a letter to the Commissioner indicating that the members of one committee, upon which you serve, agreed that its meetings should be subject to the Open Meetings Law. Nevertheless, Assistant Commissioner Hector Del Toro "vehemently disagreed".

You have requested an opinion relative to the status of those bodies under the Open Meetings Law. In this regard, I would like to offer the following comments.

As you may be aware, the Open Meetings Law is applicable to public bodies, and the phrase "public body" is defined in §102(2) of the Public Officers 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 viewing the definition in terms of its components, I believe that each condition required to be met is present with respect to the advisory committees and the Executive Advisory Board.

First, both committees and the Board would constitute "entities" consisting of a minimum of three members.

Second, although there may be no reference to any qourum requirement, I believe that the bodies in question can conduct their business only by means of a quorum. Here I point out that §41 of the General Construction Law entitled "Quorum and majority" 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."

The specific language of §41 of the General Construction Law refers not only to entities consisting of public officers, but also to entities consisting of three or more "persons" who are "charged with any public duty to be performed or exercised by them jointly or as a board or similar body". As such, it is my view that the entities in question may perform their duties only by means of a quorum, a majority of their total membership [see e.g., Pissare v. City of Glens Falls, Sup. Ct., Warren Cty., March 7, 1978 and MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977)].

Fourth, since the entities have been designated for the purpose of advising the Commissioner with respect to rent administration, I believe that they conduct public business and perform a governmental function for an agency, the Division of Housing and Community Renewal.

I point out, too, that the Appellate Division has unanimously determined that advisory bodies designated by a mayor were public bodies required to comply with the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)[.

Further, the current definition of "public body" differs from the same provision as originally enacted. Since the original definition alluded to entities that "transact" public business, it was often contended that the Open Meetings Law was applicable only to those entities having the capacity to take final action. The amendments to the Law enacted in 1979 were in my view intended to ensure that advisory bodies, such as those that are the subject of your inquiry, would fall within the requirements of the Law. Rather than referring to entities that "transact" public business, the current Law makes reference to entities that "conduct" public business. Moreover, the definition of "public body" now refers to committees, subcommittees and similar bodies.

For the reasons described above, I believe that each of the three bodies designated by the Commissioner to advise are "public bodies" subject to the Open Meetings Law in all respects.

Lastly, as you requested, enclosed are copies of the Freedom of Information and Open Meetings Law, regulations promulgated by the Committee under the Freedom of Information Law, and the Committee's latest annual report.

I hope that 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: Commissioner Scruggs-Leftwich
Deputy Commissioner Del Toro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1157

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

April 3, 1985

Mr. Robert F. Reninger
Treasurer
Fairview Fire District
[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 25 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, as Treasurer of the Fairview Fire District, you expressed concern "about the possible future invalidation" of an action taken by the Board of the District at a special meeting. It is your view that the meeting may have been held in violation of the Open Meetings Law, for, although notice of the meeting was posted, notice was apparently not given to the news media. You wrote that the action taken involved a resolution calling for a permissive referendum to obtain voter approval for the purchase of fire fighting equipment.

In my view, it is doubtful that the Board's resolution would be invalidated.

While I agree that §104 of the Open Meetings Law requires that notice be given to the news media, §107(1) of the Law states in part that:

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

As such, if the only area of noncompliance relative to the meeting involved an "unintentional failure to fully comply with the notice provisions...", it would be doubtful in my view that the Board's action could be invalidated. It is noted, too, that §107(1) refers to discretionary authority of a court to invalidate, "upon good cause shown." Therefore, an additional element would have to be demonstrated to a court before the Board's action could be invalidated.

I hope that 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-1158

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

April 11, 1985

Mr. Frederic Dicker
Albany Bureau Chief
New York Post
Legislative Correspondents Assn., Inc.
of the State of New York
P.O. Box 7340
State Capitol
Albany, New York 12224

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. Dicker:

I have received your letter of April 2, in which you requested an advisory opinion under the Open Meetings Law.

On behalf of the New York Post, you have sought an opinion regarding "the legal status the state's Open Meeting Law of the majority 'conferences' or caucuses of the state Assembly and Senate, when attended by a majority of lawmakers from each respective legislative body." By means of example, you asked whether:

> "...if Assembly Democrats hold a 'conference' with more than 75 assemblymen present (a majority of the house,) should that conference be open to the press under the Open Meetings Law?
>
> "Should a Senate Republican Conference, with 31 senators present, be open to the press?"

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

First, I am unaware of any judicial determination involving conferences or caucuses that you described that have been rendered with respect to either house of the State Legislature. As such, I know of no precedent that deals specifically with the gatherings that are the subject of your inquiry.

Second, in terms of background, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) 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 view of numerous provisions of law, I believe that the Senate and the Assembly would each constitute a "public body" subject to the Open Meetings Law.

Third, the Open Meetings Law pertains to meetings of public bodies, and the term "meeting" has been expansively construed by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that the definition of "meeting" encompasses any situation in which a quorum of a public body convenes for the purpose of conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Further, the definition of "meeting" that appeared in the Open Meetings Law as originally enacted was amended in a manner consistent with the direction provided by the Court of Appeals as part of a series of amendments to the Law that became effective on October 1, 1979.

The determination of the Court of Appeals unanimously affirmed a decision of the Appellate Division in which the Court in its discussion of the term "meeting" found that:

> "Certain practices have been adopted whereby 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 any action. Thus, the deliberative process which is at the core of the Open Meetings Law is not available for public scrutiny (see First Annual Report to the Legislature on the Open Meetings Law, Committee on Public Access to Records, Feb. 1, 1977).
>
> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (id. at 414, 415).

As such, based upon case law, I believe that a gathering of a majority of the membership of a public body for the purpose of conducting public business constitutes a meeting required to be held in accordance with the Open Meetings Law.

In addition, I believe that all meetings must be preceded by notice given pursuant to §104 of the Open Meetings Law and convened open to the public [see Open Meetings Law, §103(a)].

Fourth, §108(2) exempts from the provisions of the Open Meetings Law "deliberations of political committees, conferences and caucuses". The question, therefore, is whether the "conferences" or "caucuses" that you described are exempt from the Open Meetings Law.

Here I point out that five judicial determinations have been rendered that deal with the status of political caucuses or similar gatherings. In each determination, it was found that a gathering by a majority of the total membership of a public body for the purpose of discussing public business fell within the framework of the Open Meetings Law, even though those in attendance might represent a single political party.

The first and perhaps the most important determination on the subject is Sciolino v. Ryan. In its discussion of the issue, the Supreme Court decision in Sciolino held that:

> "A meeting of the majority members of the legislature to discuss purely political matters such as campaign finances to elect or re-elect members of the party to the legislature or to discuss party organization might be the type of 'political caucus' the legislature intended to exclude from the operation of the Open Meetings Law" [431 NYS 2d 664, 667].

The Court added that the holding in Orange County, supra, as well as the statute's legislative declaration required a finding that a discussion of public business during a so-called "politicial caucus" conducted by a majority of the membership of a public body is subject to the Law, stating that:

> "[T]he most decisive indication of the legislative intention is the legislative declaration contained in section 95 of the law. That

> section states: '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.' (Emphasis added). Based primarily upon the legislative declaration, the courts held in Matter of Orange County Publications v. Council of the City of Newburgh, 60 A.D.2d 409, 401 N.Y.S.2d 84, affd. 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157, that the words 'public meeting' within the meaning of the Open Meetings Law 'includes the gathering or meeting of a public body whenever a quorum is present for the purpose of transacting public business, whether or not a vote of the members of the public body is taken' (60 A.D.2d at pp. 412, 419, 401 N.Y.S.2d at p. 87); that it includes informal 'work sessions', 'agenda sessions' and 'conferences', 'during which public business is discussed, but without the taking of any action' (60 A.D.2d at p. 414, 401 N.Y.S.2d at p. 88); that 'the deliberative process' is 'at the core of the Open Meetings Law' (60 A.D.2d at p. 414, 401 N.Y.S.2d at p. 88); and that 'any private or secret meetings or assemblages of the Council * * * when a quorum of its members is present and when the topics for discussion and eventual decisions are such as would otherwise arise at a regular meeting, are a violation of the New York Open Meetings Law.' (60 A.D.2d at p. 418, 401 N.Y.S.2d at p. 91)" (id. at 667, 668).

The Appellate Division, Fourth Department, affirmed the decision of the Supreme Court, holding that:

> "[T]he closed sessions of the Council's Democratic majority constitute meetings within the scope of the Open Meetings Law. A majority of the nine member Council constitutes a quorum (Rochester City Charter, §5-7), and it is undisputed that a quorum was present at the three closed sessions to which petitioners sought admission. The decisions of these sessions, the legislative future of items before the Council, although not binding, affect the public and directly relate to the possibility of a municipal matter becoming an official enactment. To keep the decision-making process of all but one of the members of the Council secret, simply because they term themselves 'majority' instead of a 'quorum', allows the public to be aware of only legislative results, not deliberations, violating the spirit of the Open Meetings Law and exaulting form over substance..." (81 AD 2d 475, 478).

Further, while it was contended that the phrase "political caucus" should be construed "to apply to a political majority of legislative body regardless of what it discusses" (id. at 479), it was determined 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 session under the guise of a political caucus, would be violative of the statute..." (id.).

Another decision dealt with "private weekend meetings" characterized as political caucuses, and were also found to be meetings subject to the Open Meetings Law (In Re Cooper, Sup. Ct., Westchester County, NYLJ, June 8, 1981). A third decision indicates that the exemption for political caucuses applies only to gatherings conducted for "purely political" matters and that a gathering of the members of a county legislature for the purpose of discussing public business was a "meeting" subject to the Open Meetings Law (Orange County Publications v. County of Orange, Sup. Ct., Orange Cty., July 30, 1981). A similar holding was reached in Oneonta Star v. County of Schoharie (Supreme Ct., Albany Cty., July 19, 1984). In the remaining decision, which involved the majority of the membership of the Troy City Council, the Court found that:

> "...the Respondents aver that prior to regular and special meetings of the Troy City Council the Democratic Majority meet with invited staff people to discuss legislation that is or may be on the Council agenda. The purpose of these discussions is to determine if the proposed legislation is consistent with the programs, goals and ideals of the Democratic Party and the impact and feed-back from constituents. The meetings are called by the Mayor, usually by a phone call to each member of the caucus. They (participating members of the Council) claim the meetings are not official ones and no vote is taken."

Nevertheless, in conclusion, the Court stated that:

> "[I]t is determined that the closed sessions or meetings of the Council's Democratic Majority constitutes meetings within the scope of the Open Meetings Law. A majority of the seven-member council constitutes a quorum. (Art. 2 Legislative Branch, City Council Local Law No. 31959 - Charter City of Troy), and it is undisputed that a quorum was present at the closed meeting. No formal decision was made at the closed meeting, no record was kept of the proceedings, however, proposed legislation was discussed and a fair inference may be drawn that such discussions affected future legislation. The holding of these preliminary meetings by the City Councils of this State have been historical and recognized as a valid exercise of political party representation in respect to matters to be considered by the Council as a whole. The State Legislature has now caused a discontinuance of this prearranged scheduling and predetermination of proposed legislation by enactment of the Open Meetings Law and the respondents closed meeting is a violation of that section of this law. (Public Officers Law Section 98). Further it is determined that such a meeting does not qualify as an exception under Public Officers Law Section 103" (Bulmer, Matter of v. Anthony, Sup. Ct., Rensselaer Cty., April 10, 1981).

There is no decision of which I am aware in which a conclusion different from those expressed in the cases cited in the preceding paragraphs was reached.

In sum, based upon judicial interpretations of the Open Meetings Law, it would appear that conferences or caucuses conducted by a majority of the members of either house of the Legislature for the purpose of conducting public business would constitute meetings subject to the Open Meetings Law. However, to the extent that political party business is discussed during the conferences or caucuses, such gatherings would in my view fall 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

cc: Hon. Warren Anderson
Hon. Stanley Fink

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1159

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

April 18, 1985

Ms. Ann Wolfe
Town Clerk
Town of Ogden
409 S. Union Street
Spencerport, NY 14559

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. Wolfe:

I have received your letter of April 2 and appreciate your kind comments.

You have requested an opinion regarding a requirement that you, as Town Clerk, must attend "work sessions" held by 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, §102(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, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. 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, §106(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, 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 it is clear that there will be no motions, proposals, resolutions or votes taken, 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 the 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3906
OML-AO-1160

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

April 22, 1985

Mr. Richard C. Cahn
Cahn, Wishod, Wishod & Lamb
534 Broadhollow Road-CB 179
Melville, New York 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 Mr. Cahn:

I have received your letter of April 4, which is addressed to Mr. Gilbert Smith.

Please note that Ms. Barbara Shack is currently the Committee Chair. In addition, although you referred to a conversation with Mr. Smith, the conversation to which you referred was with me. As indicated above, the staff of the Committee is authorized to advise.

Your letter was precipitated by an advisory opinion written at the request of Ms. Sondra Bachety, a member of the Suffolk County Legislature. Her question involves rights of access to minutes of meetings of the Board of Suffolk County Vanderbilt Museum. In response, I expressed the view that the records are subject to rights granted by the Freedom of Information Law, and that minutes would have to be prepared and made available under the Open Meetings Law. Upon your receipt of a copy of the opinion, you contacted me to express "dismay" with respect to the opinion. You suggested that significant facts were not available to me when I prepared the opinion and that a judicial determination to be sent to me would likely alter my opinion. You also asked that I "recall" the opinion and you wrote in your letter of April 4 that I called Ms. Bachety to advise her that she should not rely upon the letter pending review of your materials. I did not "recall" the opinion, but I did contact Ms. Bachety as you requested for the purpose of informing her of your disagreement as well as your offer to send additional materials for review.

Based upon our conversation, you led me to believe that a determination had been made of which I was unaware involving the Suffolk County Vanderbilt Museum. The materials that you sent included copies of proposed stipulation of settlement as well as a judgment based upon that stipulation. In this regard, it is noted that the Office of Suffolk County Attorney forwarded the same materials to me in an effort to assist in responding to the inquiry from Ms. Bachety. Further, having reviewed those materials again, I do not believe that the opinion written on March 26 should be altered.

Unless I am mistaken, the stipulation of settlement and the ensuing order continue to indicate that the Commission was created by the Suffolk County Legislature, that Suffolk County continues to be "the sole and exclusive owner of the real and personal property, tangible and intenagible, of the Vanderbilt Museum and Planeteriaum including principal and income of any trust fund or trust funds heretofore or herafter to be maintained", and that the Suffolk County Legislature continues to appoint the members of the Board of Trustees of the Commission. If those facts are present, I must reiterate my opinion that the Commission is an "agency" subject to the Freedom of Information Law. As you are aware, §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 initial clause of the language quoted above refers to a "municipal...commmission". Once again, if the members of the Commission are appointed by the Suffolk County Legislature, I believe that the Commission would be an "agency". Further, the language of the definition refers to a governmental entity, such as an entity created by the governing body of the County, performing a governmental or "proprietary function" for one or more municipalities. In this instance, it would appear that the Suffolk County Vanderbilt Museum performs what might be characterized as a proprietary function for a municipality, Suffolk County. If my contentions are accurate, once again, I believe that the records of the Commission would be subject to the Freedom of Information Law.

Further, reference was made in the letter of March 26 sent to Ms. Bachety to Burgher v. Purcell [87 AD 2d 888 (1982)]. In that case, Nassau County was given property by means of a bequest, and the Board of Supervisors of the County was authorized to designate trustees responsible for carrying out the terms of the will. In Burgher, it was found by the Appellate Division that the Trustees constituted a "public body" required to comply with the Open Meetings Law. I believe that the situation of the Suffolk County Vanderbilt Museum is sufficiently similar to that described in Burgher that a like finding would be reached. Moreover, if the Commission is a "public body", it would be required to prepare and make available minutes of its meetings [see Open Meetings Law, §106].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sondra Bachety
Martin Ashare
Gregory Hensas

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1161

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

April 26, 1985

Mr. George Bingham
[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. Bingham:

I have received your letter of April 9 in which you requested an advisory opinion.

According to your letter, the Town of Burlington held a special meeting on April 1 for which notice was posted at the Town Clerk's Office and at the Town Hall. You explained that the Town Hall sits well back from the road and that the notice would not be seen unless an individual was entering the building. You asked whether the meeting was properly convened under these circumstances. In addition, you asked whether "it is legal for an individual to pay the town's legal fees, (in advance yet) to benefit that individual's cause?"

In this regard, I offer the following comments.

First, §104 of the Open Meetings Law requires that notice be given prior to all meetings of a public body. Generally, a meeting can be defined as the convening of a quorum of a public body for the purpose of discussing public business, regardless of whether the public body intends to take action. Notice of the time and place of a meeting scheduled at least one week in advance must be given to the news media and must be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting. For other meetings, notice must be given as required above, to the extent practicable. Section 104(3) of the Law provides that the notice shall not be construed to require publication as a legal notice.

Second, while the Law requires that the news media be notified, I point out that there is no requirement that the notice be published in a newspaper or announced over the radio. The obligation of a public body to notify the news media is fulfilled, in my view, when the news media are notified of the meeting.

In addition, the public body is required to designate one or more public locations for the purpose of posting notice of its meetings. In my opinion, any reasonable public location, such as a town hall or a town clerk's office, would be a satisfactory location for posting notices. In my view, it would be difficult to designate a location where all the residents of a town would be able to see a notice of a meeting.

Finally, I am unable to comment with respect to the legality of the matter of an individual paying the Town's legal fees. The circumstances of this situation are unclear to me and, in any event, would not fall within the authority of the Committee, which is limited to advising regarding 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1162

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

April 30, 1985

Ms. Frances M. Battistoni
President
Lansingburgh Teachers
Association
320 Seventh Avenue
Troy, NY 12182

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. Battistoni:

I have received your letters of April 10 and April 17, both of which concern the implementation of the Open Meetings Law by the Board of Education of the Lansingburgh School District.

Attached to the first letter is a "workshop agenda" pertaining to a gathering held on April 9. You wrote that the Board entered into an executive session to discuss items numbered 1,3 and 4, which are identified on the agenda, without more, as "Week in Review", "Personnel Item" and "Budget." Attached to the second letter is a workshop agenda dated April 16. The first three items on that agenda are listed as follows

> "1. Personnel Item - Mr. Swanick and Mr. Osterman will be present (Executive Session)
>
> 2. Budget (Executive Session)
>
> 3. Retirement Incentive (Executive Session)"

You added that no agenda was available to you prior to the April 16 workshop until that evening.

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

First, it is noted that there is in my view no distinction between a "work session" or "workshop" 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, §102(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 School Board was present at the workshop, I believe that it was a meeting subject to the Open Meetings Law in all respects.

Second, 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 §105(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.

I point out, too, that the phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded [see §102(3)]. Moreover, §105(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 is 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 by carried by a majority of a public body.

Third, it appears that the executive sessions were held to discuss issues involving personnel. With regard to personnel matters, §105(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 §105(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 §105(1)(f) should make reference to the fact that the issue concerns a "particular person", and that it involves a topic or topics dexcribed 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.

Assuming that discussions of the budget involved the addition or elimination of positions in a move to cut departmental costs or discussions involving 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".

In short, it is unlikely in my view that a discussion of the budget could properly have been held during an executive session.

Similarly, a discussion of the "week in review" or "retirement incentive" would not, as they are characterized on the agenda, constitute proper subjects for consideration in an executive session. If the discussion concerning retirement incentive involved issues of policy or the financial impact upon the District, once again, it does not appear that any ground for entry into an executive session would have applied. On the other hand, if the discussion focused upon a "particular person" in conjunction with the topics listed in §105(1)(f), to that extent, an executive session would in my opinion have been proper.

Lastly, §104 of the Open Meetings Law requires that a public body provide notice of the time and place of each meeting. Nevertheless, there is nothing in the Open Meetings Law that requires the preparation of an agenda.

In an effort to enhance compliance with the Open Meetings Law, copies of this opinion and the Open Meetings Law will be sent to the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3913
OML-AO-1163

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

April 30, 1985

Mr. Charles J. Tiano
[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:

I have received your letter of April 15, in which you lodged a "protest" concerning notice of a meeting held by the Woodstock Town Board. In addition, you sought clarification regarding the adequacy of motions for entry into executive sessions and rights of access to records.

Specifically, in your initial area of inquiry, you wrote that motions to enter into executive sessions often refer to "code words", such as "personnel" and "litigation". You have asked how much information should be included in a motion in order to comply with the Open Meetings Law.

First, as you are aware, §105(1) of the Open Meetings Law prescribes a procedure that must be accomplished by a public body during an open meeting before it may enter into an executive session. 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..."

Second, 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 executive session.

With respect to litigation, §105(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, §105(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 §105(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 §105(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.

The remaining area of inquiry concerns rights of access to letters addressed to the Town Board.

Here I point out that the Freedom of Information Law is applicable to records of an agency, such as a town,, and that §86(4) of the Law defines "record" to include:

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

Based upon the language quoted above, I believe that letters maintained by the Town Board are "records" subject to rights 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law. Therefore, as a general matter, the correspondence between the public and Town would in my view be accessible under the Freedom of Information Law. However, the nature and content of the correspondence also have an impact upon rights of access and the capacity to withhold records. For instance, if a complaint is sent to the Town Board, it is possible that identifying details may be deleted on the ground that disclosure would constitute an "unwarranted invasion of personal privacy" prior to release of the remainder of the document [see Freedom of Information Law, §87(2)(b)].

In short, while letters are subject to rights of access, their specific contents must be reviewed by the agency to determine the extent, if any, to which one or more of the grounds for denial may appropriately be asserted.

I hope that 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 Woodstock

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3419
OML-AO-1164

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

May 1, 1985

Ms. Rosemary O'Hara
Albany Times Union
6 Milton Avenue
Ballston Spa, NY 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 Ms. O'Hara:

I have received your letter of April 15 in which you requested an advisory opinion concerning "the application of the Freedom of Information and Open Meetings Laws to the Saratoga Economic Development Corporation (SEDC)."

According to your letter and the enclosed copy of its certificate of incorporation, the SEDC is a local development corporation pursuant to §1411 of the Not-for-Profit Corporation Law. You indicated that the County Board of Supervisors in 1978 adopted a resolution "approving the concept of forming a not-for-profit corporation in Saratoga County to promote industry", and authorizing an appropriation of $40,000 to the SEDC. In addition, according to your letter, the SEDC "is described as the 'sales arm' of the county" and "its staff work closely with the Saratoga County Industrial Development Agency".

For the reasons discussed in the ensuing paragraphs, meetings of the SEDC 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 SEDC 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 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."

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 SEDC may be characterized as a "local development corporation". The cited provision describes the purposes of local development corporations and states in part 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 SEDC 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 partners with or extensions of government that carry out their duties in conjunction with government. In my opinion, the SEDC, as you have descirbed its relationships with government, 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 Newspapers 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 pwers 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 responsibile 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 SEDC and various entities of government, it is possible that similar reasoning might be applied with respect to the SEDC as was described in the decision cited above rendered by the Court of Appeals. If such a rationale is applicable, the SEDC would be subject to the requirements of the Freedom of Information Law.

Assuming that the SEDC is subject to the Freedom of Information Law, its records would be accessible to the same extent as any agency covered by the Law. If it is not subject to the Freedom of Information Law, its relationships with government would likely require the transmission of various SEDC records to agencies. Those records, once maintained by an agency, would in any case fall within the scope of rights of access.

Notwithstanding the lack of clarity regarding the status of the SEDC under the Freedom of Information Law, I believe that meetings of the Board of the SEDC 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 §102(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 cor-

> poration 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 a public corporation, in this instance, the County of Saratoga.

In conjunction with your questions, if it is assumed that the Board of the SEDC is subject to the Open Meetings Laws, I believe that it would be required to provide notice of its meetings pursuant to §104 of that statute. In brief §104 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. Meetings subject to the Open Meetings Law must be convened open to the public and remain open except to the extent that grounds for entry into an executive session may appropriately be asserted. It is noted, too, that §106 of the Open Meetings Law requires that minutes be prepared and made available 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: Saratoga Economic Development Corporation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1165

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

May 3, 1985

Mr. Andy Danzo
The Knickerbocker News
Box 15-627
Albany, New York 12212

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. Danzo:

I have received your letter of April 17 as well as a variety of materials attached to it. You have requested an advisory opinion "on the closure of meetings by Market Square Garden Inc."

Market Square Garden, Inc. (MSG) is a not-for-profit corporation created to own and operate a proposed Albany Civic Center. Although it has been advised that most not-for-profit corporations and the meetings of their boards fall outside the requirements of the Open Meetings Law, a review of the history that led to the creation of MSG may result in a finding that, despite its status as a not-for-profit corporation, its meetings should be subject to the requirements of the Open Meetings Law.

In brief, a series of studies, recommendations, statements by government officials and other materials indicates that the construction of the civic center is a substantial project of Albany County, rather than a "private" project initiated by citizens acting independently of government.

The concept of building a civic center has been discussed for several years and, based upon the materials that you forwarded, an initial major step toward its construction was taken by Albany County Executive, James Coyne, on December 5, 1983, when he announced his appoint-

ment of the membership of the Albany County Civic Center Review Commission. According to a news release issued by Coyne, the function of the Commission was "to review the matter, examine any and all feasible proposals, and make recommendations back to [him] on the matter prior to action by the County Legislature". While the news release refers to the Commission as a "citizens review panel", five of the nine members were current or future members of the Albany County Legislature. At the end of the release, Mr. Coyne stated that:

> "I am asking this commission to examine the concept of the civic center, to look at the viability and economic feasibility of any and all proposals, and to be especially concerned about the cost to the taxpayer. This last item is the most important one to me; we have to demonstrate that this facility can stand on its own or be a limited liability to the property taxpayers."

In terms of chronology, the next item that you forwarded is a memorandum dated December 14, 1983, sent to Civic Center Commission members by Larry Smith, Director of the County Planning Board. Throughout the memorandum, it appears that there was an assumption that the County would build and own a civic center. In terms of construction costs, Mr. Smith wrote that "Civic centers vary greatly in size, type, cost, and quality. It is, therefore, important to know exactly what the County is agreeing to buy". The memorandum raised a series of questions involving governmental concerns, including the nature and cost of construction, operating costs and revenues, environmental issues and "secondary benefits", such as additional new development, increased convention activity, extra sales tax revenue and the creation of construction jobs.

The next significant step appears to have been the production of the "Final Report and Recommendations to the County Executive" on March 30, 1984, by the Civic Center Commission. The recommendations were, according to a press release issued by Thomas J. Cairns, Chairman of the Commission, unanimously adopted. The report, which recommends "that the County vigorously pursue the construction of" a civic center in a specific location in the City of Albany, also stated that:

> "It is the sense of the Commission that the County should own THE CENTER. Day to day operations should be the responsibility of an experienced staff which reports to an operations manager. The County may optionally elect to create an oversight Authority/Board or to secure the services of a private management consultant firm to set policy and to provide guidance to the operations manager. The Commission cannot at this time recommend between these management alternatives as there are no standards and insufficient information upon which a specific recommendation for THE CENTER's operation could be made."

Later in the report, the issue of ownership was stressed:

> "The Commission has recommended County ownership of THE CENTER. Several of the proponents made offers of long term lease arrangements in lieu of outright purchase. The Commission finds the lease opinion undesirable..."

Once again, the thrust of the recommendations made by the Commission involved an intent that the construction of a civic center should be a county governmental project.

On August 15, 1984, the New York State Sportsplex Corporation, a subsidiary of the Urban Development Corporation, based in part upon a commissioned study performed by Peat Marwick Mitchell, recommended "to the Governor and the State Legislature that the State participate in the construction of a downtown Albany 14,000 seat civic center..."

The next development appears to have been a debate and decision to use Albany County Industrial Development Agency (IDA) bonds to finance the civic center. According to news articles published on November 26 and 27, 1984, in the Albany Knickerbocker News, the Times Union and the Schenectady Gazette, the County Executive decided to finance the civic center by means of IDA bonds, thereby avoiding

the necessity of a vote by the County Legislature, which requires a two-thirds majority vote with respect to bonding measures. Further, according to an article that you wrote involving comments by Edward T. Stack, County Comptroller, "The bonds would be repaid by the county either way, but IDA bonds would not require approval by the County Legislature, where Coyne is concerned about opposition to the project".

The functions of industrial development agencies are described in Article 18-A of the General Municipal Law. The Albany County IDA was created pursuant to §903 (b) of the General Municipal Law. State policy concerning industrial development agencies is described in §852 of the General Municipal Law, which provides in part that:

> "It is hereby declared to be the policy of this state to promote the economic welfare, recreation opportunities and prosperity of its inhabitants and to actively promote, attract, encourage and develop recreation, economically sound commerce and industry and economically sound projects...through governmental action for the purpose of preventing unemployment and economic deterioration by the creation of industrial development agencies which are hereby declared to be governmental agencies and instrumentalities and to grant to such industrial development agencies the rights and powers provided in this article...
>
> "It is hereby further declared to be the policy of this state to protect and promote the health of the inhabitants of this state and to increase trade through promoting the development of facilities to provide recreation for the citizens of the state and to attract tourists from other states."
>
> "The use of all such rights and powers is a public purpose essential to the public interest, and for which public funds may be expended."

The latest development is described in a news release issued by County Executive Coyne on January 9, 1985, in which he announced "the creation of a seven-member executive board to run Market Square Garden Inc., a not-for-profit corporation to be formed to direct planning for the proposed civic center in downtown Albany." The release also stated that:

> "Market Square Garden Inc. will own the proposed civic center and finance it through the issuance of tax-exempt industrial development bonds (IDBs) through the Albany County Industrial Development Agency. Market Square Garden Inc. will lease the civic center to Albany County.
>
> "'Basically, the financing is a cost-saving device,' Terry Burke, Bond Counsel to the Industrial Development Agency said. 'If you didn't have tax-exempt bonds, you'd have to finance conventionally at interest rates of prime rate or prime plus one or two percent. Interest rates today on IDBs are running 70 to 75 percent of the prime rate.'"

Further, according to materials that you wrote, Mr. Burke informed you that MSG was created as a not-for-profit corporation "because a private entity was needed to use IDA financing". Burke stated to you that "If an IDA were to build a public facility for a public entity then you couldn't have an industrial development bond".

At this juncture, the specific duties of MSG, based upon comments by Burke and Coyne, are not entirely clear. What is clear in my view, however, is that MSG was created to enable County government to initiate and perhaps complete the construction of a civic center that Albany County sought to own and construct. To reiterate a statement attributed to me appearing in an editorial in the Albany Times-Union on April 21, the MSG:

> "is something that was borne of the action of the county executive and other county officials.
>
> "They have done something which on the face of it looks as though it may be separate from government, but in reality it's a cre-

> ation of the county executive and apparently a vehicle under which the county carries out duties that (the county) would otherwise perform."

I continue to maintain that view, for the history of the civic center project merely amplifies what in my opinion is obvious, that the project is governmental in nature and that the public bears the ultimate burden of paying for the construction and maintenance of the civic center. Further, MSG will apparently be responsible for deciding how approximately $40 million of taxpayers' money will be spent.

The incident that precipitated your inquiry was the exclusion of the public from a meeting held by the board of MSG. The question, therefore, is whether the board of MSG is a "public body" subject to the Open Meetings Law.

As indicated earlier, it has been advised that most not-for-profit corporations fall outside the scope of the Open Meetings Law. While such corporations might carry out some public purpose, they generally do not perform a governmental function. On the other hand, it has been advised that particular boards, despite their not-for-profit status, are subject to the Open Meetings Law due to the performance of governmental functions. Those entities include the boards of volunteer fire companies [see Westchester News v. Kimball, 50 NY 2d 575 (1980)] and local development corporations [see Not-for-Profit Corporation Law, §1411(a)].

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

It appears that each of the conditions present in the definition is met by MSG.

First, the MSG is an "entity", whose members were apparently chosen by the County Executive, that was incorporated under the Not-for-Profit Corporation Law.

Second, according to a news release of January 9, the Board of Directors of MSG consists of seven members.

Third, pursuant to §608 of the Not-for-Profit Corporation Law, the Board of MSG can act only by means of a quorum.

Fourth, in my view, since MSG was created to carry out duties that would otherwise and were intended to be carried out by County government, I believe that it conducts public business. Further, §5 of the Certificate of Incorporation of MSG, entitled "Public Objective", states in part that:

> "The lawful public or quasi-public objective of the business purposes set forth in paragraph 4 of this Certificate of Incorporation is to promote the economic welfare, the recreational and cultural opportunities and the prosperity of the inhabitants of the County of Albany."

In view of the stated public objectives, its strong nexus with government and its role in constructing and operating a $40 million project financed entirely by taxpayer supported funding, I believe that the Board of MSG is involved in conducting public business.

Fifth, does MSG perform "a governmental function for the state or for an agency or department thereof, or for a public corporation..."? Is the construction of a civic center a governmental function? In this regard, there is precedent that indicates that a similar project initiated by a county constituted a governmental function.

In the 1960's, Erie County sought to build what is now known as Rich Stadium. Although the facts are not entirely consistent with those present here, in response to a challenge to the County's authority to build and lease the stadium, the Appellate Division in Murphy v. Erie County stated that:

> "[W]e are also constrained to reject appellants' argument, made along similar lines, that the project is an illegal joint venture between the county and a private corporation. The resolution does not authorize an undertaking between the county and Kenford for the purpose of carrying on a business with a sharing of profits and losses. Rather, the county, in the exercise of its governmental function, is to construct a stadium and lease it to Kenford for a total payment necessary to cover the costs of construction or, failing that, to hire experienced managers to promote the stadium so that the cost can be recovered" [34 AD 2d 295, 299 (1970), emphasis added].

That decision, which held that the construction of a stadium by the County is a "governmental function", was later affirmed by the Court of Appeals [28 NY 2d 80 (1971)]. In addition, Chapter 699 of the Laws of 1974, which amended Chapter 252 of the Laws of 1968, entitled "An Act relating to the construction and financing of a stadium by the county of Erie and authorizing, in aid of such financing, the leasing of such stadium and exemption from current fund requirements", states that:

> "a. The financing, construction, operation, leasing and use of a stadium and all purposes as authorized by this act are governmental and public purposes of the county of Erie.
>
> b. The purpose of this section is to confirm the intention of the legislature in section two of this act that all the purposes mentioned are and shall be deemed to be the public and governmental purposes of the county of Erie."

A view of both judicial and legislative pronouncements, I believe that the construction, operation and financing of a civic center by a county, like a stadium, involve the performance of a governmental function.

It might be contended that those functions carried out by MSG, a not-for-profit corporation, do not constitute a governmental function. Nevertheless, the series of events that led to the creation of the MSG, in my opinion, indicate that MSG exists solely for the purposes of enabling Albany County to carry out a public project and that its functions are and will be dependent solely upon legal relationships between MSG and one or more county agencies. Therefore, I believe that MSG will be enaged in performing a governmental function for one or more public corporations, including Albany County.

Based upon the preceding analysis, it is my view that all of the conditions precedent to a finding that MSG is a "public body" subject to the Open Meetings Law can be met.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James Coyne, County Executive
Thomas Cairns, Chairman, Market Square Garden, Inc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1166

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

May 13, 1985

Ms. Bette Smith
D.E.C.E.P.A.
P.O. Box 1233
Newburgh, NY 12550

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 April 17 in which you requested an advisory opinion.

According to the newspaper clipping attached to your letter, the Beacon Zoning Board of Appeals granted a second hearing on a variance "but after lengthy discussion and a brief executive session" approved a motion to deny the variance. You asked whether the executive session was legally conducted. In this regard, I offer the following comments.

First, according to the news article, the Board explained that it had no legal authority to grant the variance. When asked why the Board decided to hold the hearing if it knew beforehand that it could not issue the permit, the chairman stated "we've gotten some legal advice."

Although it is not clear from the article, it is possible that the Board was consulting with its attorney during the closed session to obtain legal opinion on the matter. If that was the case, the discussion between the Board and its attorney would have been exempt from the Open Meetings Law because such communications are privileged under the Civil Practice Law and Rules.

Second, if the Board was not seeking the legal advice of its attorney during the closed session, it would appear that no proper grounds existed for conducting an executive session to discuss the matter. However, the article does not provide sufficient information for determining the propriety of conducting the 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

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-1167

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

May 14, 1985

Mr. Joseph Spytko, Sr.
[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. Spytko:

I have received your letter of April 27 in which you requested assistance.

According to your letter, you would like to inform the Village of Richfield Springs Board of Trustees of its responsibilities under the Freedom of Information and Open Meetings Laws. In your letter of April 27 to the records access officer of Richfield Springs, you requested minutes of the Village Board's meetings of April 24 and 27, and also noted that, to your knowledge, notice of the meetings was not given. In addition, you want to know which members of a Village Board of Trustees have the authority to call a special meeting. In this regard, I offer the following comments.

First, with respect to the minutes of the Village Board's meetings, §106 of the Open Meetings Law requires that minutes of an open meeting be made available within two weeks of the meeting. Moreover, if an executive session was held during the meeting and minutes of the session were taken, such minutes are required to be made available within one week of the executive session.

Second, §104 of the Open Meetings Law requires that public notice be given prior to all meetings of a public body. If a meeting is scheduled at least one week in advance, notice must be given to the news media and be con-

spicuously posted in one or more designated public locations at least seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given, to the extent practicable, in the manner described above at a reasonable time prior to the meeting.

Third, with regard to special meetings, I know of no provision in the Village Law which pertains to special meetings or the authority to call special meetings. You may wish to contact an attorney with the Division of Legal Services in the Department of State to discuss this matter further. You may call (518) 474-6740 or write to the Division of Legal Services, NYS Department of State, 162 Washington Avenue, Albany, NY 12231.

Lastly, I have included three of our pamphlets, Your Right to know, which generally describes the scope of the Freedom of Information and Open Meetings Laws. You may wish to distribute the pamphlets to the Trustees of the Village Board and may request more pamphlets if you need 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

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-1168

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

May 14, 1985

Ms. Anita Leibowitz
North Shore News Group
1 Brooksite Drive
P.O. Box 805
Smithtown, NY 11787

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. Leibowitz:

I have received your letter of April 22 in which you requested an advisory opinion concerning practices of the Board of Education of the Commack School District.

In your first area of inquiry, you requested my comments concerning a proposed policy pertaining to the use of tape recorders at Board meetings. The proposed policy would, if adopted, state that:

> "1. Anyone who intends to use a recording device (audio-visual) at a public meeting of the Board will be required to file a written request with the District Clerk at least three (3) days prior to the public meeting.
>
> 2. At its discretion, the Board may designate certain areas of a meeting room for the use of such recording instruments.
>
> 3. The Board reserves the right to order the individual or individuals to cease recording if such recording devices disrupt the meeting."

I point out initially that the Open Meetings Law currently is silent with respect to the use of tape recorders or other audio-visual devices at meetings of public bodies. Legislation has been proposed on the subject; it has been passed by the Assembly and will likely soon come before the Senate. At this juncture there are several judicial decisions that have been rendered concerning the use of tape recorders. However, there are no decisions of which I am aware that pertain to the use of visual devices or cameras at 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, 344 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 when 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. The same outcome was reached recently in a decision rendered by Supreme County, Nassau County [see Mitchell v. Johnston, Supreme Court, Nassau County, April 6, 1984].

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 noted that an opinion of the Attorney General rendered on May 13, 1980 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."

Based upon the opinions cited above, it is questionable that a written request to use a tape recorder, for example, must be filed in advance of a meeting. From my perspective, if any person can use a portable, cassette recorder unobtrusively, there should be no requirement that prior notice be given.

The second area of inquiry deals directly with the implementation of the Open Meetings Law. Although Board meetings are scheduled for 8:30, you wrote that "the Board always meets in executive session about an hour before the meeting..." You added that "they always vote to meet in executive session on days other than the public meeting". For instance, minutes of meeting which are attached to your letter contain the following resolution:

> "RESOLVED that the Board of Education of the Commack Union Free School District hold a Special Meeting for the purpose of meeting in Executive Session to discuss, on the following dates:
>
> Wednesday May 8, 1985
> Tuesday May 14, 1985
>
> Proposed, pending or current litigations; and/or collective bargaining negotiations pursuant to Article 14 of the Civil Service Law; and/or the medical, financial, credit or employment history of any person or corpora-

> tion, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation; and/or the preparation, grading or administration of examinations; and/or the proposed acquisition, sale or leasing of real property; and/or matters concerning student records, COH, disciplinary proceedings, and other student and/or familial matters."

In this regard, it is emphasized that 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)].

Further, 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. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. 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..."

Based upon the language quoted above and the definition of "executive session", I do not believe that a public body can hold or schedule an executive session in advance of a meeting. As such, the gatherings conducted prior to regularly scheduled meetings of the Board are themselves "meetings" that should be convened upon to the public and preceded by notice given in accordance with §104 of the Open Meetings Law.

Further, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session fails to comply with the Law. For instance, in reviewing minutes that referred to various bases for entry into executive session, it was held that:

> "[T]he minutes of the March 26, 1981 meeting indicate that the Board voted on two separate occasions to enter executive session to discuss 'personnel' and 'negotiations' without further amplification. On May 28, 1981, the Board again entered into executive session on two occasions. The reasons given for doing so were to discuss a 'legal problem' concerning the gymnasium floor replacement and for 'personnel items'. Again, on June 11, 1981, the Board voted to enter executive session of 'personnel matters'.
>
> "We believe that merely identifying the general areas of the subjects to be considered in executive session as 'personnel', 'negotiations', or 'legal problems' without more is insufficient to comply with Public Officers Law §100[1].
>
> "With respect to 'personnel', Public Officers Law §100[1][f] permits a public body to conduct an executive session concerning certain matters regarding a 'particular person'. The Committee on Public Access to Records has stated that this exception to the open meetings law is intended to protect personal privacy rather than shield matters of policy under the guise of privacy... Therefore, it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person. When entering into executive session to discuss

> personnel matters of a particular individual, the Board should not be required to reveal the identity of the person but should make it clear that the reason for the executive session is because their discussion involves a 'particular' person...
>
> "Concerning 'negotiations', Public Officers Law §100[1][e] permits a public body to enter executive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle v. Board of Education, Sup. Ct., Chemung Cty., Oct. 20, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

In another case in which a ground for executive session was quoted from the Law, the Court stated that:

> "...any motion to go into executive session must 'identify the general area' to be considered. It is insufficient to merely regurgitate the statutory language; to wit, discussions regarding proposed, pending or current litigation.' This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity, the pending, proposed or current litigation to be discussed during the executive session. Only through such an identification will the purposes of the Open Meetings Law be realized. Democracy, like a precious jewel, shines most brilliantly in the

> light of an open government. The Open Meetings Law seeks to preserve this light " [emphasis added by court; Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981)].

In sum, I believe that the "executive sessions" held prior to meetings should be preceded by notice and convened open to the public, that executive session cannot be scheduled in advance of meetings and that the motions for entry into executive sessions are inadequate.

I hope that 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-1169

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

May 14, 1985

Mr. Martin A. Hollander
Citizens Committee For
Civic Action
P.O. Box 10048
Westbury, NY 11590

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. Hollander:

I have received your mailgram of May 1 in which you asked that I "investigate" your allegation that the Open Meetings Law has been violated.

Specifically, you wrote that you have been informed that:

> "the Department of Environmental Conservation is holding private, by invitation only meetings on its proposed resource recovery plant regulations. Only officials of municipalities and private corporations are being informed of these sessions. There has been no word about the meetings given to the general public."

You expressed the belief that the gatherings in question are being held in violation of the Open Meetings Law.

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

First, it is noted that the Open Meetings Law is applicable to meetings of public bodies and that the phrase "public body" is defined by the Law [§102(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."

Therefore, as a general matter, the Open Meetings Law applies to entities consisting of at least two members that carry out a duty collectively, as a body. Under the circumstances, it does not appear that the gatherings in question are being conducted by any "entity" analogous to a board, commission or council, for example. Further, a "meeting" subject to the Open Meetings Law concerns gatherings of public bodies which conduct business and deliberate, as a body. As I understand the scope of the gatherings in question, they are hearings held for the purpose of eliciting the views of representatives of government, the public and industry. If my assumptions are accurate, the Open Meetings Law would not be applicable to the gatherings in question, for they are hearings, rather than meetings of a public body.

Second, on your behalf, I have contacted a representative of the Department of Environmental Conservation. I was informed that, during the course of the hearings, thousands of notices have been or will be sent to members of the public. Moreover, news releases have been distributed by the Department which indicate that the public may attend and speak at the hearings.

If you would like additional information regarding the hearings, it is suggested that you may contact Mr. John Moore at the Department of Environmental Conservation at (518) 457-5400.

I hope that 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 - 1170

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 14, 1985

Mr. Peter La Grasse
[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, unless otherwise indicated.

Dear Mr. La Grasse:

I have received your thoughtful letter of April 23, which pertains to the status of a board of assessors under the Open Meetings Law.

Your letter contains a detailed description of the duties of a board of assessors which, among other areas, visits parcels of real property in order to arrive at preliminary assessed valuations and carries out a variety of administrative functions. The question raised involves the application of the Open Meetings Law to meetings of assessors held to engage in those administrative functions.

By way of background, on your behalf, I contacted the office of counsel at the Division of Equalization and Assessment. As you suggested, I was informed that a board of assessors consisting of three members performs the same duties as a single assessor in other municipalities. I was also told that there are now relatively few municipalities that maintain boards of assessors; since the early 1970's, most have opted to use a sole assessor.

In terms of the Open Meetings Law, as you may be aware, the definition of "meeting" has been construed broadly by the courts 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)]. Further, §104 of the Law requires that each meeting be preceded by notice.

Although I agree with your contention that it may be illogical to require that a board of assessors comply with the Open Meetings Law, it would appear, based upon the terms of the Law and its judicial interpretation, that the types of gatherings described in your letter are "meetings" subject to the Open Meetings Law. While you suggested that the functions of the Board are "quasi-judicial" and, therefore, outside the scope of the Open Meetings Law, I believe that the functions of the board are administrative. Having discussed these issues with Counsel to the Division of Equalization and Assessment, we are in agreement, notwithstanding what may be considered an unreasonable result.

Since I could not advise in good faith that the gatherings described in your letter are not "meetings", and since I concur that the Open Meetings Law should not apply to those gatherings, I have contacted the Office of Counsel to the Governor for the purpose of suggesting legislation that would clearly exempt boards of assessors from the Open Meetings Law.

As you requested, the legislation introduced to enhance the enforcement of the Open Meetings Law in A.5856, a copy of which is enclosed.

I hope that 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-1171

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

May 23, 1985

Mr. Timothy D. Bunn
Managing Editor
The Herald Journal
Clinton Square
P.O. Box 4915
Syracuse, NY 13221-4915

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. Bunn:

As you are aware, I have received your letter of May 16, as well as the correspondence attached to it. You have requested an advisory opinion regarding the "state Board of Regents' policy of scheduling executive sessions a month in advance".

In terms of background, a review of the correspondence indicates that on March 18, you wrote to then Chancellor Genrich concerning the Board's implementation of the Open Meetings Law. In his response of March 21, Chancellor Genrich wrote that:

> "It is a fact that the Board typically schedules, and usually conducts an executive session during the regular two day meeting of the Board. Such executive sessions are conducted strictly in accordance with the provisions of Public Officers Law §105..."

Approximately a month later, you wrote to the new Chancellor, Martin C. Barell, for the purpose of raising the issue again. In that letter you wrote that:

> "I am led to believe now that the board, at the end of any given monthly meeting, votes in open session to begin the following month's meeting with an executive session. I am unclear as to whether the purpose for the executive session is stated at that time. But nevertheless, it strikes me that, if this procedure is in fact followed, it violates the spirit, if not the letter, of the state open meetings law. The spirit of the law, it seems to me, suggests that public bodies conduct all business in public and go into executive session only as a last resort as immediate business dictates. To plan a month ahead of time for a closed meeting seems to run counter to the notion of government in the sunshine."

Chancellor Barell responded on April 26 and explained the Board's procedure, writing that:

> "...it is the practice of the Board to adopt a resolution scheduling an executive session of the Board on a designated date and at a specified time during the next ensuing meeting of the Board. The reason for that practice is that the activities of the Board during each of its two day monthly meetings are carefully scheduled, and involve (open) meetings of the Board's standing committees, open meetings of the full Board, a brief executive session and other activities. In order for that schedule to be prepared and distributed to the media in advance of each meeting, it is of course essential that the complete schedule, including any executive session which is to be conducted, be set in place in advance of each monthly meeting."

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

First, it is emphasized that the courts have interpreted the term "meeting" expansively to include any gathering 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, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear in my view that an executive session is a portion of an open meeting and that it must be preceded by the convening of an open meeting.

It is noted, too, that §105(1) prescribes a procedure that must be accomplished by a public body, during an open meeting, before it may enter into an executive session. The cited provision states in relevant part that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Attached to your letter is what appears to be a portion of an agenda. At the top of the page a notation appears for an executive session to be held at 8:30 a.m. There is no indication of the subject matter to be discussed. Without knowledge of what may have transpired at the previous meeting, which may have included an indication of topics to be considered during the upcoming executive session, it cannot be known on the basis of the agenda which topics would indeed be considered during the executive session. Consequently, it is unknown on the basis of the materials that you sent whether executive sessions dealt with appropriate subject matter.

With respect to your specific question, it has been consistently advised that a public body cannot schedule an executive session in advance of a meeting, because a vote to enter into an executive session must in my view be taken at the meeting during which the executive session is held. When a similar situation was described to a court, it was held that:

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law §100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certaim enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981].

The court also stated that:

> "...where there is a large amount of business to come before a meeting it is necessary for the orderly disposition of that business to have an agenda and to schedule the manner in which the matters are to be taken up. If it is known to the person who makes up the agenda that, for instance, personnel problems with respect to an individual employee or as to negotiations with respect to a collective

> bargaining agreement which are valid subjects for discussion in executive session must be dealt with, it would seem practical and proper to indicate the necessity of discussing and voting on the holding of an executive session in regard to those subjects on the agenda itself. It would be proper to indicate that taking such a vote would be considered at the meeting. This would be in keeping with the spirit of the statute in providing advance notice of what it likely to be considered and voted on at a meeting" [id.].

Perhaps a better practice would involve that suggested by the court, i.e., that an agenda include reference to topics that might be considered during an executive session, and that any discussion in executive session would be preceded by a motion introduced at the meeting during which the discussion occurs.

Lastly, both former Chancellor Genrich and Chancellor Barell stressed that the subjects that have been considered by the Board of Regents in executive sessions have been appropriate subjects for consideration behind closed doors. While that may be so, the nature of motions made to enter into executive session was not described in the materials that you forwarded. Here I would like to point out that a motion to enter into an executive session that merely reiterates one of the statutory grounds for executive session is, according to judicial determinations, insufficient.

For example, 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..."

It has been held that a motion to enter into an executive session relative to the provisions 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 §105(1)(f) [see Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983 and Doolittle, Matter of v. Board of Education, supra]. 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 be appropriate; a motion to discuss "personnel" or "personnel matters" without more would not.

Similarly, since the Chancellor referred to discussions of matters involving litigation, I point out that 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 §105(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 Jefferson County Mall v. Town Board of Town of Yorktown, 84 AD 2d 612, appeal dismissed, 54 NY 2d 957 (1981); Weatherwax v. Town of Stony Point, 97 AD 2d 840 (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 a motion that merely "regurgitates" the statutory language of §105(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.

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

Sincerely,

Robert J. Freemna
Executive Director

RJF:jm

cc: Chancellor Martin C. Barell

FOIL-AO-3250
OML-AO-1172

COMMITTEE ON OPEN GOVERNMENT

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

May 28, 1985

Ms. Bette German-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. German-Smith:

I have received your recent note, as well as the correspondence attached to it.

Your comments appear on an article that was published approximately a year ago in the Newburgh Evening News. The article contains a statement by the Town Supervisor of the Town of Newburgh to the effect that the Town would experience significant economic growth in the foreseeable future. He also stated that "the Newburgh Town Board has formed a seven-member committee" which will seek to serve as liaison between the Town and commercial interests that may seek to operate businesses in the Town.

You have indicated that Town officials have not disclosed the identities of persons who serve on that Committee, which is characterized as the "Crossroads Committee". In addition, you asked whether the meetings of the "Crossroads Committee" should be conducted in accordance with the Open Meetings Law.

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

First, with respect to the identities of persons who serve on the Crossroads Committee, assuming that a record identifying the members exists, I believe that it would be accessible under the Freedom of Information Law.

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

Under the circumstances, I do not believe that any of the grounds for denial could justifiably be cited to withhold the names of those who serve on the Committee. Moreover, since the Committee was created by the Town Board, reference identifying those designated by the Town Board should, in my opinion, be included within minutes required to be prepared and made available pursuant to §106 of the Open Meetings Law.

Second, I believe that the "Crossroads Committee" is a "public body" subject to the Open Meetings Law. 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."

From my perspective, each of the conditions present in the definition of "public body" can be met by the Crossroads Committee.

The Committee is an entity that consists of more than two members. Based upon the description of its duties, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the Town of Newburgh. Further, even though a resolution or other act creating the Committee might not have referred to any quorum requirement, §41 of the General Construction Law has long required that any group of three or more persons or public officers charged with any public duty to be performed or exercised by them jointly, as a body, may do so only by means of a quorum. In addition, I point out that the definition of "public body" makes specific reference to committees and subcommittees, such as those created by a town board.

Assuming that the Crossroads Committee is indeed a "public body" required to comply with the Open Meetings Law, I believe that notice of the time and place of its meetings must be given prior to all meetings and that every meeting of the Committee must be convened open to the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Kirkpatrick, Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3252
OML-AO-1173

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

May 29, 1985

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 May 14 in which you requested an advisory opinion.

In your letter, you asked several questions regarding the Freedom of Information and Open Meetings Laws. In this regard, I offer the following comments.

First, many of your questions relate to the availability of records involving school district personnel. The relevant provisions of the Freedom of Information Law are §87(2)(b) or §89(2)(b) which permit an agency to withhold records or portions thereof when disclosure would result in an unwarranted invasion of personal privacy. Section 89(2)(b)(i) provides that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

Although the standard in the Freedom of Information Law regarding privacy is flexible and subject to a variety of interpretations, the courts have provided substantial guidance regarding the privacy of public employees. In brief, it has been found in various contexts that public employees enjoy a lesser degree of privacy than others, for it has been determined that public employees are required to be more accountable than others.

Further, the courts have held on several occasions that records which are relevant to the performance of a public employee's official duties are available, for disclosure in those instances 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, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980]. Conversely, if records or portions of records are irrelevant to the performance of one's official duties, it has been held that records or portions thereof could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977 and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

In my opinion, records which merely indicate the amount of sick time or personal leave taken by a public employee would be relevant to that employee's official duties. On the other hand, those portions of a record which explain why the time was taken, i.e., that nature of an illness or the reason for the use of personal leave, may properly be withheld based upon the privacy considerations discussed above. It is noted, however, that one court has held that disclosure of records indicating the number of sick time hours accumulated by particular city employees would constitute an unwarranted invasion of personal privacy [see Bahlman v. Brier, 462 NYS 2d 381 (1983)], while another court reach the opposite conclusion [Capital Newspapers v. Burns, Sup. Ct., Albany Cty., May 5, 1984, Supplemental decision, June 9, 1984].

With respect to records which indicate the total number of over-time hours worked, I believe that such records should be made available. Such records are relevant to the performance of a public employee's official duties and do not generally involve the personal details of the employee's life.

Likewise, I believe that the employment contract between the school district and the Superintendent of Schools should be available under the Freedom of Information Law. Such a record directly relates to the Superintendent's responsibilities and compensation for official duties performed on behalf of the district.

Second, you asked about the availability of "records from a physician advising custodians of an infectious disease and advice for innoculation". A number of circumstances affect a determination of the availability of such records. The purpose of preparing the letter, the type of information and advice included therein, and the location where the records are maintained are factors affecting their availability. Without such details, I am unable to advise with respect to access to those records under the Freedom of Information Law.

Third, with respect to injury reports prepared for a school district on a particular day, again, I believe that various factors affect the availability of such records. The identity of the injured individuals, the nature of the injury and the purpose of preparing such a report are a few of the details which must be considered before such records are disclosed or withheld. Beyond the question of whether disclosure would result in an unwarranted invasion of personal privacy under §87(2)(b) of the Law, the federal Family Educational Rights and Privacy Act may further limit the availability of an injury report. The federal Act limits disclosure of records maintained by an educational agency and related to a student where such records contain information which would make the student's identity easily traceable (see 20 USC §1232g). Thus, the availability of a record consisting of a daily report of injuries would depend on the extent of personal information contained in such record, and the persons to whom the reports pertain.

Fourth, in responding to a request for the records described in the preceding paragraphs, a records access officer must, within five business days, grant access to the records or deny the request, in whole or in part, by explaining, in writing, the basis of the denial. If the records access officer cannot locate or review the records within five business days of receiving the request, he or she must, within those five business days, acknowledge receipt of the request in writing and state the approximate date when such request will be granted or denied [see §89(3) of the Freedom of Information Law].

With respect to disclosure of records which would constitute an unwarranted invasion of personal privacy, §89(2)(c) of the Freedom of Information Law provides that:

> "...disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:
>
> i. when identifying details are deleted..."

Thus, a records access officer should, if possible, delete the identifying features of a record and make it available, rather than deny the record in its entirety. In my view, such a deletion should be considered at the time the records access officer reviews a request for records.

Fifth, you asked several questions regarding school board's meetings in executive session. In this regard, I point out that an executive session, a meeting closed to the public, may only be conducted for the purpose of discussing one or more of the subject areas enumerated in §105(1) of the Open Meetings Law. For example, §105(1)(f) of the Law permits a public body to hold an executive session to discuss:

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

Based upon the language quoted above, I believe that a school board may properly conduct an executive session for the purpose of directing one of its employees to undergo a medical evaluation.

Furthermore, a school board may discuss the appointment of a particular person as "school medical inspector" or a "district assigned physician" in executive session for that subject matter also falls within §105(1)(f) quoted above. However, I point out that §1708(3) of the Education Law has been interpreted as generally prohibiting a school board from taking action during an executive session. Action may be taken during a closed session of a school board only when such is permitted or required by statute [see Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Thus, the school board must in my opinion vote on the appointment of the physician at an open meeting.

Sixth, with respect to the procedure for conducting an executive session, I note that such a session is part of an open meeting. Section 105(1) of the Open Meetings Law provides 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..."

Thus a school board may not properly hold an executive session before an open meeting. Rather the board must begin with an open meeting and vote to enter into executive session.

Moreover, the executive session may not be held without notice. Since an executive session takes place within an open meeting, and notice of an open meeting is required to be given under §104 of the Law, the executive session cannot be conducted separate from an open meeting. However, §104 does not require a public body to notify the public in advance of a meeting that it intends to conduct an executive session. For your information, I have included copies of the Freedom of Information and Open Meetings Laws and our pamphlet, "Your Right to Know", which generally describes the scope of those Laws.

Finally, you asked about the relationship between a records access officer for a school district and a Board of Education relative to a request for records. In my view, a records access officer may not only seek the advice of a board in responding to a request, but a board may go further and determine the nature of the response. Generally, a records access officer is designated by a school board, and as such, the responsibilities of an access officer may be defined by a board so long as they are in compliance with the Freedom of Information Law and the regulations promulgated thereunder.

I hope 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1174

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

June 11, 1985

Mr. Frank Fornario
Rockland County Legislature
Allison-Parris Office Building
New City, New York 10956

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. Fornario:

As you are aware, I have received your note of May 23, as well as the news articles attached to it.

Both articles pertain to "decisions" apparently made during a closed Democratic caucus conducted by members of the Rockland County Legislature. The decisions involve the office to be used by the county executive, related changes involving office space, and the creation of positions in the new office of the county executive. According to the Majority Leader, "The decision of the caucus... would guide the efforts of the transition team which was recently formed to insure a smooth transition from the legislative to county charter form of government".

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

First, it is emphasized that, in the period between the preparation of your inquiry and now there has been a change in the Open Meetings Law. In brief, the Open Meetings Law has always exempted political caucuses from its coverage [see Open Meetings Law, §108(2)]. However, in determining the scope of the exemption, it was held by several courts that the exemption concerning political caucuses applied only to discussions of political party business.

Concurrently, those decisions indicated that a gathering by the majority of the membership of a public body for the purpose of discussing public business constituted a "meeting" subject to the Open Meetings Law, even if the members present represented one political party [see e.g., Sciolino v. Ryan, 103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 AD 2d 475, 440 NYS 2d 795 (1981)]. In response to the case law, on May 31, legislation amending the Open Meetings Law became effective. The amendment expands upon the scope of what constitutes a political caucus. Specifically, §108 (2) was amended as follows:

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations..."

Therefore, as of the effective date of the amendment, a political caucus could be held in private, even if the discussion involves public business.

There remains an issue concerning caucuses described in the articles. In my opinion, even though those in attendance at the caucus in question might represent a majority of members of the County Legislature, and even though the actions may have been characterized as "decisions", I do not believe that binding decisions can be made during a political caucus. On the contrary, it is my view that a binding decision of a public body may be made only in the context of a "meeting" during which all the members of a public body have the capacity to be present. It is noted that a requirement that has existed for decades involves a "quorum". Although it is generally understood that a quorum is the majority of the total membership of a public body, additional requirements exist relative to the taking of action. Specifically, §41 of the General Construction Law states in relevant part that:

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

Based upon the language quoted above, I believe that action may be taken only at a meeting duly held upon notice to all the members of a public body. Therefore, while the action taken at the caucus might lead to a decision by a legislative body, I do not believe that the actions occurring at the caucus may be characterized as final decisions of the County Legislature.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1175

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

June 11, 1985

Mrs. Mary A. Lavoie
Town Clerk
Town of Dover
East Duncan Hill Road
R.D. 2, Box 132
Dover Plains, NY 12522

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. Lavoie:

I have received your letter of May 29 in which you described a series of events and asked whether they might represent violations of the Open Meetings Law.

According to your letter, the Town Board of the Town of Dover, which you serve as Town Clerk, regularly meets at 8 p.m. on the second Monday of each month. On May 13, the Board "got together" at 7 p.m. to discuss bids received and opened at a preceding meeting. Although all the Board members were present, you indicated that "the press and public had not been made aware of this 'get together'". Further, at approximately 7:20 a member of the public addressed the Board "about a soil mining operation". The discussion between the individual and the Board continued for some time and "the Supervisor signed a reclamation plan" for that individual. Later, the Board interviewed candidates for the position of dog control officer in the Supervisor's office and then decided which candidate would be appointed at the regular session.

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

First and perhaps most importantly, the term "meeting" has been construed broadly 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" subject to the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The decision cited above was precipitated by issues involving the status of "work sessions" and similar "informal" gatherings during which there may have been only an intent to discuss public business, but no intent to take action. The decision indicated that those types of gatherings should be considered "meetings" required to be held in accordance with the Open Meetings Law.

Second, every meeting of a public body must be preceded by notice of the time and place of the meeting. Section 104 of the Law requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations prior to every meeting. Consequently, if it was intended that the meeting begin at 7 p.m., I believe that notice to that effect should have been given to the news media and to the public by means of posting prior to the meeting.

Third, as you are likely aware, §105(1) of the Law specifies the topics that may properly be discussed during an executive session. One of the issues considered by the Board could likely have been discussed during an executive session. Section 105(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, the Board's interviews and discussions relative to candidates for the position of dog control officer could have been conducted during an executive session. Nevertheless, the Law requires that a procedure be accomplished during an open meeting before a public body may enter into an executive session. Specifically, the introductory language of §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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Therefore, prior to entry into executive session, a motion to do so must be made and carried during an open meeting. Further, the motion must indicate in general terms the subject to be considered during an executive session. On the basis of your letter, it does not appear that the Board complied with the Law by taking the procedural steps described in §105(1).

I hope that 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-1176

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

June 12, 1985

Ms. Irene Koch
Evening Observer
[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. Koch:

I have received your letter of June 4, which pertains to executive sessions held by the Board of Education of the Gowanda School District.

You included in your letter reference to meetings held on particular dates by the Board and quoted from the minutes the stated grounds for entry into executive sessions. You have asked that I review those grounds for entry into executive session to advise whether "the board is required to be more specific about the nature of its closed sessions".

In this regard, having reviewed the stated bases for entry into executive sessions, it appears that three of the grounds listed in §105(1) of the Law have been cited frequently by the Board.

One of the grounds is §105(1)(d) which permits a public body to enter into an executive session to engage in:

> "discussions regarding proposed, pending or current litigation..."

In some instances, the stated basis for entry into executive session concerned "legal matters". In another, a specific lawsuit was cited. Here I point out that it has been held judicially that the purpose of §105(1)(d) is to enable a public body to discuss its litigation strategy privately, so as not to bare that strategy to its adversary [Concerned Citizens to Review the Jefferson Mall, Matter of v. Town Board of the Town of Yorktown, 84 AD 2d 612, appeal dismissed 54 NY 2d 957 (1981) and Weatherwax v. Town of Stony Point, 97 AD 2d 840 (1983)]. Consequently, if, for example, there is a possibility of litigation, but the Board's litigation strategy is not the subject of discussion, §105(1)(d) could not likely be invoked as a basis for entry into an executive session. Further, "legal matters" would not in my opinion sufficiently identify the subject to be discussed in the Board's motion for entry into an executive session.

In a decision that dealt specifically with the "litigation" exception for executive session, it was held that:

> "...any motion to go into executive session must 'identify the general area' to be considered. It is insufficient to merely regurgitate the statutory language; to wit, discussions regarding proposed, pending or current litigation. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity, the pending, proposed or current litigation to be discussed during the executive session. Only through such an identification will the purposes of the Open Meetings Law be realized" [emphasis added by court; Daily Gazette Co., Inc. v. Town Board, Town of Cobbleskill, 444 NYS 2d 44, 46 (1981)].

A second ground for executive session often cited concerns contract negotiations. The provision for entry into an executive session that generally permits a public body to discuss contract negotiations behind closed doors is §105(1)(e). The cited provision permits a public body to enter into an executive session to discuss:

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

The provision quoted above refers to collective bargaining negotiations conducted under the Taylor Law between a public employer and public employee union. One of the items listed among the executive sessions pertains to a discussion of "administrators contract negotiations". If, for instance, administrators are not members of a public employee union, §105(1)(e) could not in my opinion be cited to engage in that type of discussion. However, if the discussion focused upon the performance of individual administrators and whether or not they merit increases in pay, a different ground for executive session might be applicable. On the other hand, if the discussion involved negotiations with the teachers' union, §105(1)(e) would be applicable.

With respect to the specificity of a motion to enter into an executive session to discuss negotiations, it has been held that:

> "Concerning 'negotiations', Public Officers Law §100[1][e] permits a public body to enter executive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle v. Board of Education, Sup. Ct., Chemung Cty., Oct. 20, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

The third apparent basis for entry into an executive session to which you referred concerns discussions of "personnel matters". Section 105(1)(f), the so-called "personnel" exception for executive session, permits a public body to engage in an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employ-

> ment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

It is emphasized that the language quoted above pertains to discussions that focus upon a "particular person" in relation to one or more of the topics described in that provision. As a consequence, a discussion of policy relative to personnel generally would not in my opinion qualify for discussion in executive session under §105(1)(f). Contrarily, if a discussion involves the performance of a particular employee or hiring a particular prospective employee, §105(1)(f) could likely be cited with justification as a basis for entry into an executive session.

With regard to specificity required in a motion to enter into an executive session to discuss "personnel", I do not believe that citing the subject as "personnel" would comply with the Law, for it has been held that:

> "With respect to 'personnel', Public Officers Law §100[1][f] permits a public body to conduct an executive session concerning certain matters regarding a 'particular person'. The Committee on Public Access to Records has stated that this exception to the open meetings law is intended to protect personal privacy rather than shield matters of policy under the guise of privacy... Therefore, it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person. When entering into executive session to discuss personnel matters of a particular individual, the Board should not be required to reveal the identity of the person but should make it clear that the reason for the executive session is because their discussion involves a 'particular' person..." [Doolittle v. Board of Education, supra and see also Becker v. Town of Roxbury, supra].

Based upon the decisions cited above, I believe that a motion to enter into an executive session pursuant to §105(1)(f) should contain two components. In my opinion, the motion 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 §105(1)(f). 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 be appropriate; a motion to discuss "personnel matters" without more would not in my view be sufficient.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be sent to the Board of Education of the Gowanda School District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1177

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

June 12, 1985

Mr. Henry P. York
Conserned Citizens of North Babylon
[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. York:

I have received your letter of June 4 in which you requested an advisory opinion. Your inquiry concerns the use of tape recorders "at open public meetings".

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 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 in 1980 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 believe that a member of the public 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

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1178

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

June 21, 1985

Mr. Robert W. Krepps
Councilman
Box 456
Machias, NY 14101

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 Krepps:

I have received your letter of June 18. Enclosed, as requested, is a copy of "Your Right to Know", which pertains to both the Freedom of Information and Open Meetings Laws.

In addition, you asked who may attend a "closed door meeting" and whether the Town supervisor may "close such a meeting without the consent of the Town Board and without prior notice to the public".

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

First, the provisions concerning executive sessions are found in §105 of the Open Meetings Law. With respect to those who may attend an executive session, §105(2) 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."

Second, 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, an executive session in my opinion is not separate from an open meeting, but rather is a part of an open meeting.

Further, the introductory language of §105(1) prescribes a procedure that must be followed by a public body during an open meeting before an executive session may be held. 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, I do not believe that a town supervisor or any other single member of a town board may require that an executive session be held. On the contrary, I believe that an executive session may be held only in conjunction with a motion carried by a majority vote of the total membership of the Town Board.

Third, a public body cannot enter into an executive session to discuss the subject of its choice. Paragraphs (a) through (h) of §105(1) specify and limit the topics that may properly be considered during an executive session. Those topics are listed in "Your Right to Know".

Lastly, as indicated earlier, a public body must convene an open meeting prior to entry into an executive session. Here I point out that every meeting must be preceded by notice given to the public by means of posting and to the news media prior to all meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3773
OML-AO-1179

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

June 26, 1985

Ms. Agnes E. Green
Community School Board Member
Community School Board #17
[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. Green:

I have received your letter of June 15 in which you requested an advisory opinion.

Specifically, in your capacity as a member of Community School Board #17, you wrote that you unsuccessfully attempted to obtain copies of "audio tapes" of meetings of the Board, even though you offered to pay the cost of furnishing blank tapes.

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

First, in my opinion, a tape recording of a meeting is a "record" subject to rights of access granted by the Freedom of Information Law. Section 86(4) of the Freedom of Information Law defines the term "record" expansively to mean:

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

In view of the breadth of the language quoted above, I believe that a tape recording prepared by or in possession of the Board constitutes a "record". It is noted, too, that the Court of Appeals, the state's highest court, has interpreted the definition of "record" as broadly as its specific language indicates [see Westchester News v. Kimball, 50 NY2d 575 (1980); Washington Post Co. v. New York State Insurance Department, 61 NY2d 557 (1974)].

Second, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more ground for denial appearing in §87(2)(a) through (i) of the Law.

Third, to the extent that your request involves audio tapes of open meetings, under the Open Meetings Law, any person could have been present during those meetings. As such, in my view, no ground for denial could appropriately be offered to deny access to tape recordings of open meetings. Moreover, it has been held judicially that a tape recording of an open meeting is accessible under the Freedom of Information Law [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978].

You inferred that some aspects of the tape recordings in which you are interested might have involved discussions held by the Board during executive sessions. While tape recordings of executive sessions would also in my opinion clearly constitute "records" subject to the Freedom of Information Law, rights of access granted to members of the public under the Freedom of Information Law relative to those tape recordings would be dependent upon the nature and content of the tapes. For instance, if an executive session was held to discuss the performance of a particular teacher, disclosure to the public of the Board's discussion by means of the tape might result in an unwarranted invasion of personal privacy. In such a situation, that portion of the tape recording might justifiably be withheld.

Nevertheless, as a member of the Board, it is questionable in my view whether any aspect of the tape recordings could be withheld if you are acting in your capacity as a member of the Board. In short, I believe that you would likely have as much right to a tape recording of a discussion of Board business as a member who may have

been present during the executive session. Further, if you were present at an executive session that was tape recorded, the information contained on the tape would have been effectively disclosed to you during the course of the executive session.

I point out, too, that §105(2) of the Open Meetings Law 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."

Based upon the quoted language, while the public at large may be excluded from a proper executive session, a member of a public body has the right to attend an executive session. As such, even though some aspects of tape recordings of open meetings might not be available to the public under the Freedom of Information Law, it might be contended that you have the right to the tapes as a member of the Board acting in that capacity in order to enable you to carry out your official duties.

Lastly, your letter indicates that minutes of meetings of the Board might not have been produced on a timely basis. Here I point out that §106(3) of the Open Meeitngs Law requires that minutes of open meetings be prepared and made available within two weeks of those meetings. In the event that action is taken during an executive session, a public body is required to prepare minutes reflective of the action taken, the date and vote, and make them available in accordance with the Freedom of Information Law within one week of the executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3777
OML-AO- 1180

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

June 28, 1985

Mr. Wallace S. Nolen
[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. Nolen:

I have received your letter of June 14, in which you raised issues concerning access to hearings and records pertaining to hearings.

Specifically, you wrote that you have attempted to attend hearings conducted by the New York City Department of Consumer Affairs relating to "process server and/or consumer affairs violations". You have also sought to obtain notices of hearings in order to know when the hearings may be held. Although you have received information following hearings, as well as the decisions rendered in conjunction with hearings, you indicated that you have been denied access to information concerning dates of hearings and that you have been unable to attend the hearings.

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

First, if records are prepared which specify when and where the hearings in question will be held, I believe that they would be subject to rights granted by the Freedom of Information Law. It is noted that the Freedom of Information Law pertains to existing records, and that the term "record" is broadly defined in §86(4) to include:

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

Based upon the language quoted above, assuming that the Division of Consumer Affairs prepares notices or other similar materials that indicate when and where hearings will be held, I believe that such documentation would constitute "records" subject to rights of access granted by the Freedom of Information Law.

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 (i) of the Law.

As you have described them, it does not appear that any ground for denial could appropriately be asserted with respect to records that indicate the times and places of scheduled hearings.

Third, with respect to your right to attend a hearing, I cannot provide specific direction. I point out that the Open Meetings Law generally is applicable to "meetings" of a "public body". Assuming that a hearing is conducted by a hearing officer, for example, no public body would be involved [see Open Meetings Law, §102(2)] and the Open Meetings Law would not be applicable. In addition, §108(1) exempts quasi-judicial proceedings from the requirements of that statute. Based upon the subjects considered at the hearings, it is assumed that they are quasi-judicial in nature and that the Open Meetings Law would not apply.

Although I could not conjecture as to public rights of access in this specific circumstance, I point out that in a decision of the Court of Appeals, [Herald Company, Inc. v. Weisenberg, 59 NY 2d 378 (1983)], it was found that administrative proceedings must generally be open to the public and the news media. Whether that decision is applicable to the hearings in which you are interested is unknown to me. Nevertheless, enclosed is a copy of the decision 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

cc: Office of Counsel,
NYC Division of Consumer Affairs

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1181

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

COMMITTEE MEMBERS
R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 2, 1985

Ms. Marnie Kirchgessner
President
Tompkins County Local 855
Civil Service Employees Association/
American Federation of State,
County and Municipal Employees
P.O. Box 325
Ithaca, NY 14850

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. Kirchgessner:

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

According to your letter, you sought to attend a meeting of the Tompkins County Human Services Committee. By way of background, you indicated that CSEA Local 855, which you serve as president, corresponded with members of the County Legislature concerning proposals by the local Commissioner of Social Services to change "on call" responsibility for the case work staff of that department. You wrote that the implementation of such a policy might mean "the filing of an improper practice charge". As a result of the proposal, you requested to meet with the Human Services Committee. However, at the meeting, the Committee entered into an executive session "because of the possibility of a lawsuit and to discuss 'personnel matters'". No further communication apparently occurred between yourself and the Committee. You have questioned the propriety of the executive session.

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

First, I believe that the Human Services Committee of the County Legislature is a "public body" subject to the Open Meetings Law. 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."

I point out that the definition makes specific reference to committees, subcommittees and similar bodies.

Second, as you may be aware, §105 of the Open Meetings Law specifies and limits the topics that may appropriately be considered during an executive session.

One of the grounds to which the Board alluded was §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending, or current litigation". From my perspective, it is questionable whether §105(1)(d) could have been cited to exclude the public. Assuming that an improper practice charge could be filed, it is uncertain that the initiation of such a charge could be characterized as "litigation". In my view, "litigation" involves a controversy between opposing parties before a court, a judicial entity. If the filing of an improper practice charge is dealt with under the provisions of a contract but not by means of a judicial proceeding, I do not believe that §105(1)(d) would have been applicable.

Moreover, even if there was a threat that litigation might ensue, §105(1)(d) might still not have applied. In discussing that exception, the Appellate Division in Weatherwax v. Town of Stony Point, held that:

> "[T]he prupose 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., 83 AD2d 612,613). 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" [97 AD 2d 840,841 (1983)].

Based upon the direction given in Weatherwax, the possibility of litigation would not alone justify an executive session.

The other ground asserted by the Committee concerned "personnel matters". The so-called "personnel" exception for executive session is found in §105(1)(f). That provision permits a public body to conduct an executive session to discuss:

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

It is emphasized that the language quoted above enables a public body to enter into an executive session only when the discussion focuses on a "particular person" in conjunction with one or more of the topics described in §105(1)(f). If the discussion involved a proposal relating to "case work staff", I do not believe that any "particular person" would have been the subject of the discussion. If that is so, §105(1)(f) could not in my opinion have been cited to justify entry into an executive session.

Lastly, it is noted that is has been held that a motion to enter into an executive session to discuss "personnel matters" without additional description is inadequate. To enter into an executive session under §105(1)(f), the motion preceding entry into an executive session should, based upon case law, contain two components [see Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981]. First, reference should be made to the fact that the discussion involves a "particular person", even though the identity of the person need not be stated; second, reference should be made to at least one of the topics described in §105(1)(f). A motion to discuss "the employment history of a particular person", for instance, would in my opinion be adequate; a motion to discuss "personnel matters", without more, would be insufficient.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Harris Dates
Mary Call
Beverly Livesay
Ethel Nichols
Frank Proto
Daniel Winch
Robert Williamson
Scott Hyman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1182

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

July 3, 1985

Mr. D.J. Brownell
Trustee
Village of Cold Spring
[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. Brownell:

I have received your letter of June 23 in which you raised two questions relative to the Open Meetings Law.

The first question involves the capacity of a person to use a tape recorder at a public meeting held by a village board of trustees or a board of education.

In this regard, it is noted that the Open Meetings Law is silent with respect to the use of tape recorders at oepn meetings of public bodies. Nevertheless, based upon recent judicial decisions, I believe that any person may use a portable cassette 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 diliberative 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."

More 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 noted, too, that an opinion of the Attorney General rendered in 1980 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 believe that a member of the public may use a portable, battery operated tape recorder at open meetings of public bodies.

Your second question concerns "barrier free physical access" to physically handicapped persons who seek to attend meetings, and how applicable provisions of the Open Meetings Law deal with "the necessity of a person having to climb twenty or more steps to attend a public meeting".

Here I direct your attention to §103(b) of the Open Meetings Law, which 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."

I would like to make several observations with respect to the language quoted above.

First, it is clear that the cited provision imposes no obligation upon a public body to construct a new facility or reconstruct or renovate an existing facility to permit barrier-free access to physically handicapped persons.

Second, the Law, does, however impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons.

Third, as a consequence, I believe that if a public body has the capacity to hold its meetings in a number of locations, meetings should be held in the facility that is most likely to accommodate the needs of persons with handicapping conditions. For instance, if a meeting can be held on the first floor rather than the second floor of a building, or if perhaps a different building permits "barrier-free access", a "reasonable effort" would in my view involve holding a meeting in an alternative site.

I hope that 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-1183

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

July 8, 1985

Ms. Darlys McDonough
Planner
Ontario County
Division of Planning &
Development
120 North Main Street
Canandaigua, NY 14424

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. McDonough:

I have received your letter of June 27, as well as the materials attached to it.

Enclosed are five copies of "Your Right to Know", which explains the provisions of both the Freedom of Information and Open Meetings Laws. Also attached is the bill recently signed into law that amended the Open Meetings Law.

In terms of the scope of the amendment, it is emphasized that it deals only with the exemption regarding political caucuses. By way of background, the Open Meetings Law has always exempted political caucuses from its requirements. However, various judicial decisions indicated that the exemption concerning political caucuses applied only to discussions of political party business; those decisions also held that discussions of public business by a majority of the membership of a public body were subject to the Open Meetings Law, even though those present might have represented one political party. The amendment indicates that members of a political party who serve on a legislative body may discuss any topic, including public business, in a closed political caucus outside the requirements of the Open Meetings Law. I point out that the legislation refers to the legislative body of a county, city, town, or village. As such, I do not believe that the amendments pertain to a municipal planning board or zoning board of appeals, for example.

You added in your letter that you located information dealing with the presence of members of zoning boards of appeals during hearings and meetings of such boards. You wrote that it is your assumption that "a quorum must be present and vote at the hearing and that the absent member must send his vote in writing, with findings (as required of the full board), in sufficient time to allow the board to respond to the applicant within the required time frame."

As stated in the materials that you sent, it appears that a member of a zoning board of appeals may cast a vote, even though that member was not present at the hearing preceding the vote, so long as the vote is based upon an "informed judgment". However, I do not believe that a member can cast a vote by mail. In brief, it is my view that when a vote is taken, in order to cast a vote, a member must be present at a meeting. Stated differently, while a member need not be present at a hearing, the member must be present at the meeting in order to vote. My opinion is based upon the definition of "meeting" appearing in the Open Meetings Law, which involves a physical convening of the members of a public body, and §41 of the General Construction Law, a copy of which is attached. The cited provision has existed since 1909 and in my opinion requires an affirmative vote by a majority of the total membership of a public body in order to carry any motion. Further, I believe that such a vote must be cast by members present at the hearing.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1184

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

July 9, 1985

Mr. George Shebitz
Shebitz and Karp
Attorneys at Law
225 Broadway
Suite 2100
New York, NY 10007

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. Shebitz:

I have received your letter of June 28 in which you requested an advisory opinion under the Open Meetings Law.

Your letter pertains to the election of officers by the members of Community School Board 15, which you represent as its attorney. You wrote that the next regular meeting of the Board is scheduled to be held on July 31. However, you added that a majority of the members desire to have a public meeting prior to that date. Your question is whether, under the Open Meetings Law, there is any prohibition regarding the conducting of an open meeting prior to July 31. Should such a meeting be held, you stated that "all formal notice provisions will be complied with".

In this regard, assuming that all appropriate notice requirements are met and the by-laws adopted by the Board are followed, there is nothing in my opinion that would prohibit the Board of Community School District 15 from holding a meeting prior to July 31.

I hope that 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- 1185

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

July 10, 1985

Mrs. Lucille LaCombe
[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. LaCombe:

I have received your letter of June 30, which concerns your capacity to attend meetings of the Town Board of the Town of Waterford.

According to your letter, you have difficulty climbing stairs, which effectively precludes you from attending meetings of the Town Board. You indicated that others who may be interested in attending meetings might, for reasons similar to yours, be dissuaded from attending. Since there are other locations within the Town where meetings could be held, you asked whether the state "would do something about this..."

In this regard, it is noted initially that the Committee on Open Government is responsible for advising with respect to the Open Meetings Law. As such, neither the Committee nor any other state agency of which I am aware could require the Town Board to conduct its meetings in a different location.

Nevertheless, §103(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."

I would like to make several observations with respect to the language quoted above.

First, it is clear that the cited provision imposes no obligation upon a public body to construct a new facility or reconstruct or renovate an existing facility to permit barrier-free access to physicially handicapped persons.

Second, the Law does, however, impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons.

Third, as a consequence, I believe that if a public body has the capacity to hold its meetings in a number of locations, meetings should be held in the facility that is most likely to accommodate the needs of persons with handicapping conditions. For instance, if a meeting can be held on the first floor rather than the second floor of a building, or if perhaps a different building permits "barrier-free access", a "reasonable effort" would in my view involve holding a meeting in an alternative site.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Waterford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1186

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

July 10, 1985

Ms. Lynn Yellott
[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. Yellott:

I have received your letter of June 28 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry concerns the propriety of an executive session held on June 18 by the Cayuga County Legislature. Specifically, the motion for entry into an executive session indicated that the issue to be discussed involved "negotiation". You added that Dr. Townsend, Chairperson of the Legislature, informed you that the executive session pertained to a discussion of "the merits of informing the NYS Department of Corrections that Cayuga County would like to be considered as a site candidate for a new state prison".

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

First, as you may be aware, meetings of public bodies are presumed to be open, except to the extent that one or more among eight grounds for entry into an executive session may appropriately be asserted to exclude the public from a meeting [see Open Meetings Law, §105(1)(a) through (h)].

Second, there is one ground for entry into an executive session that deals directly with negotiations. That provision, §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, which is generally known as the "Taylor Law", concerns the relationship between a public employer and a public employee union. As such, §105(1)(e) permits a public body to enter into an executive session to discuss collective bargaining negotiations.

From my perspective, based upon the information provided in your letter, neither §105(1)(e) nor an assertion that the issue involved "negotiation" could have justifiably been cited to enter into an executive session. Further, it does not appear that any other ground for entry into an executive session could appropriately have been asserted.

I hope that 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. Townsend, Chairperson, Cayuga County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1187

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

COMMITTEE MEMBERS
R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 11, 1985

Richard Castellane, Esq.
99 South Main Street
P.O. Box 1089
Liberty, New York 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 July 9 in which you requested an advisory opinion under the Open Meetings Law.

Your questions pertain to the notice requirements imposed by §104 of the Open Meetings Law, which states 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."

Having reviewed a previous opinion of this office, it is your view that the opinion interpreted the phrase "conspicuously posted" to mean "posted in a conspicuous public location". You wrote that you concur with my earlier opinion, for a different interpretation could result in a failure to comply with the intent of the Open Meetings Law. For instance, you wrote that in the matter in which you are interested:

> "the 'posting' was made on a bulletine board within certain public offices (2nd Floor, corner) which are amongst the least frequently visited public offices within the particular public building (County Government Center)" (emphasis yours).

You added that:

> "Within the very same public building there is a large public lobby (certainly 'a conspicuous public location') which is entered by the overwhelming majority of people who visit said building."

I would like to offer several comments in this regard.

First, in my view, like any other provision of law, I believe that the Open Meetings Law should be given a reasonable construction that gives effect to its clear intent. From my perspective, the purpose of the notice requirements imposed by §104 is to provide a reasonable opportunity to those who might be interested in attending a meeting to view a notice posted by a public body. If a notice is posted in a public building, but in an area that is not generally seen or passed by most members of the public, I do not believe that posting in such a location could be characterized as "conspicuous". Moreover, an ordinary dictionary definition of "conspicuous" would bolster such a contention. In Webster's Seventh New Collegiate Dictionary, "conspicuous" is defined to mean "obvious to the eye or mind", and the synonym is "noticeable". I believe that a notice posted in the main lobby of a public building would certainly be more "noticeable" than a notice posted near a corner office on the second floor of the same building, particularly if that part of the building is visited infrequently by the general public.

It is noted, too, that in the same dictionary, one among several definitions of "public" is "exposed to general view", or "prominent". Once again, the posting of notice in a public building may or may not be "prominent" or noticeable, depending upon the location where the notice is in fact posted. Nevertheless, to reiterate, to give effect to the spirit and intent of the Law, I believe that the posting requirement of §104 involves prominent posting in an area noticeable to the public.

The second area of inquiry presented in your letter involves the requirement that notice be posted in a "designated" public location. It is your view that the term "designated" would not mean:

> "simply that a public body by resolution designates the posting location, but much more significantly, that the public location is made known, described and pointed out to the public (via official publications, and upon the constant influx of new residents into the County, by periodic republication of the designated location for posting)" (emphasis yours).

Here I do not believe that there is any requirement that a public body engage in the type of publication or republication of notice as you have suggested. I do believe, however, that a public body is required to designate, perhaps by means of a resolution or by some other method designed to inform the public, the location or locations where notice of all meetings of a particular public body will always be posted. As indicated in §104(3), the notice required to be given under the Open Meetings Law is not intended to be a legal notice or its equivalent.

I hope that 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-1188

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

July 12, 1985

Hon. Steven G. Dworsky
Rensselaer County Legislature
85 23rd Street
Troy, New York 12180

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. Dworsky:

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

According to your letter:

> "Over the last few years the public and County legislators, with the exception of the Finance Committee, have not been allowed to attend the Budget hearings held pursuant to Section 5.03(2) of the Rensselaer County Charter".

Attached to your letter is a copy of the cited provision of the Charter, which states that:

> "The Budget Director, upon receipt of the estimates of the various departments and the requests for an appropriation of several authorized agencies, shall proceed to make such review and hold hearings with the heads of such departments and agencies as the Budget Director deems necessary. Said Budget Director may

> require the officers or employees thereof to furnish data and information, and to answer inquiries pertinent to such review. The Budget and Finance Committee of the County Legislature shall be entitled to attend and participate in all such hearings."

You asked whether, in my view, the Open Meetings requires "proper notification and public admittance" relative to the hearings described above.

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

First, the Open Meetings Law is applicable to meetings of public bodies, and the term "public body" is defined in §102(2) of the Law to mean:

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

Based upon the language quoted above, neither the budget director, nor the heads of County departments or agencies or their employees would in my opinion constitute a "public body" subject to the Open Meetings Law.

Second, I believe that a committee of a public body, such as the County Legislature, would constitute a public body. Therefore, I believe that the Budget and Finance Committee of the County Legislature is a "public body" required to comply with the Open Meetings Law.

Third, as stated earlier, the Open Meetings Law is applicable to meetings of public bodies. Section 102(1) defines "meeting" to mean "the official convening of a public body for the purpose of conducting public business".

From my perspective, the definition indicates that there must be an intent to convene. By way of example, if the Budget director gathers with County officials to review and discuss estimates and a member or members of the Budget and Finance Committee attend without the prior knowledge of other members of the Committee, I do not believe that such a situation would involve an intent to gather as a public body. However, if, in advance of such a gathering, it is determined that the Budget and Finance Committee intends to meet with the Budget director and/or others to discuss the budget, and if a quorum of the Committee is present, such a gathering would in my opinion constitute a "meeting" subject to the Open Meetings Law.

In a case in which a quorum of the Committee seeks to discuss the budget with the Budget Director and in which the Open Meetings Law, therefore, be applicable, I believe that the Committee would be required to give notice to the news media and to the public by means of posting in accordance with §104 of the Open Meetings Law, and that the general public would have the right to attend the meeting.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1189

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

August 2, 1985

Mr. Hugo V. De Ciutiis
[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. De Ciutiis:

I have received your letter of July 9 in which you requested comments regarding a meeting held by the Westbury School Board on July 1.

According to your letter, the Board and the Superintendent met behind locked doors immediately prior to a scheduled meeting. When the Board began the open meeting, you indicated to the Board President that executive sessions must be voted upon at an open meeting and the discussion fall within one of the prescribed areas deemed appropriate for entry into executive session. You wrote that when the President did not respond, the Board's attorney advised him not to attempt to answer.

In this regard, I offer the following comments.

First, §105 of the Open Meetings Law sets forth the procedure for a public body to enter into executive session The body may conduct an executive session upon a majority vote of its total membership taken in an open meeting, pursuant to a motion generally describing the subject to be discussed. Thus, as you know, an executive session is a part of an open meeting and cannot be conducted before the open meeting has commenced. Moreover, the discussion must fall within one or more of the grounds listed in §105(1)(a) through (h) of the Law.

Second, I note that §108(3) of the Open Meetings Law provides that matters made confidential by federal or state law are exempt from the provisions of the Law. For example, if the Board's attorney met with members of the Board for the purpose of rendering legal advice, the discussion might have fallen within §4503 of the Civil Practice Law and Rules. Section 4503 provides that communications between an attorney and client are privileged and confidential. Thus, the Board and its attorney could meet privately before a Board meeting for the purpose of seeking legal advice and it would not be required to comply 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Mr. Sumner Spivack, President
Westbury School Board

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3810
OML-AO-1190

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

August 6, 1985

Ms. Eddee Kolos
c/o SASU
One Columbia Place
Albany, NY 12207

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, except as otherwise indicated.

Dear Ms. Kolos:

I have received your letter of July 15, which you sent to this office on behalf of students at the State University of New York, College at Purchase.

According to your letter, the Purchase College Foundation Board of Trustees has repeatedly denied access to its meeting and records, claiming that, as a "private foundation", it is not subject to open government laws. It is your view that the Foundation is not a separate entity, since members of its Board include various administrators of the College, such as the College President, Vice Presidents, and an aide to the President. Further, based upon a review of the "Absolute Charter of the Purchase College Foundation", which was granted in 1969, and a description of the Goals & Purposes of the College Foundation, both of which are attached to your letter, it is your view that there is no justification that can be offered by the Board to remove it from the requirements of the Freedom of Information or Open Meetings Laws.

You have asked for an advisory opinion relative to the status of the Purchase College Foundation and its Board of Trustees under those statutes.

The Absolute Charter of the Foundation indicates that the Foundation is a not-for-profit educational corporation formed for educational purposes. The Charter describes those purposes in subdivision 2 as follows:

> "a. The promotion of literature, history, the visual and performing arts, science and other departments of knowledge or of education at the State University of New York College at Purchase, a higher eudcational institution organized and existing under the laws of the State of New York, and located in Purchase, New York; and
>
> b. The solicitation, receiving and holding of moneys and property for the purposes herein set forth, including but not limited to providing library aid, classroom, laboratory and other equipment: scholarships, fellowships and professorships and and other financial aid to students and faculty; student and/or faculty activities; cultural and scientific studies, programs and publications; and alumni activities; all in such a manner as best carries out these purposes."

Further, subdivision 6 states that "The Commissioner of Education is designated as the representative of the corporation upon whom process in any action or proceeding against it may be served." Additionally, in the statement of Goals & Purposes attached to your letter, the objectives of the Foundation include:

> "(a) Plan appropriate civic, educational, and benevolent activities and facilitate implementation whenever such activities shall be of benefit to the College;
>
> (b) Enlarge the educational scope of the College through support of teaching, research, school and community activities;
>
> (c) Improve student opportunities for both learning and recreation by providing for concerts, educational projects, lectures, study and work projects;

> (d) Provide financial assistance for worthy students, faculty, and staff who require such aid;
>
> (e) Acquire financial support for construction of buildings or other permanent improvements, for the purchase of books and equipment, for programs of community-related activity, or for other objects which will contribute to the educational facilities and opportunities afforded by the College."

That statement also indicates that, by achieving those objectives, the Foundation will provide for:

> "(a) A citizen structure which attracts and enlists the interest and efforts of a widespread group, extending the opportunity for private participation in advancing higher education..."

Based upon the foregoing, I would like to offer the following comments.

First, the scope of the Freedom of Information Law is determined in part by means of the definition of "agency". Section 86(3) of the Law defines the term 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, while the Foundation might perform a governmental function for an agency, the State University of New York, it is questionable whether it is a governmental entity.

However, in a somewhat similar situation in which the Court of Appeals considered the status of a volunteer fire company, also a not-for-profit corporation, it was found that such an entity is an "agency" subject to the Freedom of Information Law. In so holding, the Court found 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'...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" [Westchester News v. Kimball, 50 NY 2d 575, at 579 (1980)].

If the relationship between the State University of New York and the Foundation in question is similar to that of a volunteer fire company and a municipality, it would appear that the Foundation, despite its not-for-profit status, would be an "agency" required to comply with the Freedom of Information Law.

I would like to point out, too, that the materials attached to your letter indicate that there is a strong nexus between the Foundation and the State University College at Purchase. In short, it appears that the Foundation carries out its duties for the benefit and on behalf of the College. Its statement of purposes, goals and objectives are, in my view parallel to those of the College.

Second, I attempted without success to locate the Foundation's incorporation papers at the Department of State. In order to attempt to learn the official name of the Foundation, I contacted the Office of the President of the College. The first person with whom I spoke stated that the Foundation is "part of the college". To obtain additional information, I spoke to Jean Heyl, who, according to your letter serves as aide to the President of the College and as Secretary to the Board of Trustees of the Foundation.

It appears that records pertaining to the Foundation and its work are in possession of officials at the College. If that is so, I believe that the records pertaining to the Foundation in possession of the College officials fall within the scope of the Freedom of Information Law, whether or not the Foundation is considered an "agency".

Here I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" expansively to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical 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 broad language quoted above, any information in possession of State University officials at the College at Purchase would in my view constitute a "record" subject to rights of access.

In the decision of the Court of Appeals cited earlier, the Court also discussed the term "record" and stated that:

> "[T]he statutory definition of 'record' makes nothing turn on the purpose for which a document was produced or the function to which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons. The present case provides its own illustration. If we were to assume that a lottery and fire fighting were generically separate and distinct activities, at what point, if at all, do we divorce the impact of the fact that the lottery is sponsored by the fire department from its success in soliciting subscriptions from the public? How often does the taxpayer-lottery participant view his purchase as his 'tax' for the voluntary public service of safeguarding his or her home from fire? And what of the effect on confidence in government when this fund-raising effort, through seemingly an extracurricular event, ran afoul of our penal law?" [id. at 581].

Under the circumstances, the situation of the College at Purchase Foundation appears to be somewhat analogous to that described by the Court. Consequently, it is reiterated that records maintained by State University of New York officials concerning the Foundation are in my opinion subject to the Freedom of Information Law, for they are apparently in physical possession of the officials of the College.

With respect to the Open Meetings Law, the issue in my view, is whether the Board of Trustees of the Foundation is a "public body". The term "public body" is defined in §102(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."

From my perspective, it is likely, based upon the materials attached to your letter, that each of the conditions described in the definition of "public body" is met by the Foundation's Board of Trustees.

First, the Board of Trustees is an entity that consists of more than two members.

Second, I believe that the Board conducts public business, for the purposes stated in the Charter of the Foundation include the promotion of education at the State University College at Purchase, as well as providing library aid, classroom and library equipment, scholarships, fellowships and professorships, cultural and scientific studies and various other purposes that inure to the benefit of the College. To reiterate some of the objectives, they include enlarging "the educational scope of the College through the support of teaching, research, school and community activities." In short, each of those activities in my opinion is reflective of "public business".

Third, as a not-for-profit corporation, the Board of Trustees can carry out its business only by means of a quorum pursuant to the Not-for-Profit Corporation Law, §608. It is also possible that quorum requirements imposed by §41 of the General Construction Law would be applicable.

Fourth, the Absolute Charter and the statement of Goals & Purposes of the Foundation indicate that the Foundation performs a governmental function for an agency of the State, in this instance, the State University College at Purchase.

If my assumptions and contentions are accurate, the Board of Trustees is a public body required to comply 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: Jean Heyl, Aide to the President and Secretary to the Board, Purchase College Foundation

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1191

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 6, 1985

Mr. Henry P. York
Concerned Citizens of North
Babylon
[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. York:

I have received your letter of July 15. Please accept my apologies for the delay in response.

Your inquiry concerns a meeting held by the North Babylon School Board concerning the District's budget during which you attempted to use a "battery operated tape recorder". You added that "The recorder was inconspicuous and in no manner or form was disruptive or detracted from any part of the deliberative process". Nevertheless, the President of the Board "demanded" that you "terminate the operation of the recorder" or she would "discontinue the meeting". You then requested that an opinion of June 12 rendered by this office concerning the use of tape recorders at open meetings of public bodies be read to the Board and its attorney. Apparently the attorney is of the view that recent court decisions on the subject are irrelevant and he advised the Board "that it was at their discretion to decide whether or not to allow the use of the recorder". Rather than permitting the use of the tape recorder, the President of the Board introduced a motion to enter into an executive session. At that point, "not wishing to inconvenience the public", you turned off the recorder.

You have asked whether this office can offer "stronger support", whether it can investigate, and which other agencies could provide assistance.

First, under §109 of the Public Officers Law, the Committee on Open Government is authorized to provide advice under the Open Meetings Law. As such, this office does not have the capacity to "investigate" or compel a public body to comply with the Open Meetings Law. Further, other than by the initiation of a judicial proceeding, I know of no other proceeding or agency that is involved with compliance with the Open Meetings Law.

Second, without reiterating the comments and rationale expressed in the earlier opinion, it is emphasized that one of the decisions cited to support the view that the public may employ a portable tape recorder was People v. Ystueta, [99 Misc. 2d 1105, 418 NYS 2d 508 (1979)], which was decided by District Court, Suffolk County, and which pertained to a school district in Suffolk County.

Third, the capacity to enter into an executive session is, in my view, wholly irrelevant to the use of a tape recorder. In brief, §105(1) of the Open Meetings Law specifies and limits the topics that may appropriately be discussed during an executive session. Stated differently, the use of a tape recorder could not, in my opinion, justify entry into an executive session.

In an effort to attempt to enhance compliance with the Open Meetings Law, this opinion, copies of the Open Meetings Law and People v. Ystueta, supra, will be sent to the Board and its President.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Helene Johnson, President

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3811
OML-AO-1192

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

August 6, 1985

Ms. Ronnie Honigsbaum
[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. Honigsbaum:

I have received your letter of July 18 concerning the status of the board of directors of a cooperative under the "Sunshine" Law.

Specifically, you have asked whether minutes of board meetings and decisions made during executive sessions must be open to the shareholders of the cooperative. In this regard, I would like to offer the following comments.

First, it is emphasized that the statutes that fall within the scope of the so-called "Sunshine Laws" are applicable to government. For instance, the Open Meetings Law is applicable to meetings of a "public body", such as a city council, a town or school board, a village board of trustees, or a zoning board of appeals. The Open Meetings Law would not be applicable to meetings of the board of directors of a private corporation, such as that which is the subject of your inquiry.

Similarly, the Freedom of Information Law pertains to records maintained by entities of government in New York. Consequently, the Freedom of Information Law is not applicable to records maintained by a private corporation.

Second, it is suggested that you obtain and review the by-laws of the corporation or that you consult with an attorney with respect to other relevant provisions of law, such as the Business Corporation Law.

To provide you with additional information regarding the scope of the Sunshine Laws, enclosed are copies of the Freedom of Information and Open Meetings Laws, as well as an explanatory pamphlet that pertains to both.

I hope that 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-1193

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

August 7, 1985

Mr. Jack J. Sissman
[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, except as otherwise indicated.

Dear Mr. Sissman:

I have received your letter of July 31 in which you requested an advisory opinion.

Two weeks ago, you called this office and we discussed the legality of a school board member publicly disclosing the content of a discussion conducted in an executive session of the Board. In your letter, you asked the following questions:

> "1. Is there any prohibition under the laws of New York State which would preclude a member of a Board of Education from revealing in a judicial or legal proceeding, (i.e. petition on appeal before the Commissioner of Education), the contents or the substance of discussions held in executive session of the Board of Education concerning labor and personnel matters?
>
> 2. If there is such a prohibition, under what statute is it?
>
> 3. If discussions in executive session of a public body included illegal plans to thwart a lawful directive of a court or administrative agency (i.e. Commissioner of Education), are such discussions protected or may they be revealed?"

In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law permits a public body, such as a Board of Education, to discuss certain matters in an executive or closed session if the subject matter falls within one or more of the grounds listed in §105(1)(a) through (h) of the Law. You described the discussion held by the Board in executive session as "relating to labor and personnel problems". In this regard, §105(1)(f) provides that an executive session may be conducted 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..."

Second, it is noted that the conduct of executive sessions is permissive rather than mandatory under §105. In other words, a public body may, for example, discuss the appointment of a particular person in an open meeting even though §105(1)(f) permits such a discussion to be held in executive session. Moreover, as a general matter, nothing in the Open Meetings Law prevents those in attendance at an executive session from revealing the details of the discussion therein.

Third, however, if the discussion involved a matter made confidential by federal or state law, such law would, in my view, control in determining whether an individual could legally disclose the content of the discussion. For example, the federal Family Educational Rights and Privacy Act generally prohibits disclosure of information contained in educational records which identifies a student. I believe that disclosure of the contents of a discussion related to such educational records would be unlawful under the federal Act. Based upon the information provided in your letter, it cannot be determined whether any matter made confidential by statute arose during the executive session in question.

In sum, without further details regarding the discussion relating to "labor and personnel problems", I cannot advise whether any state or federal statute would prohibit disclosure of the contents of the discussion. Moreover, without additional details, I cannot cite any law which protects, or requires confidentiality of discussions involving "illegal plans to thwart a lawful directive of a court or administrative agency".

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-1194

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

August 12, 1985

Mr. James M. Odato
The Binghamton Press Co., Inc.
Vestal Parkway East
Binghamton, NY 13902

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. Odato:

I have received your letter of July 30 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, a panel of experts is to meet with representatives of certain public employee unions concerning the reopening of the Binghamton State Office Building. You wrote that the individuals represent workers who will be asked to return to work in the Office Building, which has been closed since a fire caused the building to be contaminated with toxic substances. You asked whether the meeting, which will also be attended by other state agency officials, can be closed to the public.

In this regard, I offer the following comments.

First, in order to learn more about the creation and composition of the panel, I contacted Dr. Robert Huffaker of the Department of Health. Dr. Huffaker informed me that the panel of experts was created by Dr. David Axelrod, Commissioner of the Department, shortly after the Office Building fire occurred in 1981. The thirteen members were chosen from the United States and Canada as experts in the field of environmental health and toxic safety. The panel was created to advise and offer recommendations regarding the clean up and the reopening of the State Office Building.

According to Dr. Huffaker, the Expert Panel has previously convened to discuss the State Office Building following public notice of the meetings and considerable publicity. A stenographic transcript of each meeting is produced and maintained at various locations for public review. While the entire panel may not convene for every meeting, there are generally nine members in attendance at each meeting. Travel expenses and an honorarium are paid to each panel member.

Second, with respect to the conduct of the Panel's meetings, the Open Meetings Law requires that all meetings of a public body be conducted open to the public. The term "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."

I believe that the Expert Panel meets the statutory conditions set forth in the definition.

In my opinion, the Panel is an "entity" for it appears to have been created to utilize the combined expertise of thirteen individuals to advise and address questions raised about the contaminated State Office Building. Moreover, it appears that a quorum may be required to conduct public business. Section 41 of the General Construction Law entitled "Quorum and majority" states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such

> board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

In my view, the members of the Panel are "persons charged with [a] public duty to be performed or exercised by them jointly". The panel was established to advise the Department of Health with respect to specifications to be included in the contracts to rebuild the Office Building and to define the conditions for its reopening. Several courts have recognized that such bodies may be charged with a public duty even though they have no authority to take final or binding action [see i.e., Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, app dis, 55 NY 2d 995 (1982); MFY Legal Services v. Toia, 402 NYS 2d 510 (1977); Pissare V. City of Glens Falls, Sup. Ct., Warren Cty., March 7, 1978]. Thus, I believe that the Panel must exercise its duty pursuant to the quorum requirements set forth in §41 of the General Construction Law.

In addition, I believe that the Panel performs a governmental function for the State, particularly the Department of Health, in that it advises with respect to the environmental safety of rebuilding and reopening the State Office Building. Based upon the foregoing, I believe that the Panel meets the definition of "public body" and is thus subject to the provisions of the Open Meetings Law.

Third, the term "meeting" for purposes of the Open Meetings Law, has been construed to mean a gathering of at least a quorum of a public body for the purpose of discussing public business, regardless of whether any action

is intended to be taken [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Since a majority of the Panel is expected to attend the dinner meeting and the reopening of the State Office Building is to be discussed, I believe that the meeting would fall within the scope of the Open Meetings Law if indeed a quorum attends.

Fourth, §105 of the Law provides that an executive or closed session may be conducted to discuss one or more of the subjects listed in the Law. Apparently, the applicability of §105(1)(e) has been raised. That provision states that an executive session may be conducted to discuss "collective negotiations pursuant to article fourteen of the Civil Service Law". In my view, §105(1)(e) permits a public body to discuss collective bargaining issues, positions, and strategies in private when the body is involved in collective negotiations pursuant to the Taylor Law. Based upon the information provided by you and Dr. Huffaker, I do not believe that the Expert Panel will be discussing, nor does it have the apparent authority to conduct, collective negotiations pursuant to article 14 of the Civil Service Law. Moreover, it does not appear that any other grounds for conducting an executive session can appropriately be cited for holding an executive session.

Fifth, I note that §108 of the Open Meetings Law exempts "any matter made confidential by federal or state law" from coverage under the Law. Thus, if the discussion is required by statute to be conducted in confidence, the meeting would not be subject to the provisions of the Open Meetings Law. However, I am not aware of any statute which would require the confidentiality of the dinner meeting discussion.

In sum, based upon the information provided by you and Dr. Huffaker, I believe that the Expert Panel is a public body subject to the provisions of the Open Meetings Law. Moreover, the dinner meeting of the Panel and the public employees union representatives, in my view, is a meeting as defined under the Law and should be conducted open to the public.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

cc: Dr. Robert Huffaker

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1195

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

August 12, 1985

Mr. Norman J. Parry
School District Clerk
North Syracuse Central Schools
5355 West Taft Road
North Syracuse, NY 13212

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. Parry:

I have received your letter of July 17. Please accept my apologies for the delay in response.

On behalf of the North Syracuse Central School District Board of Education, you have requested an advisory opinion "on the Board's obligations under the law in regard to proposed seminar and 'get acquainted' weekend for members of the North Syracuse Board of Education." As such, the proposed session would serve as a combination "seminar and social gathering". You added that no action would be taken and raised questions concerning the Board's obligation to "keep minutes, post notice, notify the press, etc..."

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 AD2d 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, goals and other business 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 accordance with the provisions of the Open Meetings Law. Those aspects of the gathering considered to be "social", however, and during which public business would not be considered, would in my opinion fall outside the scope 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 meida 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.

Fourth, with respect to minutes, §106(1) of the Open Meetings Law 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."

As such, to the extent that the Board's activities involve motions, proposals, resolutions and the like, it appears that minutes should be prepared.

In sum, the gathering described in your letter would in my view be a "meeting" subject to the requirements of the Open Meetings Law to the extent that it involves the conducting of public business. 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

OML-AO-1195

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

August 14, 1985

Mr. Charles V. Dobrescu
City Councilman
Office of the City Council
City Hall
Glen Cove, NY 11542

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 June 29 and appreciate your continuing interest in compliance with the Open Meetings Law.

According to your letter, it has been the policy of the Glen Cove City Council to conduct a "pre-council meeting one week before the regularly scheduled meeting of the City Council". You added that the pre-council meetings are held to "discuss issues, problems, and accordingly, prepare an agenda for the regularly scheduled meeting". The public is given notice of pre-council meetings and public participation is encouraged during those meetings.

The issue that you raised concerns minutes. While minutes of a "regular" City Council meeting are prepared, there are no minutes of a "pre-council meeting". You also pointed out that minutes of executive sessions are not prepared. As such, your question is whether the City Council is required to maintain minutes of pre-council meetings, as well as executive sessions that may be held during such meetings.

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

First, it is emphasized that the courts have broadly construed the term "meeting". In a landmark decision rendered in 1978, the Court of Appeals unanimously affirmed a decision of the Appellate Division, Second Department, and held that the term "meeting" encompasses any gathering in which a quorum of a public body convenes to discuss public business, whether or not there is an intent to take action and regardless the manner in which a gathering may be charactered [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The decision of the Appellate Division made specific reference to so-called "work sessions", "agenda sessions", "conferences", "organizational meetings" and the like during which public business is discussed but in which no binding action is taken. Once again, it was determined that such gatherings, irrespective of how they may be denominated, are "meetings" subject to the Open Meetings Law.

As such, in my view, the "pre-council meetings" that you described are subject to the Open Meetings Law, and the Council has the same obligation to prepare minutes relative to pre-council meetings as it has with respect to "regular" meetings.

Second, §106 of the Open Meetings Law contains what might be considered minimum requirements concerning the contents of minutes. That provision does not require that a verbatim transcript of a discussion held at a meeting be prepared. However, it does require that certain kinds of information be included in minutes.

Section 106(1) pertains to minutes of open meetings and 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."

Based upon the language quoted above, if there are motions, proposals, resolutions and the like introduced or adopted at pre-council meetings, I believe that minutes must be prepared.

Section 106(2) concerns 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."

In my opinion, the language quoted above indicates that if a public body enters into an executive session but merely engages in a discussion and takes no action, minutes of the executive session need not be prepared. On the other hand, if action is taken during an executive session, minutes must be prepared as described in §106(2). It is also noted that §105(1) requires that a motion be made during an open meeting prior to entry into an executive session. If such a motion is made during a pre-council meeting, I believe that reference to the motion would have to appear in minutes as required by §106(1).

Lastly, §106(3) specifies the time limits within which minutes must be prepared and made available, stating 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."

Consequently, I believe that minutes of open pre-council meetings must be prepared and made available within two weeks of such meetings. If action is taken in an executive session that is held during a pre-council meeting, minutes must in my view be prepared and made available in accordance with the Freedom of Information Law within one week of the executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3825
OML-AO-1197

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

August 19, 1985

Mr. Bruce Gilchrist
[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. Gilchrist:

I have received your letter of August 6 in which you raised questions concerning the Open Meetings Law.

You wrote that "When a Town Board holds 'work sessions' at which no decisions are made, it would appear that no minutes need be taken. Similarly, no minutes need be taken of an 'executive session' in which no decisions are made." The issue that you raised pertains to the situation in which a motion is made during a "work session" to enter into an executive session. Your specific questions are:

> "Does the motion to go into 'executive session', together with how the individual members voted on it, have to be recorded and be available for public inspection?"

and

> "If the answer to the first question is 'yes', where does the vote have to be recorded?"

In this regard, I offer the following comments.

First, it is emphasized that the courts have broadly construed the term "meeting". In a landmark decision rendered in 1978, the Court of Appeals unanimously affirmed a decision of the Appellate Division, Second Department, and held that the term "meeting" encompasses any gathering in which a quorum of a public body convenes to discuss public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be

characterized [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The decision of the Appellate Division made specific reference to so-called "work sessions", "agenda sessions", "conferences", "organizational meetings" and the like during which public business is discussed but in which no binding action is taken.

As such, in my view, the "work sessions" that you described are subject to the Open Meetings Law, and the Board has the same obligation to prepare minutes relative to work sessions as it has with respect to "regular" or "official" meetings.

Second, section 106 of the Open Meetings Law contains what might be considered minimum requirements concerning the contents of minutes. That provision does not require that a verbatim transcript of a discussion held at a meeting be prepared. However, it does require that certain kinds of information be included in minutes.

Section 106(1) pertains to minutes of open meetings and 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."

Based upon the language quoted above, if there are motions, proposals, resolutions and the like introduced or adopted at work sessions, I believe that minutes must be prepared.

Section 106(2) concerns 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..."

In my opinion, the language quoted above indicates that if a public body enters into an executive session but merely engages in a discussion and takes no action, minutes of the executive session need not be prepared. On the other hand, if action is taken during an executive session, minutes must be prepared as described in section 106(2).

Third, as you intimated, section 105(1) requires that a motion be made during an open meeting prior to entry into an executive session. If such a motion is made during a work session, I believe that reference to the motion would have to appear in minutes as required by section 106(1).

Fourth, section 106(3) specifies the times limits within which minutes must be prepared and made available, stating 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."

Consequently, I believe that minutes of open "work sessions" must be prepared and made available within two weeks of such meetings. If action is taken in an executive session that is held during a work session, minutes must in my view be prepared and mde available in accordance with the Freedom of Information Law within one week of the executive session.

Lastly, although the Open Meetings Law does not specify that minutes include reference to how individual members may have voted on a motion, the Freedom of Information Law contains such a requirement. While the Freedom of Information Law generally pertains to existing records and does not require an agency to create or prepare a record, an exception to the rule involves the votes of members of public bodies. Section 87(3) of the Freedom of Information Law states that:

"Each agency shall maintain:

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

Therefore, when a vote is taken pursuant to a motion to enter into executive session, I believe that minutes must be prepared that include reference to the motion, as well as the manner in which each member cast his or her vote.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

COMMITTEE ON OPEN GOVERNMENT

OML-AO-1193

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 22, 1985

Mr. L.J. Campbell
[redacted]

Dear Mr. Campbell:

I have received your letter of August 19, which pertains to the recent amendment to the Open Meetings Law.

As requested, enclosed is a copy of the bill that was signed into law on May 31. At this juncture, the Committee does not have a great deal of information regarding the change in the Law other than news articles published around the state.

By way of background, the Open Meetings Law has always exempted from its provisions political caucuses. However, the courts consistently held that the exemption concerning political caucuses was applicable only to discussions of political party business, and that a discussion of public business held by a majority of the membership of a public body constituted a "meeting" subject to the Open Meetings Law, even though those in attendance might have served one political party. The amendment permits closed political caucuses to be held to discuss any topic, including matters of public business.

In terms of its scope, the amendment applies to the Senate and the Assembly, as well as legislative bodies of counties, cities, towns or villages. In my view, the amendment would not apply to other public bodies, such as school boards, planning boards, zoning boards of appeals and the like.

My personal opinion is that the amendment represents a step backward and my hope is that public bodies will not avail themselves of the capacity to close what would otherwise have been open meetings.

To enable public bodies to guarantee that closed political caucuses will not occur, Common Cause and the League of Women Voters have prepared a model resolution to be used locally by public bodies as a means of ensuring openness. As you requested, enclosed are copies of the model resolution and a news release issued by Common Cause on the subject.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1199

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 22, 1985

Ms. Patricia S. Minton
[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. Minton:

I have received your letter of August 11, in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, at a recent meeting of a Board of Education, having completed consideration of items on the agenda, the President of the Board stated that the "board will recess into an executive session and...(an employee)...is requested to be present." The motion was seconded and passed with one dissenting vote. You wrote that, as a result of the executive session, "the employee was sent a letter of disciplinary action, by the President of the Board, for not attending the executive session". The letter states that "The Board directed me (by resolution) to write this letter, etc." You indicated further that "The Board did not come back into public session at all after the 'executive session'".

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

First, the Open Meetings Law prescribes a procedure that must be accomplished during an open meeting before it may enter into an executive session. Specifically, section 105(1) of the Law states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, one of the conditions precedent to entry into an executive session involves the identification of the "general area or areas of the subject or subjects to be considered". According to the facts presented in your letter, the motion to enter into an executive session did not identify the topic or topics to be considered. It is noted, too, that a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may appropriately be discussed during an executive session.

From my perspective, it is unclear whether there was any basis for entry into an executive session because the motion failed to adequately describe the subject matter that the Board was to consider. Stated differently, neither the public, nor perhaps the members of the Board, could apparently have known whether the subject to be discussed could properly have been considered behind closed doors, for the motion did not identify the topic of the discussion. As such, it appears that a procedural requirement of the Open Meetings Law was not met.

Second, since "disciplinary action" relative to a particular employee was apparently the result of the executive session, it is likely that a valid executive session could have been convened. Section 105(1)(f) of the Law permits a public body to conduct 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..."

Assuming that the discussion focused upon a matter leading to the discipline of a particular person, section 105(1)(f) could have been asserted. However, it is reiterated that the motion prior to entry into executive session should in my opinion have identified that topic as the subject to be discussed.

Third, your letter infers that the Board adopted a resolution during the executive session, for you wrote that the Board directed its president to transmit a letter of discipline to an employee, but that no vote was taken following the executive session.

Here I 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, section 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 section 106(2). Nevertheless, various interpretations of the Education Law, section 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 626 (1982)]. As such, based upon the judicial decisions cited above and the facts that you have provided, it would appear that the action taken by the Board in adopting a resolution should have been accomplished by means of a vote taken during an open meeting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1209

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

August 23, 1985

Mr. Art Gould
President ETA
RD2
Box 52S
Stone Ridge, NY 12484

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. Gould:

I have received your letter of August 14, in which you requested an advisory opinion.

You have raised several questions regarding the propriety of certain executive sessions held by the Ellenville School Board and the applicability of the Open Meetings Law to meetings of committees established by the School Board. In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law provides that all meetings of a public body be conducted open to the public. Closed or "executive sessions" may be held to discuss only those subjects enumerated in section 105(1)(a) through (h) of the Law.

You wrote that, during a Board meeting held in May, the Superintendent recommended certain staff cuts. Following public objection to the recommendation voiced during an open meeting, the Board voted to enter into executive session to discuss "personnel matters". When the Board returned from the executive session, it defeated the recommendation to cut staff. In my view, if the Board discussed the staff cuts in relation to budgetary matters, i.e., the manner in which public money would be expended or appropriated, without referring to particular individuals and their employment history, no basis for executive session could have been asserted. On the other hand, if the staff cuts were discussed in terms of terminating particular employees based upon their performance, for example, then the discussion would have been, in my opinion, appropriate for executive

Relevant to the issue is section 105(1)(f), which permits a public body to enter into an executive session to discuss:

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

Based upon the language quoted above, a discussion of "staff cuts" as a result of budgetary concerns would not in my opinion deal with any "particular person" and, therefore, would not have qualified for entry into an executive session.

In addition, it has been held that a motion to enter into an executive session 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 section 105(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., Chumung Cty., July 21, 1981]. As such, a motion to discuss "the employment history of a particular particular person" would in my view be proper when the subject to be discussed falls within the scope of section 105(1)(f); a motion to discuss "personnel matters", without more, would not.

Second, you wrote that the Board and the Superintendent met in executive session on July 16. No public notice of this meeting was given and no vote to enter into executive session was held. You further explained that the topic of the meeting was the substitution of a new five-year contract for the existing three-year contract between the Superintendent and the School District. While this topic may have been properly discussed in an executive session, section 105 of the Open Meetings Law contains a procedure that must be followed during an open meeting before a public body may enter into an executive session. Specifically, section 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 to

> 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 identifying, in general terms, the topic or topics to be discussed, and the motion must be carried by a majority vote of the total membership. Further, section 104 of the Law requires that every meeting be preceded by notice given to the news media (at least two) and to the public by means of posting.

Third, according to your letter, the School Board President has appointed various committees of the School Board for the purpose of recommending action to the entire Board. You explained that one such committee, the Public Relations Committee, currently consists of three of the nine Board members. Its primary function "will be to advance the board's position on a referendum to finance a controversial renovation project." The Board President has announced that these meetings would be for Board members only. You asked whether meetings of committees of the School Board are subject to the provisions of the Open Meetings Law.

In this regard, I note that 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" (emphasis added).

Thus, in my opinion, School Board committees are "public bodies" as defined by the Law and their meetings must be conducted in compliance with the Law. In other words, the meetings of the committees are subject to the requirements of public notice and must be held open to the public unless an

executive session may properly be held pursuant to section 105 of the Law. Moreover, I believe that minutes of the committee meetings must be prepared pursuant to section 106 of the Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Arnold Elman, Superintendent
Jack Siegel, President, ECSD School Board
Benjamin Lonstein, School Board Attorney
Jo Galante

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3842
OML-AO-1200

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

August 30, 1985

Mr. Rex Smith
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 Mr. Smith:

I have received your letter of August 28, as well as the documentation attached to it.

The materials pertain to the existing Suffolk County local law regarding the filing of financial disclosure statements by certain County officials, and a proposal to amend the local law introduced by a County Legislator. You have asked that I review the materials for the purpose of commenting on whether the local law and the operations of the Suffolk County Board of Public Disclosure "are subject to the provisions of New York's open government laws". You also requested answers to the following questions:

> "(1) Under the Freedom of Information Law, should a list naming employees covered by the local law, specifying whether or not they have waived confidentiality under Section 9 of the local law, be available for public inspection?
>
> (2) Should minutes of the meetings of the Suffolk County Board of Public Disclosure be available for public inspection?
>
> (3) Under the state Open Meetings Law, would meetings of the county Board of Public Disclosure be open to the public?"

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

It is noted initially that the Freedom of Information Law is broad in its scope. Section 86(4) of the 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."

As such, I believe that financial disclosure statements would constitute "records" 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 section 87(2)(a) through (i) of the Law.

The introductory language of section 87(2) indicates that an agency may withhold "records or portions thereof" that fall within one or more of the grounds for denial. Based upon the quoted language, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. The language also in my view imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

With respect to the current local law regarding release of financial disclosure statements, it appears that the statements are considered "confidential", unless the subject of a disclosure statement consents to disclosure. Here I point out that, although records may in some instances be characterized as "confidential", they may be considered confidential in my view only when a statute, an act of the State Legislature or Congress, so prescribes. In terms of the Freedom of Information Law, section 87(2)(a) permits an agency

to withhold records that "are specifically exempted from disclosure by state or federal statute". Since the local law in question is not a statute, I do not believe that it can require "confidentiality". This is not to suggest that financial disclosure statements submitted under the existing local law must be made available in their entirety. However, I believe that they are subject to whatever rights might exist under the Freedom of Information Law.

Perhaps the most relevant exception to rights of access relative to the existing local law or the proposed local law is section 87(2)(b), which enables an agency to withhold records or portions thereof to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Here I point out that the Freedom of Information Law, as it pertains to municipalities, such as Suffolk County, is permissive. A municipal agency may withhold records when disclosure would constitute an unwarranted invasion of personal privacy; nevertheless, there is no obligation to do so. Further, if the only basis for withholding records concerns unwarranted invasions of personal privacy, and if the subject of the records consents to disclosure, thereby waiving the protection of privacy, the records would in my view become available.

It is possible that, despite the confidentiality restriction present in the existing local law that some portions of the financial disclosure statements might be found to be available. The standard in the Freedom of Information Law concerning privacy is flexible. Reasonable people often differ with regard to whether disclosure of personally identifiable information would result in a permissible as opposed to an unwarranted invasion of personal privacy. However, it has been found in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are generally required to be more accountable than others. In addition, various decisions rendered under the Freedom of Information Law indicate that records that are relevant to the performance of public employees' official duties are available, for disclosure in those situations would result in a permissible rather than an unwarranted invasion of personal privacy [see 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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty, NYLJ, October 30, 1980; Capital Newspapers v. Burns, 490 NYS 2d 651, AD 3 Dept.,

1985]. Conversely, when records or portions of records pertaining to public employees are irrelevant to the performance of their official duties, they could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1984]. As such, it is reiterated that, notwithstanding the requirement of confidentiality present in the existing local law, it might be found that some aspects of financial disclosure statements are accessible, based upon a finding that disclosure would result in a permissible, not an unwarranted invasion of personal privacy.

By means of analogy, you may be aware that Governors Carey and Cuomo have promulgated executive orders requiring the submission of financial disclosure statements by certain executive branch employees. While the financial disclosure statements are not available in their entirety, "public versions" are disclosed pursuant to the Freedom of Information Law. The public inspection versions include information regarding the sources of income, assets and liabilities, while the amounts related to those types of information are deleted to protect personal privacy. I believe that the system is based upon the principle that the public has the right to know the sources of income or liabilities of certain public officials in order to determine whether or not those individuals may be engaged in an actual or potential conflict of interest.

At this juncture, I offer responses to your specific questions.

First, I believe that if a list naming employees covered by the local law exists, it should be made available. It is noted that one of the few instances in the Freedom of Information Law in which an agency must create a record involves payroll information. Section 87(3)(b) requires each agency to maintain:

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

Therefore, the identities of those subject to the local law, their titles and salaries must be made available by means of a different record, a payroll record prepared by Suffolk County. I note, however, that as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if no list of employees subject to the local law exists, I do not believe that Suffolk County would be required to prepare such a list on your behalf.

Assuming that such a list does exist, once again, I believe that it would be available. Further, if the list specifies whether or not persons covered by the local law have waived confidentiality, that portion of the list would also in my view be accessible, for it does not appear that there is anything "personal" about either a grant of access or a decision to opt for confidentiality.

The second and third questions deal with the Board of Public Disclosure created by the local law.

In my opinion, the Board is a "public body" subject to the requirements of the Open Meetings Law. Section 102(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 description of the County's Board of Public Disclosure in the documentation that you enclosed, I believe that each of the conditions found in the definition of "public body" can be met by the Board. Therefore, I believe that the Board must convene its meetings open to the public and provide notice of its meetings in accordance with section 104 of the Open Meetings Law.

It is emphasized that a public body may under appropriate circumstances enter into a closed or "executive" session. Further, I believe that much of the Board's work could likely be conducted during an executive session, for section 105(1)(f) of the Open Meetings Law permits a public body to exclude the public from a meeting to discuss:

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

Based upon the language quoted above, if the Board is reviewing financial disclosure statements submitted by a particular employee or discussing issues relative to conflicts of interest or other related matters pertaining to particular employees, I believe that it could conduct executive sessions pursuant to section 105(1) of the Open Meetings Law. Moreover, a public body may generally take action during a proper executive session, unless its action involves the appropriation of public monies.

With respect to minutes, section 106(2) concerns 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."

The language quoted above in my view would require that minutes be made available. However, depending upon the nature of the action taken by the Board, it is likely that identifying details could often be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I believe that minutes indicating the adoption of policy or determinations of general applicability would be available to the public under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jane Devine, County Legislator

COMMITTEE ON OPEN GOVERNMENT OML-AO-1202

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 5, 1985

Mr. Art Gould
President ETA
RD 2, Box 52S
Stone Ridge, NY 12484

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

Dear Mr. Gould:

I have received your letter of August 27 in which you requested clarification regarding the applicability of the Open Meetings Law to meetings of committees designated by the Ellenville School Board.

According to your letter and the materials attached to it, the Ellenville School Board and its attorney disagree with the Committee's opinion regarding the status of school board committee meetings. Specifically, you asked whether the meetings of such committees, which each consist of less than five members of the entire nine member Board, must be conducted open to the public.

In my opinion, the 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 with the hope that they clarify and eliminate any misunderstanding.

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 the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject, which was apparently cited by Mr. Lonstein, the District's attorney, also 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" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

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 section 102(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 the committees in question are subject to the Open Meetings Law. Specifically, each of the committees is an entity consisting of more than two members. I believe that they are requried to conduct business by means of a quorum (see General Construction Law, section 41 and Syracuse United Neighbors, supra). Further, in view of their duties, I believe that the committees conduct public business and perform a governmental function for a public corporation, in this instance, the School District.

For the reasons expressed above, the committees of the Board are in my view "public bodies" subject to the Open Meetings Law in all respects. As such, I believe that they have the obligation to provide public notice of meetings, prepare minutes and comply with all other aspects of the Open Meetings Law. Concurrently, the committees also have the capacity to conduct executive sessions when the Law so permits.

I hope that 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: Arnold Elman, Superintendent
Jack Siegel, President, School Board
Benjamin Lonstein, Attorney, School Board
Jo Galante, Times Herald Record

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1203

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 6, 1985

Mr. James J. Nolletti
Village Attorney
Village of Mamaroneck
Village Hall
P.O. Box 10543
Mamaroneck, NY 10543

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. Nolletti:

I have received your letter of August 28 in which you requested an advisory opinion under the Open Meetings Law concerning "confidential investigations of complaints that are brought to the attention of the Human Rights Commission..." of the Village of Mamaroneck. The Commission inquires "into incidents of tensions and conflict among or between various racial, religious and nationality groups" and takes "action to alleviate such tensions and conflict".

More specifically, you asked the following questions:

> "Would the Human Rights Commission be in violation of the Open Meetings Law if it met confidentially with respondents to investigate complaints?
>
> Could such meetings be attended by the full Commission, or only a part thereof?
>
> Could such meetings be held at Village Hall without public notice?"

You added that, due to the nature of issues brought before the Human Rights Commission, "the posting of notices with the alleged violators named could possibly leave the Village open to litigation."

In this regard, I offer the following comments.

First, based upon the provisions of Article 12-D of the General Municipal Law, I believe that a municipal commission on human rights is a "public body" subject to the Open Meetings 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 view of the language quoted above, I believe that each of each of the conditions necessary to a finding that the Commission is a "public body"can be met.

Second, as you may be aware, section 105(1) of the Open Meetings Law specifies the topics that may be discussed by a public body during an executive session. It is possible that one or more of those grounds could appropriately be asserted to exclude the public from a meeting. For instance, section 105(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..."

Some of the inquiries or complaints taht reach the Human Rights Commission might involve, for example, the employment history of a particular person or corporation.

It is noted, however, that section 103 of the Law requires that every meeting be convened as an open meeting and that a public body accomplish a procedure during an open meeting before it may enter into an executive session pursuant to section 105. In relevant part, section 105(1) states that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

While a motion to enter into an executive session must in general terms identify the topic or topics to be considered, I do not believe that a motion must in any way identify either a complainant or the subject of a complaint brought before the Commission.

In a related vein, while I believe that every meeting must be preceded by notice given in accordance with section 104 of the Open Meetings Law, the cited provision does not require that the notice include an agenda or an indication of the specific subjects to be discussed by a public body. Section 104 merely requires that a public body provide notice of the time and place of its meetings.

You asked whether meetings of the Commission could be attended by a full Commission, "or only a part thereof". In my view, every member of a public body has the right to attend a meeting of the body. Further, section 105(2) of the Open Meetings Law specifies that members of a public body have the right to attend executive sessions. The cited provision also states that a public body may authorize other persons to attend an executive session. Therefore, if a proper basis for entry into an executive session can be asserted, the Commission could meet "confidentially" with respondents in conjunction with complaints.

Viewing your question from a different perspective, I believe that a meeting may be convened by a quorum, a majority of the total membership of the Commission [see General Construction Law, section 41]. If less than a quorum of the Commission convenes, the Open Meetings Law would not apply. Similarly, however, no action could be taken by the Commission by means of an affirmative vote of less than a majority of its total membership.

In sum, assuming that the Human Rights Commission has a basis for entry into an executive session, it may engage in discussions with respondents during an executive session in its process of investigating complaints. Further, while I believe that notice must be given prior to all meetings of the Commission, there is no requirement in the Open Meetings Law that the specific subjects to be considered by the Commission be disclosed with the notice or prior to a meeting.

I would like to add that, based upon a review of the powers and duties of commissions of human rights created by local governments pursuant to Article 12-D of the General Municipal Law, it would appear that a local commission has no authority to take "action", but rather has the authority to seek to conciliate when controversies arise.

Although it may be argued that the Commission acts as a conduit with respect to action that may later be taken by the State Division of Human Rights, the two agencies are separate and distinct. When the State Division of Human Rights receives a complaint, the proceeding that may ensue is in essence de novo. Moreover, based upon conversations with a representative of the Office of Counsel to the Division several years ago when similar questions arose, I was informed that the Division does not consider a municipal commission as an "agent" or employee of the Division.

Further, none of the exemptions contained in section 108 of the Open Meetings Law could in my opinion be asserted. Although the Commission hears controversies and attempts to conciliate, it does not make determinations of a judicial nature. Consequently, I do not believe that its proceedings could be characterized as quasi-judicial or exempt from the Open Meetings Law pursuant to section 108(1). While there are provisions requiring nondisclosure of records of the State Division of Human Rights [see e.g., Executive Law, section 297(8)], such provisions pertain only to the Division. They do not extend to municipal human rights commissions, for, as noted previously, such municipal commissions are not considered "agents" of the Division. Therefore, records or discussions relative to proceedings of a local commission are not "matters made confidential by federal or state law" and as such are not exempt under section 108(3) of the Open Meetings Law.

Finally, Article 12-D of the General Municipal Law, which sets forth the responsibilities of municipal human rights commissions, indicates that the meetings of such commissions are intended to be open to the public. Specifically, section 239-r(b) states that such commissions shall:

> "...hold conferences, and other public meetings in the interest of constructive resolution of racial, religious and nationality group tensions and the prejudice and discrimination occasioned thereby" (emphasis added).

In view of the provision quoted above, it appears that the Legislature intended that local commissions on human rights seek to resolve disputes in an open forum.

I hope that 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1204

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 6, 1985

Mr. John L. Petry
President
Police Benevolent Association, Inc.
Ithaca, New York 14850

<u>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.</u>

Dear Mr. Petry:

I have received your letter of September 1 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, in July, the Ithaca Board of Police Commissioners decided to hold its "regular monthly meeting as part of a Police/Community Relations Forum organized by the Tompkins County Human Rights Divisions' Sub-Committee on Police/Community Relations". The Board convened at the forum held on July 18 at approximately 7:30 p.m. You indicated that a quorum was present with respect to the Board of Police Commissioners and the Human Rights sub-committee. However, a problem arose when, prior to the meeting, at approximately 4:30 p.m. on the day of the forum, the Ithaca Chief of Police gave an order that "no uniformed officers will be permitted to attend the meeting-by orders of the Police Commissioners". You added that since the Police Benevolent Association, which you serve as president, arranged for the attendance of uniformed officers at the forum , officers and others were "upset" by the order.

Although you are concerned with your own specific situation, you asked whether persons may be excluded from public meetings "based upon the way they are dressed, irregardless of the reasoning? May they be excluded because of their employment?" You apparently raised the question concerning the manner of dress, because some officials expressed the view that a segment of society "harbors some fear of police uniforms".

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

First, the Open Meetings Law is applicable to meetings of public bodies, and the phrase "public body" is defined in section 102(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."

In view of the language quoted above, it appears that both the Board of Police Commissioners and the subcommittee designated by Tompkins County constitute public bodies subject to the Open Meetings Law. Further, if, as you indicated, a quorum of either of those entities was present, for the purpose of conducting public business, the forum in my view was a "meeting" subject to the requirements of the Open Meetings Law.

Second, section 103(a) of the Open Meetings states in relevant part that "Every meeting of a public body shall be open to the general public..." In my opinion, the cited provision grants a right on the part of any person to attend a meeting of a public body, irrespective of an individual's manner of dress or interest. By means of analogy, the Freedom of Information Law grants rights of access to records to members of the public, and it has been held that accessible records should be made equally available to any person "without regard to status or interest" [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; see also M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. From my perspective, like the Freedom of Information Law, the Open Meetings Law grants equal rights to any person who seeks to attend an open meeting of a public body. Consequently, I believe that any person would have had the right to attend the meeting in question.

Lastly, I am unaware of the specific powers of the Chief of Police or the Board of Police Commissioners with respect to the issuance of orders to officers. I am similarly unaware of any rules that might exist pertaining to the

authority to wear uniforms. It is possible that provisions concerning the powers of the Chief or the Board, or rules and regulations might be relevant to the situation. Nevertheless, it is reiterated that any person may in my view attend an open meeting of a public body.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James M. Herson, Chief of Police

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMGAO-1205

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 11, 1985

Mr. Ronald Marsico
City Reporter
Oneida Daily Dispatch
Oneida, NY 13210

<u>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.</u>

Dear Mr. Marsico:

I have received your letter of September 5 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, the City Council of the City of Oneida "decided to hold an executive session to discuss problems with a newly created driveway correction policy, which is to be used when residents seek redress for driveways altered by city road work". When you questioned the propriety of holding an executive session, you were "told by the mayor and city attorney that it could involve possible litigation. Ther both conceded that it involved neither a current nor a specific litigation matter".

You expressed the view that the discussion involved a matter of policy and that the executive session was improperly held. In this regard, I offer the following comments.

First, as you 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 topic falls within the scope of one or more grounds for entry into executive session pursuant to section 105(1)(a) through (h). As such, the Law specifies and limits the topics that may properly be discussed during an executive session.

Second, the Common Council entered into its executive session apparently on the basis of section 105(1)(d), which permits a public body to conduct an executive session to discuss "proposed, pending, or current litigation". From my perspective, "possible" litigation would not constitute an

appropriate basis for entry into executive session. Under the circumstances, it does not appear that litigation on the issue has been initiated or that there had been any threat of litigation. Moreover, in a decision rendered by the Appellate Division concerning the cited provision, it was determined that:

> "The 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., 83 AD 2d 612, 613). 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)].

In view of the foregoing and based upon the facts as described in your letter, I believe that the discussion of "driveway correction policy" by the City Council should have been conducted during an open meeting.

As you requested, copies of this opinion will be sent to the officials of the City of Oneida identified in your letter.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

cc: Mayor Jeannette Kidd
Councilman Patrick Ryan
Councilman Peter DuChene
Councilman Edmond W. Miller III
Councilman Leo Matzke
Councilman Joseph Valesky
Councilman Frank Sarensky
City Attorney, Frederic Rann

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1206

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 11, 1985

Mr. Jack H. Rosenberg
Trustee
Village of Spring Valley
[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. Rosenberg:

As you are aware, I have received your letter of September 4, as well as the materials attached to it.

You have requested an opinion under the Open Meetings Law concerning the contents of minutes of the Board of Trustees of the Village of Spring Valley, upon which you serve.

Your first question concerns the propriety of a resolution adopted by the Board on July 9, which, according to the minutes, states that:

> "On motion by Trustee Friedman and seconded by Trustee Darden, the Board voted 4-1 adopting a resolution authorizing the minutes of Village Board meetings to reflect only a record, in summary form, of all motions, proposals, resolutions and any other matters formally voted upon and the vote thereon."

Here I point out that section 106 of the Open Meetings Law requires what might be characterized as minimum requirements concerning the contents of minutes. It is clear in my opinion that minutes need not consist of a verbatim account of discussions conducted at a meeting or that minutes make reference to each comment made by Board members or others. The cited provision states in relevant 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."

Based upon the language quoted above, it would appear that the motion concerning minutes adopted on July 9 was appropriate.

The second issue involves your attempt to amend minutes of a meeting held on July 23 to include two reasons why you cast a negative vote concerning a bond sale. Despite your attempt, the minutes of the meeting in which you sought to do so contain "no mention of that fact..." It is your view that the minutes of the meeting held on August 13 should have indicated that you sought to amend the minutes of the earlier meeting.

Assuming that you sought to amend the minutes by means of a motion, I believe that reference to your motion should have been included in the minutes, whether the motion passed or failed. As indicated earlier, at a minimum, minutes must include reference to "all motions", whether or not they are adopted. Consequently, it is my view that your motion to alter the minutes of the meeting of July 23 should have been included in the minutes of the meeting of August 13.

I hope that 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-3854
OML-AO-1207

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

September 16, 1985

Mr. Karl Thuge
Fire Fighting Products
Corporation
186 East Shore Drive
Massapequa, NY 11758

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. Thuge:

I have received your letter of September 4 in which you requested assistance in obtaining information from the Massapequa Board of Fire Commissioners.

According to your letter and attachments, you requested various records concerning the purchase of a certain fire fighting apparatus on August 14 from the Board of Fire Commissioners. Specifically, you would like to inspect all bids and documents submitted at the bid opening, copies of minutes of all meetings pertaining to the purchase, and copies of "the report from the fire insurance rating organization which makes recommendations as to the needs of the apparatus of the Massapequa Fire District". In addition, you asked to know "from where the funds are coming to pay for this apparatus". The request was apparently sent to the attention of the Board's attorney, William Sinnreich, and you wrote that you have not yet received a response to your request.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law provides that all records of an agency are presumed to be available unless the record, or a portion thereof, may be withheld under section 87(2)(a) through (i) of the Law. Section 86(3) defines "agency" to include:

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

Based upon the statutory definition, I believe that the Massapequa Board of Fire Commissioners is an agency subject to the Freedom of Information Law.

Second, the Freedom of Information Law grants rights of access to records rather than information. In other words, if the information which you seek is not maintained in some physical form, an agency is not required to create a record. Moreover, a request must "reasonably describe" the records sought [see section 89(3) of the Freedom of Information Law].

Third, I believe that many of the records which you have requested, if they exist, should be made available to you. As to the bids and documents submitted at the bid opening, I can think of no basis under the Freedom of Information Law which would permit the Board to withhold that information at this time.

Likewise, minutes of Board meetings in which the purchase of the apparatus was discussed would be available. I note that the Open Meetings Law provides minimum requirements for preparing minutes of meetings held by a public body. Section 106 of that Law requires that minutes of an open meeting consist of:

> "...a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

While section 106 requires a summary of only the more formal aspects of a meeting, it is possible that the Board prepared the minutes of its meetings with more detail. I believe that the minutes taken at the open Board meetings would be available to you in any form in which they are prepared.

Fourth, you requested "to know from where the funds are coming to pay for this apparatus - capital reserve account, general tax monies or tax anticipation notes." As I explained if this type of information is reflected in some physical form, I believe that such records would be available to you. However, the Board need not create a record in response to your questions.

Finally, without more detail, it is difficult to advise with respect to the availability of the "report from the fire insurance rating organization". Since I am not familiar with the organization or its relationship with the Board, I cannot advise with certainty as to your right of access to the report.

Requests for records of an agency should be forwarded to its records access officer. Thus, I suggest that you submit your request to the Board's records access officer who, as you know , has five business days within which to grant or deny access. A denial of access must be in writing and state the reasons for such denial. If you receive no response from the records officer after five business days, you may consider your request "constructively" denied and appeal to the Board's Appeals Officer. The Appeals Officer must respond within ten business days of receiving appeal.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Assistant Attorney General David Smith
William Sinnreich
Mr. Herman Payne, Chairman
Massapequa Board of Fire Commissioners

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-1208

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

September 18, 1985

Mr. Richard Decker
Department of State
Local Government Services
5th Floor
162 Washington Avenue
Albany, NY 12231

Dear Mr. Decker:

I have received your request for an advisory opinion regarding the applicability of the Open Meetings Law to meetings of the Long Island Regional Ashfill Board. In this regard, I offer the following comments.

The Board was established by the State Legislature under Chapters 358 and 359 of the Laws of 1985, signed by Governor Cuomo on July 19. The Board is required to recommend a site for a regional ash disposal facility in Nassau or Suffolk County. The board consists of thirteen members, including the Commissioners of the Departments of Environmental Conservation, Health and the Secretary of State or their designees, and ten ad hoc members appointed by the governor, the Nassau and Suffolk County Executives and by the minority members of those counties' legislative bodies. The ad hoc members are to be qualified to analyze and interpret matters pertaining to solid waste management by professional training or by experience and attainment.

By January 15, 1986, the Board is required by statute to make recommendations to the Environmental Facilities Corporation concerning the operation of the ashfill, involving:

> "(i) potential intermunicipal arrangements for the management of downtime and untreatable waste;
>
> (ii) the process for selection of a facility operator;

> (iii) the establishment of tipping fees for use of the ashfill; and
>
> (iv) potential incentives that could be provided to the municipality that hosts the ashfill."

The statute further provides that, for purposes of this act, "the ad hoc members of the board shall be considered officers or employees of public entities and shall be afforded such defense and indemnification as provided pursuant to section seventeen of the public officers law."

As you are aware, the Open Meetings Law requires that meetings of a public body are to be held open to the public unless an executive or closed session may be held pursuant to section 105 of the law. Public body is defined in section 102(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 subcommittee or other similar body of such public body."

Based upon the definition, I believe that the Long Island Regional Ashfill Board is a public body subject to the provisions of the Open Meetings Law. The Board consists of more than two members and performs a governmental function for the State as well as for Suffolk and Nassau Counties. In addition, I believe that the Board is required to conduct public business by means of a quorum. Section 41 of the General Construction Law entitled "Quorum and Majority" states that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or

> similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such 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 disquallified from acting."

In my view, the Board consists of public officers and "persons charged with a public duty to be performed or exercised by them jointly". The Board was established to recommend a site for a regional ashfill in Suffolk or Nassau County. Several courts have recognized that such bodies may be charged with a public duty and are, therefore, subject to the Open Meetings Law, even though they have no authority to take final or binding action [see i.e., Syracuse United Neighbors v. City of Syracuse, 80 AD 2D 984, app dis 55 NY 2d 995 (1982); MFY Legal Services v. Toia, 402 NYS 2d 510 (1977); Pissare v. City of Glens Falls, Sup. Ct., Warren Cty., March 2, 1978]. Thus, I believe that the Board must exercise its duty pursuant to the quorum requirements set forth in section 41 of the General Construction Law.

Finally, the term "meeting" for purposes of the Open Meetings Law has been construed to mean a gathering of at least a quorum of a public body for the purpose of conducting public business, regardless of whether any action is intended to be taken [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 the Long Island Regional Ashfill board must comply with the provisions of the Open Meetings Law when at least a quorum of the Board gathers to conduct public business.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1209

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 27, 1985

Mr. John Johnson
c/o General Delivery
Medusa, NY 12120

<u>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.</u>

Dear Mr. Johnson:

I have received your letter of September 17 in which you requested an advisory opinion regarding the meetings of the Rensselaerville Town Board.

You wrote that on August 6 and September 10, 1985, meetings were held at the Rensselaerville Town Hall. In attendance were the Town Supervisor and four board members, in addition to the Town Clerk. You believe that your request for minutes of these meetings will be denied. You also indicated that the meetings were "non public" and that you were told that the September 10 meeting was "informal" and an executive session. You asked whether these meetings should have been public and whether minutes of the meetings should have been taken.

In addition, you asked whether a request for records of a county agency should be submitted directly to that agency or to the county clerk's office.

In this regard, I offer the following comments.

First, the Open Meetings Law requires that all meetings of a public body be open to the public unless an executive session may be held pursuant to section 105 of the Law. "Public body" is defined in section 102(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."

Thus, the Rensselaerville Town Board is clearly a public body as defined by the Law.

Moreover, a "meeting" of a public body is defined as the "official convening of a public body for the purpose of conducting public business" [see section 102(1) of the Open Meetings Law]. The Court of Appeals has interpreted that definition to include any gathering of at least a quorum of the public body for the purpose of discussing public business, regardless of whether any action is intended to be taken [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 415 NY 2d 947 (1978)].

Second, if the Supervisor and the four councilmen consisted of at least a quorum of the Rensselaerville Town Board, then their meeting, in my view, should have been conducted pursuant to the Open Meetings Law. Specifically, the requirements that public notice be given and minutes be taken must be met.

Section 104 of the Law requires the Board to provide public notice of the time and place of its meetings by notifying the news media (at least two) and by posting notice in at least one designated public location. If the meeting is scheduled a week or more in advance, notice must be given at least seventy-two hours before the meeting. For meetings scheduled less than a week in advance, notice must be given as described above, to the extent practicable, at a reasonable time prior to the meeting.

Minutes of an open meeting must be prepared and should consist of a summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon [see section 106(1) of the Open Meetings Law]. Thus, if no motions or proposals are made during the meeting, minutes need not be taken. I note that the Law provides the minimum requirements for preparing minutes, although the better practice may be to prepare minutes with more detail than required by section 106. Nonetheless, minutes of an open meeting must be made available in the form in which they are prepared, whether they merely comply with the minimum requirements or contain a detailed account of the meeting.

Third, a public body may conduct an executive or closed session by following the procedure set forth in section 105. Pursuant to a motion generally describing the subject matter to be discussed, a majority of the public body must vote to enter into executive session. Thus, an executive session must take place within an open meeting. Moreover, an executive session may be conducted only for the purposes enumerated in the Law. No action by formal vote may be taken to appropriate public monies in such a session.

Whether minutes of the August 6 and September 10 meetings should have been prepared would depend upon what action was discussed or taken during those meetings. Likewise, whether the Board had a basis for conducting an executive session would depend upon the topic of discussion. Nonetheless, the meeting would have to be convened open to the public before the Board entered into executive session.

Finally, you asked whether a request for a record should be forwarded to the office which maintains the record or to the unit of government of which that office may be a part. The answer to this question may vary among the different levels of government. At the state level, for instance, each agency generally designates its own records access officer, while at the local level, there may be one records access officer, for example, for all of a town's offices. In Albany County, all requests for records should be made to the County Clerk's Office even if the record is maintained by the County Health Department. The County Clerk will then obtain the record from the Health Department and determine whether it should be made available.

For your information, I have enclosed a copy of our pamphlet "Your Right to Know" which summaries the scope 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,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:jm
Enc.
cc: Kermit E. Jackson, Town Supervisor

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1210

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279

September 30, 1985

Mr. Lawrence A. Hendrix
Superintendent
Putnam Central School
District No. 1
Putnam Station, NY 12861

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

Dear Mr. Hendrix:

I have received your letter of September 17 and appreciate your interest in complying with the Open Meetings Law.

You have asked that I review minutes of a meeting of the Board of Education of the Putnam Central School District for the purpose of advising whether the Board appropriately conducted an executive session.

In relevant part, the minutes state that:

> "After much discussion about the Budget, Sally O'Connor made the motion to go into executive session to determine what recourse to take with the Budget. James Hock seconded that motion. The motion was presented and carried unanimously by all members presenat. The Board went into executive session at 9:20 p.m. Closed 10:00 p.m.
>
> "At that time Sally O'Connor made the motion to go with an austerity Budget for the 1985-1986 School year. James Hock seconded that motion. Diane Hart opposed. The motion was presented and carried."

In my opinion, it is unlikely that the executive session was legally held.

As you may be aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may legally be convened purusant to section 105 of the Open Meetings Law. Paragraphs (a) through (h) of section 105(1) of the Law specify and limit the topics that may properly be considered during an executive session. A discussion of "what recourse to take with the Budget" would not in my view fall within the scope of any of the grounds for entry into an executive session.

It has been suggested that a discussion of a budget may in some instances relate to "personnel". Section 105(1)(f), 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."

While issues relative to a budget might have an impact upon personnel, those issues ~~generally~~ relate to personnel generally or the manner in which public monies may be expended, rather than on the performance of a particular employee, for example. If indeed the discussion of the budget involved considerations of policy relative to the expenditures of public moneys, I do not believe that there was any legal basis for entering into an executive session [see e.g., Orange County Publications, Division of Ottoway Newspapers Inc. v. the City of Middletown, the Common Council of the City of Middletown, Sup. Ct., Orange Cty., December 6, 1978; Orange County Publications, Division of Ottoway Newspaers Inc. v. County of Orange, Legislature of the County of Orange and the Rules, Enactments and Intergovernmental Relations Committee of the County Legislature, Sup. Ct., Orange Cty., Oct. 26, 1983].

In sum, based upon the language of the Open Meetings Law and its judicial interpretation, a discussion of the budget, a matter of policy, should in my view have been discussed in public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1211

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279

October 1, 1985

Mr. Frederic N. Rann
City Attorney
City of Oneida
Department of Law
128 Main Street
Oneida, NY 13421

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. Rann:

I have received your letters of September 16 and 18 in which you requested an advisory opinion.

You wrote in response to an article which appeared in the Oneida Daily Dispatch regarding an executive session held by the Oneida Common Council on September 3, 1985. You believe that inaccurate information was provided to this office upon which an advisory opinion was rendered at the request of the Dispatch. You have described the circumstances surrounding the executive session and have asked for my response. In this regard, I offer the following comments.

According to your letter, following the completion of the regular agenda of the Common Council, the City Engineer reported that "claims had been made against the City" and that "as a result of the recent law enacted by the City and the retrospective application of it in one case that he had a number of inquiries made of him concerning claims that land owners had against the City." At that point, you wrote, you realized that the Engineer and the Common Council were looking to you for legal advice and you advised the Common Council to deal with the subject in executive session.

You contend that two proper grounds for executive session existed; the situation of "current claims and numerous prospective claims" and the attorney-client privilege.

First, as you are aware, section 105(1)(d) of the Open Meetings Law permits a public body to conduct an executive session to discuss "proposed, pending or current litigation". The courts have generally held that the purpose of paragraph (d) is to enable a public body to discuss litigation strategy privately, so as not to bare its strategy to its adversary [see Weatherwax v. Town of Stony Brook, 97 AD 2d 840 (1983); Concerned Citizens to Review Jefferson Val. Mall v. Town Board, 83 AD 2d 612 (1981)]. It is unclear from your letter whether the claims made by the land owners were notices of claims under section 50-e of the General Municipal Law. If they were, a discussion of such claims, in my view, could properly have been conducted in executive session.

If the Common Council met to discuss claims which appeared to "propose" litigation, and the Council intended to discuss its legal strategy as to how it would prevent or defend such litigation, again, I believe that the discussion could been held in executive session. However, if the discussion was to be held strictly to "determine the exact nature and extent of the claims against" the City, without more, the discussion would not, in my view, rise to one of "proposed litigation" and thus, would not have constituted a ground for executive session under section 105(1)(d).

Second, you wrote that the Council was looking to you for legal advice regarding the matter and that you were "not about to interview and advise your clients in an open forum in a situation that appeared at the time to expose the City to many thousands of dollars of claims". You explained that you therefore exercised the attorney-client privilege and recommended an executive session.

In my opinion, if the Council met with you as the City Attorney for the purpose of seeking legal advice, the attorney-client privilege, as contemplated by section 4503 of the Civil Practice Law and Rules, may have been invoked. Such a discussion would be exempt from the coverage under the Open Meetings Law pursuant to section 108. That provision states that:

> "Nothing contained in this article shall be construed as extending the provisions hereof to: ...
>
> 3. any matter made confidential by federal or state Law."

Since section 4503 of the Civil Practice Law and Rules deems communications between an attorney and clients confidential when legal advice is sought, I believe that such communications would fall outside the scope of the Open Meetings Law. In other words, no executive session need be conducted; the attorney-client discussions may simply be held in private.

In sum, it appears that your discussion with the Council on September 3 may have been privileged as attorney-client communications. Therefore, an executive session would have been procedurally inappropriate, for there is no ground enumerated in section 105 for entering into such a session based strictly upon the attorney-client privilege. Rather, pursuant to section 108, the discussion may have been held without complying with the provisions of the Open Meetings Law. Nonetheless, it is the better practice to generally explain to those in attendance at an open meeting why the Council seeks to meet in private.

I hope 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: Common Council of the City of Oneida
Mr. Ronald Marsico, Oneida Daily Dispatch

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1212

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 1, 1985

Mr. Philip L. McIntyre
[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, except as otherwise indicated.

Dear Mr. McIntyre:

I have received your recent letter in which you expressed "dissatisfaction" with the Panama Central School District Board of Education for calling what you believe may have been "an illegal or improper executive session".

According to your letter, at a meeting held on August 12, your attorney asked that the Board "withdraw a transportation referendum that [you] instigated". A new board member asked questions pertaining to the issue and apparently requested to enter into an executive session. Your attorney objected on the ground that "there was no litigation or potential litigation concerning the transportation referendum".

It is noted that I have discussed the matter with both Charles R. Pegan, Superintendent, and David A. Farmelo, attorney for the District. I was informed that Mr. Farmelo met with Mr. Pegan earlier in August to discuss legal issues relative to the referendum, which is apparently the subject of an appeal before the Commissioner of Education. They also told me that the executive session was held in order to enable the new member to become familiar with the legal issues and the Board's legal strategy relative to the appeal before the Commissioner.

In this regard, I offer the following comments.

From my perspective, the issue is whether an executive session could justifiably have been held under section 105(1)(d) of the Open Meetings Law. That provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". The courts have

held that the purpose of section 105(1)(d) is to permit a public body to discuss its litigation strategy in private, so as not to bare that strategy to its adversary [see Weatherwax v. Town of Stony Point, 97 AD 2d 840 (1983); Concerned Citizens to Review the Jefferson Mall, Matter of v. Town Board of the Town of Yorktown, 84 AD 2d 612, appeal dismissed 54 NY 2d 957 (1981)].

A related issue is whether a proceeding before the Commissioner of Education could be characterized as "litigation". I am unaware of any judicial determination that has dealt with that issue. However, Black's Law Dictionary defines "litigation" to mean "contest in a court of justice for the purpose of enforcing a right; a judicial contest, a judicial controversy, a suit at law".

An appeal before the Commissioner, although it may be a quasi-judicial proceeding, is not a proceeding conducted by a judge or a court. As such, it might be determined that a discussion of such an appeal is not a discussion of "litigation". Under such a finding, there would not apparently have been any basis for entry into an executive session. If, on the other hand, it is determined that such a proceeding is the equivalent of litigation, a discussion of legal strategy relative to such a proceeding could likely qualify for consideration in executive session pursuant to section 105(1)(d).

In view of the foregoing, the propriety of the executive session is in my opinion somewhat unclear.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles R. Pegan
David A. Farmelo

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3869
OML-AO-1213

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279

October 3, 1985

Mr. John Johnson
c/o General Delivery
Medusa, New York 12120

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

Dear Mr. Johnson:

I have received your recent letter in which you requested an advisory opinion concerning requests directed to the Town of Rensselaerville.

Specifically, according to your letter, the Town Board at several recent meetings entered into executive sessions. Subsequently, you submitted requests under the Freedom of Information Law for minutes of executive sessions. As of the date of your letter to this office, you had not received responses to those requests.

In this regard, I offer the following comments.

First, there is no indication in your letter of the nature of the topic or topics that may have been considered during the executive sessions.

Here I point out that, prior to entry into an executive session, a public body is required to accomplish a procedure prescribed in the Law. Specifically, section 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, a motion to enter into an executive session must be made during an open meeting. Further, the motion must indicate in general terms the topic or topics to be considered.

Second, the Open Meetings Law contains provisions pertaining to minimum requirements relative to the contents of minutes. In the case of executive sessions, section 106(2) states in part 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..."

If, for example, a public body enters into an executive session and merely discusses an issue or issues but takes no action, there is no requirement that minutes of an executive session be prepared. Contrarily, based upon section 106(2), if action is taken during an executive session, minutes reflective of the nature of the action, the date and the vote must be prepared. Further, section 106(3) requires that minutes of executive sessions must be prepared and made available within one week.

Third, even if no action was taken during the executive sessions, and if, therefore, no such minutes exist, I believe that Town officials are nonetheless required to respond to your requests made under the Freedom of Information Law in a timely manner.

It is noted that the Freedom of Information Law and the regulations promulgated by the Committee prescribe time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regulations provide that an agency must respond to a request within five business day 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 business 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 acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, section 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, section 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 section 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 Rules [Floyd v. McGuire, 108 Misc. 2d 87 Ad 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Supervisor

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO · 1214

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

COMMITTEE MEMBERS
R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 7, 1985

Ms. Cindy Morrison
Morrison Realty
179 Montcalm Street
Ticonderoga, NY 12883-0045

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. Morrison:

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

You have asked that I review minutes of a meeting held by the Board of Trustees of the Village of Ticonderoga in which, according to your letter, an executive session was held "to make a decision on the request for a zoning variance". The minutes of the meeting held on September 23 state that a particular trustee "requested that the Board go into executive session to make a decision". The minutes do not indicate that a motion was made to enter into executive session or that there was a statement providing the topic to be discussed. Following the executive session, a determination was made by means of a resolution. You have questioned the propriety of the executive session.

In this regard, I offer the following comments.

First, on the basis of the minutes attached to your letter, it does not appear that the Board of Trustees complied fully with the procedural requirements that must be accomplished prior to entry into an executive session. Specifically, section 105(1) of the Law states in relevant part that:

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

In view of the language quoted above, a motion to enter into an executive session must indicate, in general terms, the topic or topics to be considered during an executive session. Further, such a motion must be carried by an affirmative vote of a majority of the total membership of a public body. Neither of those requirements is mentioned in the minutes.

Second, the grounds for entry into an executive session are specified and limited in paragraphs (a) through (h) of section 105(1). Having reviewed the topics that may appropriately be discussed during executive sessions, I do not believe that to a request for a variance could have legally been discussed during an executive session. Stated differently, in my opinion, the discussion of that issue by the Board should have been conducted 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:ew

cc: Board of Trustees, Village of Ticonderoga

FOIL-AO-3876
OML-AO-1215

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

October 10, 1985

Mrs. Marjorie F. Wickes
[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, except as otherwise indicated.

Dear Mrs. Wickes:

As you are aware, I have received a copy of your letter addressed to Robert H. Giles, Editor of the Rochester Democrat & Chronicle, in which you stated that you would seek an opinion from this office.

In that letter, you identified yourself as a member of the Seneca Park Master Plan subcommittee and indicated that you have repeatedly been denied access to "any form of a map which shows the proposed changes". The inability to review such a map has in your view effectively prevented accurate information from being disseminated to interested people. In response to your latest request, the records access officer for Monroe County, Frederick W. Lapple, wrote that the County does not have in its records a copy of the map, which had been presented to the subcommittee by Mr. Reimer, a consultant, at a meeting held in June. Mr. Lapple added that it is his understanding that the map will:

> "ultimately be incorporated into Mr. Reimer's final report to the subcommittee and that all subcommittee members will receive a copy of the report. At that time, the report will become an official record of the County and will be available to the public under the Freedom of Information Law."

Further, although the map was presented at the meeting held in June, you wrote that Assistant County Executive Alexander J. DiPasquale was quoted in the Democrat & Chronicle as stating that it would be "violating the process" to disclose the plan to the public. During our conversation, you indicated that the map was prepared for the County by a consultant and that the map is in the physical custody of the consultant rather than the County.

In addition to your letter, you sent a variety of materials concerning the process under which a master plan is to be adopted. Throughout the materials, reference is made to public participation and to the duties of subcommittees, such as that on which you serve. It is clear on the basis of the materials that the subcommittee is supposed to be involved "at all stages throughout the preparation of each master plan to review work in progress and advise...on issues of citizen concern" (document entitled "Monroe County Parks Advisory Committee - Public Participation Process).

In this regard, I offer the following comments.

First, although not relevant to the Freedom of Information Law per se, if there has been any "violation of the process", it appears that the violation involves the inability of the subcommittee to carry out its duties as intended and as described in the documentation pertaining to the process of developing a master plan. In short, based upon your description of events, the subcommittee was designated to participate in every stage of the process, and yet it appears that County officials have not enabled the subcommittee to represent or speak on behalf of the public by diminishing its role.

Second, in terms of the Freedom of Information Law, a statement that disclosure would "violate the process" would not in my view constitute a basis for withholding records. 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 section 87(2)(a) through (i) of the Law.

Third, it is important to note that the Freedom of Information Law pertains to "records" of an agency, such as Monroe County. In this instance, as stated earlier, it appears that the map in which you are particularly interested was prepared for the County by a consultant and that the consultant has the only copy. Nevertheless, I believe that the map is a "record" subject to rights of access. Section 86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

Based upon the definition quoted above, which makes specific reference to maps, I believe that the map in question consists of "information...produced...by...or for an agency..." Therefore, even though the map might not be in physical possession of the County or considered "official", I believe that it is nonetheless a "record" subject to the Freedom of Information Law and that Monroe County would be required to respond to a request for the map in accordance with the Law.

Fourth, in terms of access, rights on the part of the public are in my view questionable. It appears that a map prepared by a consultant for the County would fall within the scope of section 87(2)(g), which pertains to "inter-agency or intra-agency materials" [see Xerox Corp. v. Town of Webster, 65 NY 2d 131 (1985)]. Although the cited provision constitutes a basis for denial, due to its structure, it often requires that records or portions of records be made available. Specifically, section 87(2)(g) 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 or intra-agency materials may be withheld, portions of such mater-

ials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those aspects of inter-agency or intra-agency materials reflective of advice, recommendation, or opinion, could likely be withheld.

I am unaware of any judicial decision concerning a map that exists in the nature of a draft. In this instance, the map was apparently prepared by the consultant and reflects the consultant's opinion. However, it has been held that statistical or factual information need not be reflective of "objective reality", and that statistical or factual data in the nature of estimates or projections, for example, are available [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)]. Like estimates or projections of expenditures prepared in the budget process that were found to be available, even though they were not reflective of "objective reality" (see Dunlea, id.), perhaps a draft of the map would be found to be similarly accessible to the public.

Fifth, the committees and subcommittees designated by Monroe County or the Monroe County Executive are in my opinion public bodies subject to the requirements of the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)]. If, for example, the draft map was discussed or exhibited at an open meeting of a public body, it might be contended that any basis for withholding was effectively waived by means of the prior public disclosure.

Lastly, it is emphasized that the preceding comments concerning the Freedom of Information Law pertain to rights of access conferred upon any member of the public. In your capacity as a member of a subcommittee designated by the County, which is charged with particular duties, it is suggested that, in order to carry out your duties, you need to review the map. Without the capacity to do so, the functions of the subcommittee, as described in the materials that you forwarded, would likely be severely diminished. As such, it is suggested that you continue to confer with County officials in an effort to obtain the information that would enable you, as a member of the subcommittee, to carry out your duties.

I hope that 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 H. Giles
Alexander J. DiPasquale
John Lamb
Don B. Martin

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3879
OML-AO-1216

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

October 11, 1985

Ms. Mary Margaret Williams
Ms. Louise Snyder
League of Women Voters
[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. Williams and Ms. Snyder:

I have received your letter of September 27, which you wrote as representatives of the Irondequoit Bay Task Force of the Rochester Metro League of Women Voters.

Your questions concern your efforts to observe meetings of and obtain information from the Irondequoit Bay Coordinating Committee (IBCC), a Technical Committee of the IBCC, and a Citizen Advisory Committee.

You wrote that the IBCC was appointed by the Monroe County Executive. The Committee's work involves a "four step process", including the "establishment of environmental objectives, identifying appropriate development management measures, designing the necessary ordinances and regulations to implement the measures, and recommending a long term mechanism for continued intergovernmental coordination in the Irondequoit Bay area". You added that the Committee also "carries out coordinated review of permit applications for development in the Irondequoit Bay area".

The IBCC has, according to your letter, designated a Technical Committee that reviews permit applications and drafts "goals, management practices and ordinances" for the IBCC. In addition to a statement that meetings of the Technical Committee have been closed on the ground that they are "work sessions", you indicated that:

"2. Copies of the proposal and permit reviews from the Technical Committee to the IBCC which are the main subjects of discussion at meetings of the IBCC, are not available to observers. It is difficult to follow the discussions as observers only hear those portions of the text that are read aloud, e.g sometimes a reference is made to a section only by number only.

"3. The Chair of the IBCC declined to make available copies of ordinances prepared for towns around the bay to the Citizens Advisory Committee which is to review these ordinances as revised by the towns. One member of the Advisory Committee was able to obtain a copy from a town planner. However, unless others of the 9 member committee obtain copies from the towns, these members will not be aware of the original proposals to the towns from the IBCC when they review the revisions made by the towns.

"4. There are no minutes of the IBCC.

"5. The Citizen Advisory Committee has no chair and does not meet as a committee but only to make response as individuals to the IBCC proposals.

"6. There were no announced meetings of the IBCC between December 28, 1984 and March 14, 1985 yet it appears that there were meetings of subgroups during that period.

"7. No copy of the Monroe County Comprehensive Plan is available, only 'Draft II' of several, but not all, of the elements. A county staff person told us the reason 'Draft II' copies were available rather than a

> copy of the Comprehensive Plan in total was that it was Draft II of each element which was adopted by the legislature. We were also told that a complete set of the elements was not available, because they are being revised."

In this regard, I offer the following comments.

First, as I understand the facts described in your letter, each of the committees that you identified would constitute a "public body" required to comply with the Open Meetings Law. 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."

Based on a review of the definition, I believe that the Committees in question possess each characteristic necessary to find that they are public bodies. It appears that each of the committees consists of two members. While they might not have the capacity to take final action, but rather only the capacity to advise, I believe that they are required to carry out their duties by means of a quorum in accordance with section 41 of the General Construction Law. Further, as designees of the County Executive, or designees of a committee selected by the County Executive, each committee in my view conducts public business and performs a governmental function for a public corporation, Monroe County. I point out, too, that the definition of "public body" makes specific reference to committees, subcommittees and similar bodies and that it has been held by the Appellate Division, Fourth Department, that an advisory committee designated by an executive head of an agency constitutes a public body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)]. If my assumptions are accurate, the IBCC, the Technical Committee, and the Citizens Advisory Committee each constitute public bodies subject to the Open Meetings Law.

You mentioned that the Citizen Advisory Committee does not meet as a committee. In this regard, if less than a quorum of a public body convenes, the Open Meetings Law does not apply. Concurrently, however, an affirmative vote of less than a majority of the total membership of a public body is in no way effective. Stated differently, an entity subject to the Open Meetings Law cannot in my opinion carry out any of its duties unless it does so by means of an affirmative vote of a majority of its total membership.

Second, you indicated that the Technical Committee has held closed meetings on the ground that the meetings are "work sessions". Here I point out that, in its initial form, the definition of "meeting" was subject to conflicting interpretations. "Meeting" was defined to mean "the formal convening of a public body for the purpose of officially transacting public business". It was contended by many that gatherings held solely for the purpose of discussion and without any intent to take action fell outside the scope of the Open Meetings Law, for those those gatherings would not have been held for the purpose of "transacting" public business. Nevertheless, the issue resulted in a lawsuit which was finally determined by the State's highest court, which held that work sessions and similar gatherings constitute "meetings" subject to the Open Meetings Law in all respects [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 (1878)]. In brief, the court held 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 irrespective of the manner in which a gathering is characterized. As such, it is clear in my opinion that a so-called "work session" is a meeting that must be conducted in accordance with the requirements of the Open Meetings Law.

Third, you wrote that the IBCC does not maintain minutes. Section 106 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. With respect to minutes of open meetings, section 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."

Further, section 106(3) requires that minutes of open meetings be prepared and made available within two weeks.

Fourth, meetings of public bodies must be preceded by notice given pursuant to section 104. In brief, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given to the news media and to the public by means of posting in the same manner as described above, "to the extent practicable" at a reasonable time prior to the meeting.

The remaining issues pertain to access to records. With regard to records, the Freedom of Information Law is applicable to all agency records. Since the committees that are the subject of your letter are the creation of Monroe County, I believe that their records fall within the scope of the Freedom of Information Law [see Syracuse United Neighbors, supra].

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 section 87(2)(a) through (i) of the Law. As such, in order to deny access to records, the denial must be based upon an exception to rights of access described in the Freedom of Information Law.

Without greater knowledge of the contents of the records to which you alluded, I cannot provide specific direction. However, assuming that records are disclosed or exhibited at open meetings, it might be contended that any ground for denial that might otherwise be cited has been waived by means of such public disclosure.

If records relative to the permit review process are prepared or sent to a committee by a person seeking a permit, for example, it would appear that such records are available, for it is unlikely that any of the grounds for denial could justifiably be cited. Other types of records prepared by an agency likely fall within the scope of section 87(2)(g). That provision represents one of the grounds for denial. Nevertheless, due to its structure, it often requires that records or portions of records be made available. Specifically, section 87(2)(g) 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 or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Lastly, you asked for my comments with respect to "compliance with Open Government Laws in Monroe County compared with that in other counties in New York State". This office does not maintain statistics or similar studies that could be used to compare compliance among municipalities. From my perspective, there are some entities within Monroe County that strenuously attempt to comply with the Freedom of Information and Open Meetings Laws; others likely do not seek to comply with the same vigor. Further, in all honesty, disagreements is some cases arise because reasonable people may differ.

I hope that 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1217

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279

October 11, 1985

Mr. John J. Tyrie
[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, except as otherwise indicated.

Dear Mr. Tyrie:

I have received your letter of September 11, in which you asked that this office attempt to "remedy" a situation concerning the Board of Education of the Hannibal Central School District.

According to your letter, at a recent meeting of the Board of Education, the Superintendent "refused admittance" to approximately fifty people who sought to attend the meeting. The Superintendent cited "fire code limitations as his justification" for excluding those interested in attending. You added that a request was made to move the meeting to a larger facility, the high school auditorium, which is located approximately "150'" from the site of the meeting. However, the request was refused. If my recollection is accurate, you also indicated during a telephone conversation that the Board generally holds its meetings in a room which can only be reached by climbing a flight of stairs.

You have asked whether the foregoing represents a violation of the Open Meetings Law. In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Open Meetings Law. Consequently, this office does not have the capacity to compel a public body to take particular action or otherwise comply with the Open Meetings law. However, in an effort to enhance compliance with the Law, a copy of this opinion will be sent to the Superintendent and the Board of Education.

Second, the Open Meetings Law contains one reference to the site of meetings. Specifically, section 103 states in part that:

> "(b) Public bodies shall make or cause to be made all reasonable 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."

Based upon the language quoted above, it is clear in my opinion that the Open Meetings Law imposes no obligation upon a public body to construct a new facility or renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Further, as a consequence, if a school board has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in the facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your letter, if, for example, a flight of stairs must be climbed to attend meetings where they have been held, and if the high school auditorium is accessible to the handicapped, I believe that compliance with the Law would require that meetings be held in the high school auditorium.

I hope that 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: Gordon Hastings, Superintendnet
Board of Education

COMMITTEE ON OPEN GOVERNMENT

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279

FOML-AO-1218

October 15, 1985

Mr. Galen B. Seerup
[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. Seerup:

I have received your letter of September 30 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter and the minutes of a meeting attached to it, the Board of Education of the Putnam Central School District entered into an executive session to discuss the budget. The Board President apparently stated that "with a hostile audience present...the board members would feel better to discuss the budget in private". After questioning the President concerning the basis for entering into an executive session, you wrote that she indicated "that it would fall under section #105-e-Collective Negotiation".

Your question is whether the executive session was appropriately held. In this regard, I offer the following comments.

First, the same issue was also raised by the superintendent, and an opinion was sent to him recently.

Second, as you may be aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings must be conducted open to the public, except to the extent that an executive session may be held in conjunction with one or more of the grounds for entry into an executive session listed in paragraphs (a) through (h) of the Law.

Thrid, as a general matter, I do not believe that an executive session may be called to discuss the budget. Further, the ground for executive session cited by the Board President pertains to discussions of collective bargaining negotiations under the Taylor Law, i.e., negotiations between a public employer and a public employee union. As such, a discussion of the budget would not in my opinion have fallen within the scope of section 105(1)(e).

Lastly, having reviewed the minutes, it does not appear that the procedural steps required to be followed prior to entry into an executive session were accomplished. For future reference, section 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 purposed only..."

I hope that 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
Lawrence Hendrix, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1219

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

October 16, 1985

Ms. Maureen Egan Buhrmaster
President
Corning-Painted Post PTA Council
[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. Buhrmaster:

I have received your letter of September 27 in which you requested an advisory opinion.

You referred to a conversation during which you asked whether PTA meetings fall within the scope of the "Sunshine Law". You indicated that your concern arises due to a memorandum from the New York State Congress of Parents and Teachers, Inc. in which it is suggested that "Executive Board Meetings [of the PTA] should be attended by invitation only".

You have requested my comments on the matter, and in this regard, I offer the following remarks.

First, the Open Meetings Law is commonly known as the "Sunshine Law". The Law is applicable to meetings of public bodies, and the phrase "public body" is defined in section 102(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, as a general matter, I believe that public bodies are those entities that perform some governmental functions. Although a PTA performs its functions in relation to government, I do not believe that the board of a PTA would constitute a public body subject to the Open Meetings Law. As such, its meetings in my view fall outside the requirements of the Open Meetings Law.

Second, during our conversation, reference was made to a provision of the State Education Law. Specifically, section 414(1)(c) of the Education Law states that a board of education may permit school property to be used for specific purposes, one of which is:

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

Although the Committee is not authorized to advise with respect to the Education Law, it would appear that, under section 414 of the Education Law, if a meeting is held on school property for a "civic" purpose or for a purpose pertaining to the welfare of the community, such a gathering "shall be non-exclusive and shall be open to the general public". As such, it appears that a meeting of the PTA held on school property would fall within the scope of the language quoted above.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1220

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

October 18, 1985

Mr. Joseph R. Attonito
Scheyer, Jellenik & Attonito
227 Middle Country Road
Smithtown, NY 11787

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. Attonito:

Your letter of September 30 addressed to the Office of the Comptroller has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Open meetings Law.

As attorney for the Village of the Branch, you requested an opinion "as to whether a member of the public has the right to bring a tape recorder into a meeting of the Board of Trustees of the Village and record the meeting".

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

By way of background, until 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 initially 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 Appellate Division, Second Department, affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meeting and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, NYLJ, October 3, 1985, __ AD 2d __]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording devices is inconsistent with the goal of a fully informed citizenry, we accordingly affirm the judgment annulling the resolution of the respondent board of education."

In view of the recent judicial determination rendered by the Appellate Division, a copy of which is enclosed, I believe that a member of the public may tape record open meetings of public bodies.

I hope that 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.

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3886
OML-AO-1221

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 18, 1985

Mr. John Johnson
c/o General Delivery
Medusa, NY 12120

<u>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.</u>

Dear Mr. Johnson:

I have received your letter of October 1 in which you requested an advisory opinion.

According to your letter, a conference was conducted by represenatives of the Town of Rensselaerville, the Department of Environmental Conservation and the Albany County Health Department concerning problems relative to a "landfill and mining operation" in the Town. When you attempted to attend, you were excluded. Your first question involves your right to attend the conference under the Open Meetings Law.

In this regard, I point out that the Open Meetings Law pertains to meetings of public bodies, and that section 102(2) of the Law defines "public body" to mean:

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

Although representatives of the Town, a state and a county agency were present at the gathering in question, it does not appear that a quorum of a public body, i.e., the Town Board,

was present. If that was so, if no quorum of any public body was present, the Open Meetings Law would not in my opinion have applied. As such, if my assumptions are accurate, the public would not have had the right to attend the gathering.

The remaining question is whether you are "entitled to inspect all paper work, minutes, agreements made, letters of understanding made between the Town..." and the other agencies. As you are aware, the Freedom of Information Law governs with respect to rights of access to records.

Without knowledge of the nature or content of any such records, specific advice cannot be offered. Nevertheless, it appears that one of the grounds for denial would be of particular significance. Due to its structure, however, that provision often grants significant rights of access. Section 87(2)(g) of the Freedom of Information Law 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 or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those portions of inter-agency or intra-agency materials containing opinion, advice or recommendation, for example, could in my view 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: Hon. Kermit Jackson, Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1222

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279

October 23, 1985

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:

I have received your letter of October 9 in which you requested an advisory opinion under the Open Meetings Law. Please accept my apologies for the delay in response.

Your question is as follows:

> "Do meetings of a subcommittee of the Board of Education, appointed by the Board President pursuant to the by-laws of the Board of Education which consists of less than a majority of the full board and which has no independent authority, qualify as meetings which must be open to the public and for which there must be notice as required by the Open Meetings Law?"

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

It is noted at the outset that there was substantial controversy under the Open Meetings Law as originally enacted regarding the status of committees, subcommittees, and similar bodies that have only the capacity to advise and no authority to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 102(2) of the Law now defines "public body" to include:

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

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

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

In my view, such a conclusion can also be reached by viewing the definition of "public body" in terms of its components. First, a committee or subcommittee would, under the circumstances, be an entity consisting of at least two members. Second, even though there may have been no specific direction that a committee or subcommittee must act by means of a quorum, section 41 of the General Construction Law has long required that any entity consisting of three or more public officers or persons can perform their duties only by means of a quorum, a majority of its total membership. Third, the entities in question clearly conduct public business and perform a governmental function for a public corporation, in this instance, the Hilton Central School Board of Education. As such, I believe that all the conditions required to find that the entities in question are public bodies can be met.

I would like to point out that a decision of the Appellate Division, Fourth Department, indicates that advisory committees, including a committee designated by the executive head of a municipality, are considered to be public bodies subject to the Open Meetings Law [Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Further, public bodies must provide public notice of the time and place of their meetings. Since committees and subcommittees are apparently public bodies, they would in my view be required to comply with section 104 of the Law. Subdivision (1) of section 104 pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Subdivision (2) concerns meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1223

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279-

October 24, 1985

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. Singer:

I have received your letter of October 11, in which you requested an advisory opinion concerning "three recent private sessions conducted by the Ulster Town Board".

The first "private session" is described in your letter as follows:

> "Before the town board's monthly meeting Oct. 10, Supervisor Rider, the four councilmen, town attorney, town planner and an attorney in private practice who has no business relationship with the town, met privately in the Supervisor's office.
>
> "Councilman Orvil E. Norman later said the attorney in private practice 'advised' town officials on a recent ruling by the state Supreme Court that struck down the town's site development law."

You asked whether, if one private citizen can attend a closed door session, can others?

With respect to the second private session, you wrote that:

> "After town officials convened the public meeting, they reviewed a site plan rejected last August by the planning board. The Supervisor abruptly called a brief recess to privately discuss the matter in his office with the councilmen, town planner and town attorney.
>
> "Supervisor Rider said on his return to the public portion of the meeting the recess complies with the state Open Meetings Law 'as long as I come back and tell you what went on.' A public meeting 'is not the place to put your counsel and planner on the spot,' he added."

In conjunction with the third private session, you indicated that:

> "Town officials the following day conducted an unadvertised budget workshop meeting. The town board has not discussed the budget at its weekly workshop sessions and made no effort to inform the public of the unscheduled meeting to review the 1986 spending plan."

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law applies to meetings of public bodies, including town boards, and the courts have construed the definition of "meeting" broadly. 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 quorum of a public body for the purpose of conducting public business, such as a "work session", constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and irrespective 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)].

Second, there are two vehicles under which a public body may exclude the public from its deliberations. One involves an "executive session", which is defined to mean a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §102(3)]. Further, the Law contains a procedure that must be accomplished by a public body, during an open meeting, before a public body 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 purusant 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, an open meeting must be convened prior to entry into an executive session. Moreover, paragraphs (a) through (h) of §105(1) of the Law specify and limit the topics that may appropriately be considered during an executive session. The other involves §108 of the Law pertaining to "exemptions". If a matter is "exempt" from the Law, the provisions of the Open Meetings Law do not apply. For example, the procedural requirements that must be met prior to entry into executive session would not be applicable.

Third, with respect 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.

The first "private" session would not in my view have been exempt from the Open Meetings Law, for, due to the presence of a private attorney "who has no business relationship with the town", the communications made at that gathering would not have been privileged. Stated differently, the presence of the private citizen who had no official, legal relationship with the Town, would in my opinion have resulted in a waiver of the attorney-client privilege. Concurrently, if there was no privileged relationship, I believe that the Open Meetings Law would have applied.

I point out that the discussion appears to have pertained to "pending litigation", a matter that may properly be discussed during an executive session pursuant to §105(1)(d) of the Law. However, the procedural requirements described earlier concerning entry into an executive session do not appear to have been met.

With regard to the presence of persons other than members of the Town Borad at an executive session, §105(2) 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."

From my perspective, the language quoted above, like any provision of law, should be given a reasonable interpretation. If, for example, the private attorney has special expertise relative to the issue, I believe that his presence was likely reasonable, even though other members of the public might have been excluded.

The second "private session" might have involved communications made in conjunction with an attorney-client relationship. If that was so, the gathering would have been exempt from the Open Meetings Law.

Lastly, "budget workshop meetings" and similar gatherings are in my opinion clearly "meetings" subject to the Open Meetings Law that must be preceded by notice given pursuant to §104 of the Law. Further, I do not believe that any ground for entry into executive session could properly be asserted to exclude the public.

In order to enhance compliance with the Open Meetings Law, copies of this opinion and the Law will be sent to the Town Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Town Board, Town of Ulster

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1224

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 29, 1985

Mr. Larry Cioppa
Trustee
Village of Wappinger Falls
[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. Cioppa:

I have received your letter dated September 17, which reached this office on October 17.

Your inquiry concerns the status of the Tri-Municipal Sewer Commission under the Open Meetings Law. According to your letter the:

> "...Commission is made up of four voting members, two each from the Village of Wappingers Falls and the Town of Poughkeepsie. They are appointed by the respective elected boards. Under the Municipal Agreement governing the Commission at least one of the representatives from each community must be a member of the elected board. The other may be a non-elected official appointed by the board. In our case there is only one non-elected official on the Commission. The Commission also has a non-voting chairman appointed by the Commission members. At our annual reorganizational meeting we set the day of each month for our regular meeting (the first Thursday of the month). All other meetings are special meetings.

> "The Commission is in charge of the construction of a joint sewer plant for the Village of Wappingers Falls and the Town of Poughkeepsie. This Commission has independent authority to make all decisions concerning this construction project. Construction costs are approximately 15 million dollars. There are also millions of dollars in related expenses (legal fees, engineers, etc.). Fundable portions are covered by federal and grants up to 87 1/2 %. As you can see, we are making expensive decisions that effect the lives of many people."

You have asked for a "ruling" on whether the Commission in question "falls under the laws governing open meetings". In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to render advisory opinions with respect to the Open Meetings Law. As such, although it is hoped that the Committee's opinions are persuasive, the opinions are not "rulings", for they have no binding effect.

Second, the Open Meetings Law is applicable to meetings of public bodies, and the phrase "public body" is defined in section 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."

Based upon the language quoted above, I believe that the Commission is a "public body" required to comply with the Open Meetings Law.

Such a conclusion can be reached by viewing the definition of "public body" in terms of its components. First, the Commission is an entity consisting of at least two members. Second, even though there may have been no specific direction that it must act by means of a quorum, section 41 of the General Construction Law has long required that any entity consisting of three or more public officers or persons designated to carry out some power, authority or duty collectively as a body, can perform its duties only by means of a quorum, a majority vote of its total membership. Third, the Commission in question clearly conducts public business and performs a governmental function for two public corporations, in this instance, the Village of Wappingers Falls and the Town of Poughkeepsie. As such I believe that all the conditions required to find that the entity in question is a public body can be met.

As you requested, enclosed are several copies of the Open Meetings Law and "Your Right to Know", which describes the Open Meetings Law, as well as 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

Encs.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1225

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

COMMITTEE MEMBERS
R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 6, 1985

Ms. Betsy Owens
Open Meetings Chairperson
League of Women Voters of
Albany County
[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. Owens:

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

Specifically, you wrote that the League of Women Voters and others are sponsoring a resolution concerning the Open Meetings Law relative to an amendment to that statute concerning political caucuses. You added that:

> "In speaking with Mr. Joseph Buechs of the Albany Common Council, he stated that our proposed resolution will be discussed in the Rules Committee of the Albany Common Council after the new Common Council convenes on January 1st. Mr. Buechs states that the Rules Committee is a closed body."

You asked whether meetings of the Rules Committee "can be in fact closed for this issue or any other issue." In this regard, I offer the following comments.

It is noted that there was substantial controversy under the Open Meetings Law as originally enacted regarding the status of committees, subcommittees, and similar bodies that might have only the capacity to advise and no authority

to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 102(2) of the Law now defines "public body" to include:

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

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

Based upon the changes in the Law, the specific language of the current definition of "public body" and its judicial interpretation, I believe that the Rules Committee of the Albany Common Council constitutes a "public body" subject to the Open Meetings Law.

In my view, such a conclusion can also be reached by viewing the definition of "public body" in terms of its components. First, the Committee in question is an entity consisting of at least two members. Second, section 41 of the General Construction Law has long required that any entity consisting of three or more public officers of persons charged with a public duty to be carried out collectively as a body can perform its duty only by means of a quorum, a majority of its total membership. Third, the Rules Committee clearly conducts public business and performs a governmental function for a public corporation, in this instance, the City of Albany. As such, I believe that all the conditions required to find that the Rules Committee is a public body can be met.

I would like to point out that a decision of the Appellate Division, Fourth Department, indicates that advisory committees, including a committee designated by the executive head of a municipality, are considered to be public bodies subject to the Open Meetings Law [Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Lastly, if it can be assumed that the Rules Committee is a "public body" subject to the Open Meetings Law, its meetings are presumed to be open in accordance with the Law. However, as you may be aware, the Open meetings Law provides specific bases for entry into executive sessions. If and when a ground for entry into an executive session may appropriately be asserted, the public could be excluded from a meeting of the Committee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mayor Thomas Whalen
Stephen McArdle, Albany Common Council President
Joseph Buechs, Rules Chairperson, Albany Common Council
Paul Elisha, Executive Director, NYS Common Cause

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 3906
OML-AO-1226

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

November 6, 1985

Mr. James F. Fix
[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. Fix:

I have received your letter of October 28 in which you indicated that you are involved in difficulties relative to the "Zoning Code" in the Town of Eastchester. Specifically, you wrote that you have faced problems "trying to find out why certain court summons were withdrawn and who did the withdrawing". In this regard, I offer the following comments and suggestions.

First, since you asked whether the Committee has representation locally, I point out that the only office of the Committee is located in Albany. Further, the staff of the Committee is small, consisting of four employees.

Second, the nature of the records or information that you are seeking is not clear. 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 section 87(2)(a) through (i) of the Law.

From my perspective, records indicating action taken by a municipal board or official would likely be available, for such records would represent agency determinations. If, for example, action was taken by the Town Board or Zoning Board of Appeals, the information sought would likely appear in minutes of meetings. With respect to the contents of minutes, section 106(1) of the Open Meetings Law 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."

Based upon the language quoted above, action taken by a public body must be indicated in minutes of meetings. If action is taken by a building inspector, zoning code enforcement officer, or an official in a similar position, similarly, I believe that records indicating that action was taken would likely be available.

If you could provide additional information concerning the specific nature of the information that you are seeking, perhaps I could provide more specific advice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-90-1227

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279-

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 6, 1985

Mr. James R. Murdock, Jr.
Attorney and Counsellor at Law
P.O. Box 230
120 East Montcalm Street
Ticonderoga, NY 12883

Dear Mr. Murdock:

I have received your letter of October 22, in which you suggested that a meeting of the Board of Trustees of the Village of Ticonderoga was conducted in compliance with the Open Meetings Law, and that my opinion of October 7 was erroneous. You also asked that I so note in my records.

More specifically, you expressed disappointment that I did not consult with Village officials prior to rendering an opinion, and you indicated that the minutes sent to me had not yet been approved by the Board of Trustees. You added that:

> "While the preliminary minutes reflect that the Village Board of Trustees adjourned to an Executive Session, the actuality of the situation was that the Village 'recessed' for the purpose of formulating the wording of a resolution concerning a subject then on the floor of the Village Board's meeting which resolution was thereafter moved and adopted in an open meeting. Accordingly, no Executive Session was in fact held by the Village Board of Trustees and all action taken by the Village Board of Trustees with regard to the variance request was done in an open meeting."

As such, it is your view that no violation was committed.

In this regard, I offer the following comments.

First, when an inquiry is made, it is assumed to be made in good faith. Further, since the minutes sent were used as the basis of my response, I believe that I responded in good faith. It is noted, too, that the minutes were not marked as "draft" or "non-final", for example. Consequently, I viewed the minutes sent to me as an accurate rendition of the facts.

Second, it is emphasized that the courts have construed the definition of "meeting" expansively. In a landmark decision rendered in 1978, the Court of Appeals unanimously affirmed a decision of the Appellate Division in which it was 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 irrespective of the manner in which the gathering is characterized [see attached, Orange County Publications, Division of Ottoway Newspapers, Inc. v. the Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]

If indeed the Board held a "recess" for the "purpose of formulating the wording of a resolution concerning a subject then on the floor", it would appear that the "recess" was itself a "meeting" subject to the Open Meetings Law. Further, as I understand the situation, there would not have been any basis for entry into an executive session or otherwise excluding the public from the gathering in question.

If I have misconstrued the facts, please feel free to contact me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3907
OML-AO-1228

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 7, 1985

Mr. Abraham Sheinfeld
[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. Sheinfeld:

I have received your letter of October 31 in which you raised questions concerning the applicability of the Freedom of Information and Open Meetings Laws to the Caring Community, Inc., and a Senior Center located at 27 Washington Square North. You added that Caring Community is funded by private sources and is considered a "non-profit organization" and that the Senior Center is funded entirely by the New York City Human Resources Administration.

In this regard, I have made numerous telephone inquiries on your behalf in an effort to learn more about the organizations in question. Based upon information given to me, it appears that neither the Caring Community nor the Senior Center would be subject to the Freedom of Information or Open Meetings Laws. Nevertheless, for reasons that will be explained later, it is likely that you can obtain significant amount of information regarding those entities.

The scope of the Freedom of Information Law is determined in part by the term "agency", for the Law applies to "agency" records. Specifically, section 86(3) of the Freedom of Information Law defines "agency" to mean:

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

> council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Although the Caring Community operates the Senior Center at 20 Washington Square North (your letter referred to 27 Washington Square North), it appears that that corporation and the Senior Center are not "governmental" entities. If that is so, their records would not fall within the scope of the Freedom of Information Law.

I point out, however, that the Human Resources Administration maintains records about the Caring Community and the Senior Center. Those records maintained by the Human Resources Administration would be subject to rights granted by the Freedom of Information Law and would be accessible or deniable based upon their contents. Enclosed is a copy of the Freedom of Information Law and "Your Right to Know" which describes the provisions of the Freedom of Information and Open Meetings Laws.

The Freedom of Information Officer for the Human Resources Administration is Ms. Doris Robinson, who can be reached at 433-6646. If it is necessary to submit a request for records in writing, I am sure that Ms. Robinson can provide you with the appropriate address.

With respect to the Open Meetings Law, it does not appear that meetings of the entities in questions would be subject to that statute. The Law includes within its scope meetings of public bodies, and the phrase "public body" is defined in section 102(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."

From my perspective, it does not appear that the board of Caring Community, for example, conducts public business, even though it contracts with a City agency.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3911
OML-AO-1229

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 8, 1985

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 November 1 in which you requested an advisory opinion concerning "a Commission formed under the Moreland Act." According to your letter, you were informed that meetings of the Commission are not subject to the Open Meetings Law and that "no information will be available" until a "final report" is prepared.

In this regard, I offer the following comments.

It is noted initially that having performed research regarding the Commission, I learned that its official title is the "Commission on Criminal Justice and the Use of Force". As you suggested, it is a "Moreland Act" Commission, having been created by the Governor by means of an executive order issued pursuant to section 6 of the Executive Law.

As you are aware, this office has generally advised that entities such as commissions and similar entities are public bodies subject to the Open Meetings Law. However, a careful review of Executive Order No. 65, which pertains to the appointment of the members of the Commission, indicates that the Open Meetings Law might not apply to the Commission. The Open Meetings Law is applicable to meetings of "public bodies", and the phrase "public body" is defined in section 102(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, one of the conditions necessary to determine that an entity is a public body involves a finding that a "quorum is required in order to conduct public business". Here I point out that section VI of the Executive Order states in part that:

> "I [the Governor] hereby give and grant to the commissioners all and singular the powers and authorities which may be given or granted to persons appointed by me for such purpose under authority of section six of the Executive Law."

In view of the language quoted above, it does not appear that a quorum is required for the Commission to conduct public business. Rather, it appears that members of the Commission enjoy certain powers individually and that various duties may be carried out singly by a member of the Commission. In short, if there is no quorum requirement, it would appear that the Commission is not a "public body" and that, therefore, it would not be subject to the Open Meetings Law.

With respect to "information", the Freedom of Information law is applicable to "agency" records, and the term "agency" is defined in section 86(3) 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, the Commission constitutes an "agency" that falls within the scope of the Freedom of Information Law.

Although I am not familiar with the particular records that may be kept by the Commission, I would conjecture that many could be withheld in accordance with one or more of the grounds for denial appearing in the Freedom of Information Law. Since it appears that the records of the Commission would pertain to law enforcement investigations, criminal investigative techniques, and advice offered to units of state and local government, once again, many of those records would likely fall within the scope of two of the grounds for denial in particular, sections 87(2)(e) and 87(2)(g) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

COMMITTEE ON OPEN GOVERNMENT

OML-AO-1230

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 26, 1985

Ms. Tinker Twine
Woodstock Times
P.O. Box 808
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 Ms. Twine:

As you are aware, I have received your letter of November 11 and the news article attached to it. Please accept my apologies for the delay in response.

Your inquiry relates to a policy adopted by the Ulster County Planning Board which precludes the Board's professional personnel from answering questions of a "controversial" nature without first having consulted with the planning director. The question that has arisen is:

> "If the personnel in question don't want the policies that govern what they may say to whom discussed in executive sessions, but prefer public discussion, does the county planning board still have the right to claim, 'Personnel matter!' and duck into executive session? No salary or employment history is involved".

In this regard, I offer the following comments.

First, whether or not the personnel to whom the policy applies would prefer public discussion of that policy is in my opinion irrelevant. The members of a public body, in this instance, the Planning Board, have the right to enter into an executive session when appropriate, even though personnel might object.

Second, the right of a public body to enter into an executive session is not unlimited. On the contrary, the Open Meetings Law specifies and limits the subjects that may properly be discussed during an executive session.

Third, irrespective of the preference of the personnel who may be affected by the policy, I do not believe that a discussion of the policy by the Planning Board during an executive session could be justified. 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..." [section 105 (1)(f)].

From my perspective, the policy in question applies to the professional staff in general, and, therefore, no ground for entry into executive session would apply, even though the staff might consist of only two individuals.

In a somewhat analogous situation, a town board entered into an executive session to discuss its policy regarding the extension of health insurance benefits to police officers on disability retirement. At the time of its discussion, the policy was applicable to only one individual. In determining that the "personnel" exception for executive session could not be asserted, the Appellate Division, Second Department, held that:

> "While the town board's decision certainly did affect petitioner, and indeed at the time the decision was made affected only him, the town board's decision was a policy decision to not extend insurance benefits to police officers on a disability retirement. Presumably this policy decision will apply equally to all persons who enter into that class of retirees. Thus, it cannot be said that the purpose of the meeting was to dis-

> cuss 'the medical, financial, credit or employment history of a particular person'" [Weatherwax v. Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the language of section 105(1)(f) and its judicial interpretation, a discussion of policy could not in my view be conducted during an executive session, even though the policy might apply to as few as two members of staff.

I hope that 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: Ulster County Planning Board

COMMITTEE ON OPEN GOVERNMENT OML-AO-1231

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 26, 1985

Mr. David Pietrusza
[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. Pietrusza:

I have received your letter of November 3, and a copy of a news article, both of which pertain to "an unscheduled meeting of the Amsterdam Planning Commission".

According to the materials, you and two others "stumbled onto" a meeting between the Mayor of the City of Amsterdam and four of the five members of the Commission. You added that no notice of the meeting was given, and that public buisness was being discussed, specifically in relation to a feasibility study and questions involving zoning. Upon your arrival at the meeting, the Mayor apparently indicated that the discussion could continue if he could "have your word it won't be in the paper the next day". You refused, and the article indicated that the Mayor then "walked out of the meeting".

In this regard, I offer the following comments.

First, I point out that the Open Meetings Law pertains to meetings of public bodies, and that the term "meeting" has been construed broadly by the courts. 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 Law, whether or not there is an intent to take action [see Orange County Publications v. Council of the City Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, it appears that the gathering in question was a "meeting" that fell within the scope of the Open Meetings Law.

Second, section 104 of the Open Meetings Law requires that notice of the time and place of a meeting be given to the news media and to the public by means of posting prior to the meeting. Consequently, I believe that notice should have been given in accordance with the Law prior to the meeting.

Third, section 103 provides that all meeting are open to the general public. As such, a reason for attending a meeting is irrelevant to rights of access or any reason that might be offered for closing a meeting. Further, although the Open Meetings Law is silent with respect to disclosures by members of the public regarding information gained at an open meeting, a recent decision may relate to that issue. Specifically, a recent Appellate Division decision involved the right to use a tape recorder at a meeting and a contention that a tape could be altered. In brief, in upholding the right to use a tape recorder, it was stated that a prohibition based upon "the potential misquotation" would "be unreasonable and arguably violative of the First Amendment" [see Mitchell v. Board of Education of Garden City Union Free School District, __ AD 2d __, NYLJ, October 3, 1985].

I do not believe that your presence could have been conditioned on a promise not to speak to the news media. Moreover, under the circumstances that you described, I believe that representatives of the news media, or any member of the public, would have had the right to attend the meeting.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Amsterdam Planning Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3924
OML-AO-1232

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

November 27, 1985

Mr. A. Foster
[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. Foster:

I have received your letter of November 11 in which you raised a series of questions concerning "open government on the local level".

Your questions generally pertain to the degree of control that citizens have over an elected board. For instance, you asked how the public can "stop the board from passing themselves raises or passing an increase in town taxes", or whether there is "a percentage of towns people who must be against passing a specific budget". Your final question is: "Who or what does a town board answer to?"

In all honesty, I believe that you answered those questions in a portion of your letter, where you expressed the understanding that "the only way to stop this type of board's behavior is to vote them out one by one".

Under the Town Law, Article 8, a town board must hold a public hearing prior to the adoption of the budget by the board. During the hearing, "any person may be heard in favor of or against the preliminary budget as compiled or for or against any item or items therein contained" (Town Law, section 108). From my perspective, the public hearing is supposed to provide the public with the opportunity to let a town board know of the views of the public regarding any aspect of the budget. I would hope, too, that if many members of the public express opposition to a preliminary budget, a town board would revise the budget to reflect the

views of the public. If a board ignores the views of the people it represents, I agree with your suggestion that the only way of stopping that type of behavior would involve the election of new board members who better represent your point of view.

Further, although the Freedom of Information and the Open Meetings Laws do not directly provide a remedy to the situation described, I believe that both laws provide rights that can be asserted to ensure that government is accountable. For instance, under the Freedom of Information Law, virtually all records concerning the expenditure of public monies by a town board are available to the public. In addition, section 29(4) of the Town Law states that the supervisor:

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

Under the Open Meetings Law, any vote involving the expenditure of public monies must be made during an open meeting [Open Meetings Law, section 105(1)]. Further, meetings of a town board, including so-called "work sessions", where there may be merely a discussion of public business, but no intent to take action, must be conducted open to the public [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

While I would like to provide a more direct response that would enable you and others to maintain greater control over the town board, I am unaware of a better method than expressing your sentiments at the polls. However, I believe that optimal use of rights granted by the Freedom of Information and Open Meetings Laws can help to ensure accountability.

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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3927
OML-AO- 1233

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

December 2, 1985

Mr. M. Davis
[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. Davis:

I have received your recent letter in which you sought assistance concerning requests made under the Freedom of Information Law.

You wrote that you requested information from the Monroe-Woodbury School District last month. As of the date of your letter to this office (which is not indicated), the receipt of your request had not been acknowledged, even though a certification indicates that the request was received. The request involved minutes of meetings, "letters to and from the school to Albany", and "financial information". You asked that this office help to obtain the records sought.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee has no authority to compel an agency to grant or deny access to records, nor does it have the capacity to obtain records on behalf of the public.

Second, the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401 et seq.) prescribe time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 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 business 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 the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, section 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, section 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 section 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)].

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

Minues of meetings of a board of education are in my view clearly available. Moreover, section 106(3) of the Open Meetings Law states in relevant part that:

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

With respect to letters between the school and "Albany", it is assumed that you are referring to correspondence between the District and a state agency, such as the State Education Department. Although you did not specify the subject matter of the letters, if they involve communications between the District and a state agency, section 87(2)(g) of the Freedom of Information Law is likely of particular relevance. The cited provision states that an agency may withhold records that:

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

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

The final aspect of your request involves "financial information". Again, it is unclear exactly what kinds of records you requested. However, records reflective of revenues or the expenditure of public monies are generally available, for they would consist of "statistical or factual tabulations or data" accessible under section 87(2)(g)(i) of the Freedom of Information Law.

Lastly, since I am unfamiliar with the terms of your request, I point out that section 89(3) of the Law requires that, when making a request, the records sought must be "reasonably described". If, for instance, your request to the District involved "financial information" without greater detail, such a request would not likely have "reasonably described" the records sought. If, however, the request described the records in such a way the District officials could locate them, I believe that such a request would have met the standard of reasonably describing the records sought.

In an effort to enhance compliance with the Law, a copy of this opinion will be sent to the District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Superintendent, Monroe-Woodbury School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1234

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

December 3, 1985

Mr. John Semeniak
Superintendent of Schools
New York Mills Union Free
School District
1 Marauder Boulevard
New York Mills, NY 13417

<u>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.</u>

Dear Mr. Semeniak:

I have received your letter of November 18 addressed to Ms. Cheryl Mugno.

You requested an advisory opinion regarding "whether or not the issue of [your] superintendent's appraisal form and [your] personal goals for 1985-86 should be discussed in an open meeting or in executive session." You added that the form was developed by a subcommittee of the Board of Education with "input" from you and that goals, which could be modified by the Board, were developed by you.

In this regard, I offer the following comments.

First, whether an issue "should" be considered during an open meeting, even though there may be a basis for entry into an executive session, is a matter of discretion that rests with a public body. Stated differently, a public body may enter into an executive session under certain circumstances; however, there is generally no obligation to do so. Here I direct your attention to section 105(1) of the Open Meetings Law, which states in relevant part that:

> "Upon a majority vote of its total memberhsip, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

As such, it is reiterated that a public body may enter into an executive session, where appropriate, only after it has voted affirmatively to do so by means of a majority vote of the its total membership.

Second, with respect to the issue itself, depending upon the nature of the discussion, an executive session may or may not be justified. The focal point of the issue is section 105(1)(f), which permits a public body to enter into an executive session to discuss:

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

From my perspective, the key word is "particular", and section 105(1)(f) is in my opinion largely intended to protect personal privacy. Therefore, if the Board of Education is discussing you and your performance as an individual, I believe that an executive session would be justified, for the discussion would focus upon the employment history of a "particular" person. Conversely, if the discussion involves policy and concerns the goals or criteria that should be met by any person who might serve as superintendent, that kind of discussion would not in my opinion pertain to a particular person, but rather to matters of policy that should be discussed during an open meeting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMG AO - 1235

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279-

December 11, 1985

Mr. Robert P. Kinchen
Director
Onondaga County Public
Library
335 Montgomery Street
Syracuse, NY 13202

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. Kinchen:

As you are aware, I have received your letter of November 25 in which you requested an advisory opinion under the Open Meetings Law concerning public participation at meetings of boards of directors of county public libraries.

Specifically, you asked "...what is the role of the citizen attending these meetings as an observer? May they ask questions directly and institute discussion, etc. about matters during discussion by the Board?"

In this regard, I offer the following comments.

First, the Open Meetings Law is silent with respect to public participation. As such, only the members of a public body conducting a meeting have the right to speak or otherwise participate. Therefore, it has consistently been advised that a public body may, but need not permit public participation at its meetings.

Second, if a public body chooses to permit public participation at its meetings, it may do so on the basis of reasonable rules that treat all members of the pulbic equally. Enclosed is a copy of a judicial decision concerning the review of a public body's policy concerning public participation that may be useful to you (see attached, Baum v. Board of Education of the Delaware Valley Central School District, Supreme Court, Sullivan County, August 10, 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
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMG-AO -1236

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

December 13, 1985

Mr. Thomas L. Hoffman
Chairman
The Park Project, Inc.
430 East 65th Street
New York, New York 10021

<u>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.</u>

Dear Mr. Hoffman:

I have received your letter of November 27 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry pertains to a meeting held by the Palisades Interstate Park Commission on November 25 at its Alpine, New Jersey, office. You wrote that the President of the Commission opened the meeting by stating that "the meeting was being held in compliance with the Open Meetings laws of New York and New Jersey." Following a discussion of several issues, you indicated that one of the Commission members suggested that an executive session be held "to consider potential litigation on an easement matter". You objected, citing the language of the New York Open Meetings Law. The Commission president then said "That's OK, We're in New Jersey now", and the Commission entered into an executive session.

In conjunction with those facts, your question is:

> "Can the Palisades Interstate Park Commission, with its principal office in New York State and after publicly stating its compliance with the New York State Open Meetings Law, discuss a New York matter matter, i.e., an easement in Rockland County and avoid the requirements of the New York State Open Meetings Law because it is meeting in New Jersey?"

In this regard, I offer the following comments.

First, according to section 9.01 of the Parks and Recreation Law, the Palisades Interstate Park Commission was "established by compact between the states of New York and New Jersey" pursuant to Chapter 170 of the Laws of 1937. From my perspective, it is questionable whether either the New York or New Jersey Open Meetings Laws is applicable to the Commission for neither state can extend the effect of its laws beyond its borders.

Second, assuming that the New York Open Meetings Law is applicable, or that, in conjunction with comments made at the meeting, it was intended to be applicable, it is unlikely, in my opinion, that the executive session was properly held.

As you are aware, the provisions in the Open Meetings Law concerning "litigation" are found in section 105(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 or "potentially" result in litigation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1237

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

December 13, 1985

Mr. Martin D. Haske
[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, except as otherwise indicated.

Dear Mr. Haske:

I have received your letter of November 27 in which you requested a "ruling" under the Open Meetings Law.

Based upon comments made in your letter, I offer the following remarks.

It is noted at the outset that the Committee on Open Government has no authority to render what might be characterized as a "ruling". This office does not have the capacity to compel a public body to comply with the Open Meetings Law; rather the Committee may advise with respect to the Law.

Your allegations concern events surrounding a "work session" held by the Town Board of the Town of Van Buren on November 16. It was indicated prior to the work session that the discussion during the work session could focus on personnel matters.

In this regard, I point out that the term "meeting" has been construed to include any gathering of a majority 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 2dd 409, aff'd 45 NY 2d 947 (1978)]. Therefore, a "work session" is a "meeting" subject to the Open Meetings law that must be preceded by notice and conducted in the same manner as a "formal" meeting relative to the requirements of the Open Meetings Law.

It is unclear, however, when on the morning of the work session a majority of the Town Board was present. To the extent that your comments involve situations in which less than a quorum of the Town Board was present, the Open Meetings Law would not in my opinion have applied.

I have spoken with Mr. Haas, the Town Supervisor, in order to obtain additional information. He told me that the discussion involved a review of the performance of particular employees in order to determine whether they should receive increases in salary. In this regard, one of the grounds for entry into executive session permits a public body to close its doors to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." [see section 105 (1)(f)].

As such, if the discussion involved a review of the performance of a particular town employee or employees, it is likely that an executive session could properly have been held.

Lastly, it is also unclear whether the Board carried out the necessary procedure prior to entry into the executive session. For future reference, section 105(1) of the Open Meetings Law 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, generally identifying the subject to be discussed, must be made and carried by a majority vote 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

cc: Supervisor Haas

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3934
OML-AO-1238

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

December 16, 1985

Mr. Peter La Grasse
[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. La Grasse:

I have received your letter of November 26 in which you asked several questions regarding volunteer fire companies.

You would like to know how the Freedom of Information and Open Meetings Laws affect the public's right to information concerning a volunteer fire company. In this regard, I offer the following comments.

First, the Court of Appeals has held that a volunteer fire company is an agency subject to the provisions of the Freedom of Information Law [Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575]. Since local governments rely on the volunteers for an essential public service, the Court reasoned that the company should be accountable to the public.

Therefore, I believe that the records maintained by a volunteer fire company are available to the public pursuant to the provisions of the Law. For example, records of receipts and expenditures held by the company would be accessible to the public. Minutes of a meeting held by the governing body of the company would likewise be available. Moreover, if records reflecting the specifications of equipment ordered by the company are maintained, I believe that they, too, would be available.

Second, the Court did not address the issue of whether the Open Meetings Law was applicable to volunteer fire companies. In my view, however, the Court's rationale in extending the provisions of the Freedom of Information Law to volunteer fire companies would likewise apply in extending the Open Meetings Law to the companies. Thus, I believe that meetings of the governing body, and committees and subcommittees, of a volunteer fire company, must be held in compliance with the provisions of the Law.

For instance, you asked whether the officers of the company could meet to select a fire engine without disclosing "the specific nature of such a selection". In my view, if the gathering of the officers constituted a quorum of the governing body of the fire company or one of its committees or subcommittees, and the discussion involved public business, i.e., the purchase of a fire engine, the meeting would be subject to the Open Meetings Law. The meeting must be held open to the public, with notice to the media and notice posted in a pre-designated public location. In addition, minutes of the meeting must be prepared in accordance with section 106 of the Law. The right to attend meetings granted under the Open Meetings Law is the same whether or not the individual who seeks access is a member of the fire company.

Finally, you asked whether bids are required for "large purchases" of the fire department and whether the purchase would be a proper subject for a public hearing. The Committee lacks the knowledge and the authority to address such questions as they are outside the scope of the Freedom of Information and Open Meetings Laws. I suggest that you contact an attorney in the Legal Unit of the Department of State for information regarding these matters. The phone number is (518) 474-6740 or you can use the hotline number which is 800-828-2338.

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

Sincerely,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive Director

CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3939
OML-AO-1239

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

December 17, 1985

Mr. Edward J. Harrington
[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. Harrington:

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

With respect to the first area of difficulty described in your letter, you enclosed six requests directed to the records access officer for the City of Oswego. One, which involved a request for a list of contractors doing business with the City Community Development Department, was denied; the others have not been answered. You were also informed by the City Clerk that the City does not maintain a subject matter list.

The other problem pertains to a meeting of the Zoning Board of Appeals held in October. City officials were apparently "notified in advance that there would be a larger than usual number of people attending..." Nevertheless, a request to move the meeting "to the Common Council chambers on the floor below", where everyone could have been seated, was rejected. As a consequence, some who wanted to attend the meeting were effectively precluded from attending.

In this regard, I offer the following comments.

First, 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 that fall within one or more of the grounds for denial appearing in paragraphs (a) through (i) of the Law.

Second, as a general rule, the Freedom of Information Law pertains to existing records and does not obligate agency officials to create a record in response to a request [see Freedom of Information Law, section 89(3)]. For instance, if no list of contractors exists, there would be no requirement that a list be prepared on your behalf. On the other hand, assuming such a list does exist, I believe that it would be available, for none of the grounds for denial could justifiably be asserted.

Other records that you requested, leases, contracts and similar documents would in my opinion also be available, for none of the grounds for denial would be applicable.

Third, one of the exceptions to the general rule that an agency need not create records under the Freedom of Information Law pertains to the subject matter list. Section 87(3) of the Law states in relevant part that:

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

As such, the City is required to prepare and make available a subject matter list in conjunction with the provisions quoted above. Moreover, the regulations promulgated by the Committee, which have the force and effect of law, state that the designated records access officer is responsible for assuring that the agency maintains an up to date subject matter list [21 NYCRR 1401.2(b)(1)].

Fourth, the Freedom of Information Law and the Committee's regulations contain prescribed time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regulations provide that an agency must respond to a request within five business day 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 business 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 acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, section 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, section 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 section 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 Rules [Floyd v. McGuire, 108 Misc. 2d 87 Ad 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The remaining areas of inquiry pertain to the Open Meetings Law.

It is suggested initially that all laws, including the Open Meetings Law, should be carried out in a manner that gives effect to the intent of those laws.

With respect to the situation that you described involving the location of a meeting, I point out that section 103(a) of the Open Meetings Law states that any person may attend an open meeting of a public body. From my perspective, if a public body has the choice of holding its meetings in two rooms within a building, one of which would accommodate those who seek to attend the meeting, and one of which would not, it would be unreasonable to choose the latter. In addition, you mentioned that the larger meeting room is located on a floor below the actual site of the meeting. Here I point out that section 103(b) of the Open Meetings Law states that:

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

If, for example, the site of the meeting was a second floor room accessible only by means of a stairway, a reasonable effort to permit barrier-free access to physically handicapped persons, and, therefore, compliance with the Law, would in my opinion have required the board to hold its meetings in the first floor meeting room.

Lastly, one of the unanswered requests involves minutes of a meeting held on August 29. Here I point out that section 106(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks. If action is taken during an executive session, minutes must be made available within one week.

To attempt to enhance compliance with the Law, copies of this opinion will be sent to Robert Riggio, the City Clerk and records access officer, as well as the Zoning Board of Appeals.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Robert Riggio
Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3947
OML-AO-1240

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

December 18, 1985

Mr. George M. Clark
Zoning Enforcement Officer
The City of Oswego
Office of Zoning and
Planning
Oswego, NY 13126

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

Dear Mr. Clark:

I have received both of your letters of November 26. One appears to pertain to the Open Meetings Law; the other concerns the Freedom of Information Law. You have asked that an "independent investigation of the City of Oswego" be initiated.

It is noted at the outset that the Committee on Open Government is responsible for advising with respect to the Freedom of Information and Open Meetings Laws. This office has neither the authority nor the resources to conduct an "investigation". Nevertheless, I offer the following comments.

The first letter concerns "a recent Zoning Board of Appeals public hearing which resulted in police officers prohibiting people from entering the hearing...with the approval..." of the Mayor, the City Attorney and the Chairman of the Zoning Board of Appeals. You added that the "police turned away approximately fifty people from the public hearing."

First, I point out that there may be a distinction between a "hearing" and a "meeting". In some instances, a hearing might fall outside the scope of the Open Meetings Law.

Second, I have received other complaints about what may have been the event that you described. That situation involved a gathering held in a small room on the second floor, even though a larger room located on the first floor was available and could have accommodated all who sought to attend.

It is suggested initially that all laws, including the Open Meetings Law, should be carried out in a manner that gives effect to the intent of those laws.

With respect to the location of a meeting, section 103(a) of the Open Meetings Law states that any person may attend an open meeting of a public body. From my perspective, if a public body has the choice of holding its meetings in two rooms within a building, one of which would accommodate those who seek to attend the meeting, and one of which would not, it would be unreasonable to choose the latter. Here I point out that section 103(b) of the Open Meetings Law states that:

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

If, for example, the site of the meeting was a second floor room accessible only by means of a stairway, a reasonable effort to permit barrier-free access to physically handicapped persons, and, therefore, compliance with the Law, would in my opinion have required the board to hold its meeting in the first floor meeting room.

Further, even if it could be assumed that the Open Meetings Law did not apply, a provision similar to that quoted above likely would have been applicable. Section 74-a of the Public Officers Law states that:

> "It shall be the duty of each public officer responsible for the siting of any public hearing to make reasonable efforts to ensure that such hearings are

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

As such, if the facts are the same as those related by others, there may have been an absence of compliance with either the Open Meetings Law or section 74-a of the Public Officers Law.

The other letter pertains to a "hinderance of public access". By means of example, you wrote that the Chairman and another member of the City Planning Board were told "that a form would have to be signed and approved by the City Attorney, James McCarthy, before they could obtain a Planning and Zoning Board file that had previously been before both boards at their public meetings."

In this regard, I offer the following comments.

First, although the Freedom of Information Law [see section 89(3)] permits an agency to require that a request be made in writing, the Law does not refer to any particular form that must be used or that can be prescribed by an agency. In short, it has consistently been advised that any written request that reasonably describes the records sought should suffice, and that a failure to complete a form prescribed by an agency cannot serve to delay or deny access.

Second, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (21 NYCRR Part 1401). In turn, section 87(1) requires the governing body of a public corporation, such as the City Council of the City of Oswego, to adopt its own procedural regulations in conformity with the Law and consistent with the Committee's regulations.

In relevant part, section 1401.2 of the regulations promulgated by the Committee states that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one

> or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list;
>
> (2) Assist the requester in identifying requested records, if necessary;
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) Make records available for inspection; or
>
> (ii) Deny access to the records in whole or in part and explain in writing the reasons therefor..."

If the City Attorney is the designated records access officer, he would have the responsibility of "coordinating agency response to public requests for access to records". However, if a different person is the designated records access officer, I believe that he or she would have such responsibility.

Lastly, in the example that you gave, it is questionable in my view whether the Freedom of Information Law should be a consideration. As a general matter, I believe that the Freedom of Information Law and the procedures adopted pur-

suant to the Law are intended to deal with requests by members of the public. Your example, however, appears to deal with requests by public officers for records that they need, acting as public officers rather than as members of the public, in order to carry out their official duties. While I am unaware of the powers conferred upon such officers by means of local enactments, it would likely serve the public to enable them to obtain the documentation they need to carry out their duties without resorting to the Freedom of Information Law or completing forms.

I hope that 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: William S. Cahill, Jr., Mayor
James W. McCarthy, City Attorney
Frank Barilla, Zoning Board of Appeals Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1241

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

December 18, 1985

Ms. Marcy Waldauer
Director
New York Civil
Liberties Union
Central New York
Chapter
2100 East Genesee Street
Syracuse, New York 13210

<u>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.</u>

Dear Ms. Waldauer:

I have received your letter of December 5, in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, the Chairman of the Oswego Zoning Board of Appeals "refused to change the meeting room in order to accommodate the number of people attending." More specifically, a news article attached to your letter indicates that:

> "Chairman Frank Barilla denied several requests to move the ZBA meeting from its normal room to the larger Common Council chambers and, in effect, turned away at least 50 people who had picketed City Hall beforehand for fair zoning enforcement."

The article also quoted Mr. Barilla as stating that "Those people do not have a right to be there...Most of the people in that picket line do not live within 200 feet of the problem."

In this regard, I offer the following comments.

First, your inquiry is the subject of several other complaints pertaining to the same event.

Second, although the Open Meetings law does not directly address the issue, there are two provisions in the Law that relate to the situation and which may be relevant. Moreover, despite the absence of specific direction, I believe that the Open Meetings Law, like every law, should be interpreted and carried out in a manner that is reasonable and which gives effect to its intent.

Third, section 103(a) of the Open Meetings Law states in part that "Every meeting of a public body shall be open to the general public..." Therefore, the residence of those who sought to attend the meeting is irrelevant to their right to attend the meeting.

Further, in terms of reasonableness, if a public body has the choice of holding a meeting in either of two rooms, one of which would accommodate those who seek to attend the meeting, and one of which would not, it would be unreasonable, in my opinion, to choose latter.

Fourth, the article indicates that the larger meeting room is located on a floor below the room where the meeting was held. Here I point out that section 103(b) of the Open Meetings Law states that:

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

If, for example, the site of the meeting was a room accessible only by means of a stairway, a reasonable effort to permit barrier-free access to physically handicapped persons, and, therefore, compliance witht he Law, would in my opinion have required the board to hold the meeting in the room that would be more accessible to physically handicapped persons.

As requested, enclosed is a copy of the Open Meetings Law. Also enclosed is "Your Right to Know", which describes both the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1242

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

COMMITTEE MEMBERS

WILLIAM BOOKMAN
R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
LAURA RIVERA
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH
PRISCILLA A. WOOTEN

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 19, 1985

Mr. David Pietrusza
[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. Pietrusza:

I have received your letter of December 9 in which you raised questions concerning an amendment to the Open Meetings Law.

You wrote that, in January, the Common Council of the City of Amsterdam will consist of four republicans and one democrat. Your questions are whether the republican majority may "caucus in closed session" and what the limits in such caucuses might be. You also asked whether the change in the Law applies to the State Legislature only, or to "lesser legislative bodies" as well.

In this regard, I offer the following comments.

First, the amendment to the Open Meetings Law, which is found in section 108(2) of the Public Officers Law (see Open Meetings Law attached), pertains to the Senate and Assembly, and the legislative bodies of a city, county, town or village. As such, the amendment is applicable to the Amsterdam Common Council.

Second, under the terms of the amendment, the four republicans can hold closed caucuses, outside the requirements of the Open Meetings Law, to discuss any topic, including public business, at any time without public notice. Specifically, section 108(2)(b) of the Open Meetings Law now states that:

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations..."

Lastly, the Committee has recommended legislation in its annual report that would limit the authority to conduct closed political caucuses and bring caucuses that can now be closed within the requirements of the Open Meetings Law. If you are interested in the proposal, the report is available on request.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1243

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

December 26, 1985

Mr. Richard Galant
Suffolk Editor
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 Mr. Galant:

I have received your letter of December 18, which concerns separate incidents involving what you believe to have been "illegally closed town board meetings".

The first concerns a gathering of the Town Board of the Town of Smithtown. You wrote that the five members of the Board met in the Supervisor's offices "for about a half hour prior to the open public meeting." Your reporter "walked into the office during the meeting and was told by Supervisor Vecchio that it was closed because the board was discussing 'contracts'". She later was told that the Board "was discussing an item on the agenda to establish the position of deputy highway superintendent", and that "this was a personnel matter, even though the discussion apparently related to establishing the post--not to who would fill it".

With respect to the other, a reporter "discovered that the Huntington Town Board met in private at 2 PM without advance notice of the meeting." The Board then voted to close the meeting over the objections of James Gaughran, a member of the Board. You added that "The discussion concerned Huntington's planned resource recovery project. Town attorney Nicholas Sordi said it was held to discuss the leasing of land in connection with the project. Gaughran said the actual agenda included a wide range of issues involving the plant's size, financing and environmental safeguards."

It is your belief that both gatherings should have been open, and you have requested an advisory opinion concerning the incidents.

I agree with your contention for the following reasons.

First, the courts have construed the definition of "meeting" [Open Meetings Law, section 102(1)] broadly. In a landmark decision rendered in 1978 by the Court of Appeals, the state's highest court, it was determined that any gathering of a quorum of a public body, such as a town board, held for the purpose of conducting public business is a "meeting" subject to the Open Meetings Law [Orange County Publications, Division of Ottoway Newspapers v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, based upon the facts as you described them, both gatherings in my opinion were "meetings" that should have been preceded by notice given in accordance with section 104 of the Open Meetings Law and convened open to the public.

Second, the Open Meetings Law requires that certain procedural steps be accomplished by a public body, during an open meeting, before a closed or "executive" session may be held. Specifically, section 105(1) of the Law 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, it is clear that an executive session is not separate and distinct from a meeting, but rather that it is a portion of a meeting. Further, it is also clear that a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may properly be considered during an executive session.

Third, with regard to the meeting of the Smithtown Town Board, it does not appear that any of the grounds for entry into an executive session could have been asserted. It is noted that a discussion of "contracts" would not likely have constituted a basis for entry into an executive session, and that for the only direct reference to "contracts" among the grounds for entry into

an executive session pertains to discussions of "collective negotiations pursuant to article fourteen of the Civil Service Law", negotiations conducted in accordance with the Taylor Law between a public employer union and a public employer. That type of "contract" negotiations was not, according to your letter, the subject under consideration.

Further, the topic that was apparently considered, the establishment of a position, would not in my opinion have fallen within the scope of the so-called "personnel" exception for entry into an executive session. That provision, section 105(1)(f), permits a public body to enter into an executive session to discuss:

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

If the discussion involved the creation of a position, it would have involved a matter of policy (rather than the qualifications of a "particular person" seeking the position, for example) which, in my view, could not have been considered during an executive session.

In addition, it has been held that a motion to enter into an executive session that refers to a discussion of "personnel", without more, is inadequate. Assuming that section 105(1)(f) may be invoked, a motion to enter into an executive session should include two components. First, it should indicate that the discussion will focus on a "particular person", who need not be identified; and second, it should refer to one of the topics listed in section 105(1)(f). Therefore, a proper motion might refer to a discussion of "the employment history" of a "particular person", rather than "personnel" [see Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981].

Lastly, with regard to the closed meeting held by the Huntington Town Board, if indeed the discussion concerned "a wide range of issues" involving the size, financing and environmental safeguards relative to a proposed resource recovery project, it is doubtful in my view that any ground for entry into an executive session could have been justified. Even if the "leasing of land" was among the topics considered, that aspect of the meeting could not necessarily have been closed. Section 105(1)(h) permits a public body to enter into an executive session to discuss:

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

Although the lease of real property might have been discussed, an executive session could have been held only if "publicity would substantially affect the value" of the property. As I understand the situation, discussions of the issue have not yet reached the stage where public discussion would "substantially affect" the value of real property.

In an effort to enhance compliance with the Open Meetings Law, copies of this opinion will be sent to the Town Boards of both Smithtown and Huntington.

I hope that 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 Smithtown
Town Board, Town of Huntington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3957
OML-AO- 1244

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

December 27, 1985

Mr. John E. Montreal
Councilman
Town of Geddes
[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. Montreal:

I have received your letter of December 20 in which you requested an advisory opinion concerning minutes of meetings of the Zoning Board of Appeals of the Town of Geddes.

Specifically, according to your letter:

> "conversations with the Geddes Zoning Board of Appeals Chairman Russell Miller indicate that Geddes Zoning Board of Appeals Meetings are not being documented on paper in every case. The ZBA Chairman feels that the tape recording of Zoning Board meetings, which can be made available to the public, is sufficient to comply with the intent of the Freedom of Information Laws. He feels it is not always necessary to document meetings and there results, such as, Zoning Board Member Voting Records and related meeting history."

It is your view that "there should be minutes documented on paper for all Zoning Board Meetings kept on file and available for public inspection."

In this regard, I offer the following comments.

First, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Section 106(1) concerning minutes of open meetings 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."

While a tape recording would likely contain the elements of minutes, I agree with your contention that they should be reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, the Town might need a permanent written record readily accessible to Town officials who must refer to or rely upon the minutes in the performance of their duties.

Second, in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

Third, there also appears to be an intent expressed in section 267(1) of the Town Law concerning zoning boards of appeals to keep paper records of the type to which you referred. The cited provision states in part that "Such board shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official action.

Lastly, I direct your attention to the Freedom of Information Law, which contains a requirement analogous to that described in section 267 of the Town Law. Section 87(3) states in relevant part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes."

In sum, based upon the foregoing, I believe that written minutes constitute the official record of meetings of the Zoning Board of Appeals, and that such minutes must be prepared.

As you requested, a copy of this opinion will be sent to Russell Miller, chairman of the Zoning Board of Appeals.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Russell Miller, Chairman, Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1245

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

December 27, 1985

Ms. Hazel C. Miller
[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. Miller:

I have received your letter of December 16 concerning meetings of the Avoca Volunteer Ambulance Corps.

You wrote that the "Corps is overseen and supported financially by the Village of Avoca." However, the Corps Captain apparently indicated its meetings are private, the "same as Moose or Elks Club meetings" and that, therefore, the public cannot attend. You added that:

> "the Ambulance Corps bylaws state that no member of the Corps may speak with any member of the Village Board concerning problems within the Corps. The Captain has stated this means no one of his members may speak with any member of any Board, including the Town board of which [your] husband is a member. The stated punishment for breach of this rule is expulsion from the Corps."

In this regard, I offer the following comments.

It is noted at the outset that I am unaware of any judicial decisions pertaining to the status of a volunteer ambulance corps under the Open Meetings Law. However, if the relationship

between the Village and the Corps is similar to that of a volunteer fire company and a municipality, it is likely, in my view, that meetings of the board of the Corps are subject to the Open Meetings Law.

A volunteer fire company is usually a not-for-profit corporation that carries out its duties pursuant to a contractual relationship with one or more municipalities. In essence, volunteer fire companies exist due to their contractual relationships with the municipalities they serve. If the relationship between the Corps and the Village is comparable to that of a municipality and a volunteer fire company, based upon the thrust of case law, I believe that meetings of its board would fall within the scope 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 section 102(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 the Board of the Corps is a "public body" may be met.

First, it 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 section 41 of the General Construction Law. Third, it appears that the board would "conduct public business" due to its functions and its relationship with the Village. And fourth, it appears that the board would perform a governmental function for a public corporation, in this instance, the Village of Avoca.

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

Of significance 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 mistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therfore 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, section 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, sections 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, if the volunteer organization in question is analogous to a volunteer fire company, according to the decision rendered by the Court of Appeals, it is subject to the Freedom of Information Law. I believe that meetings of a board of a volunteer fire company or, in this instance, the board of a volunteer ambulance corps, would fall within the requirements of the Open Meetings Law.

The remaining issue, which involves the capacity of members of the Corps to speak with members of the Village Board of Trustees falls outside the Committee's jurisdiction or expertise. However, it appears that questions might be raised concerning the first amendment and freedom of speech.

I hope that 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, Village of Avoca
Avoca Ambulance Corps

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3963
OML-AO-1246

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

December 30, 1985

Mr. Martin Halpert
[redacted]

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

Dear Mr. Halpert:

I have received your letter of December 21, as well as the materials attached to it.

According to your letter, at a meeting of the Board of Education of the Ticonderoga Central School District held on November 19, you asked what it cost to rebuild an outdoor running track earlier in the year. The acting superintendent responded that he did not know the cost, but that a "full report" would be presented at the next meeting of the Board. At that meeting, the President of the Board, Dr. Brennan, announced that the issue would be discussed in executive session. When you asked Dr. Brennan why the cost of the track would not be revealed, you wrote that "He responded by stating that a Board member had requested that this matter be discussed only in executive session. Further that it is a matter of his (President) policy that whenever a Board member requests an open agenda matter be discussed only in executive session he always agrees to same". You apparently then stated that you would seek records concerning the track under the Freedom of Information Law.

At this juncture, I offer the following comments.

First, it may be "policy" of the President of the Board to permit executive sessions to be held at the request of a member of the Board; nevertheless, that policy, in my opinion, is inconsistent with a statute enacted by the State Legislature, the Open Meetings Law (Public Officers law, Article 7). Further, with regard to the validity of such a policy, I point out that section 110(1) of the Open Meetings Law states that:

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

From my perspective, the "policy" or "rule" described by the President is "more restrictive with respect to public access" than the Open Meetings Law and, therefore, is void to that extent.

Second, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the topics that may appropriately be considered during an executive session. Unless one or more of those topics is the subject of discussion, a public body cannot enter into an executive session.

Third, under the circumstances, I do not believe that the executive session in question was properly held, for none of the grounds for entry into executive session would have applied, based upon the facts presented in your letter.

The second issue raised in your correspondence pertains to a request made under the Freedom of Information Law on December 18 and sent to Rudolph T. Meola, Administrative Assistant. On December 20, Mr. Meola rejected your request, stating that the District requires that its application form must be completed.

Under section 89(3) of the Freedom of Information law, an agency may require that a request be made in writing. That provision also requires that such a request "reasonably describe" the records sought. There is nothing in the Freedom of Information Law, however, concerning the use of a form prescribed by an agency that must be completed in order to make a request. As such, it has been consistently advised that a failure to complete a form prescribed by an agency cannot serve to delay a response to a request or deny access to records. In short, I believe that any written request that reasonably describes the records sought should suffice. Therefore, in my opinion, Mr. Meola should have responded to your request of December 18 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

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Rudolph T. Meola

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1247

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

December 31, 1985

Mr. Bill Meyer
Councilman
Town of Cicero
[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. Meyer:

I have received your letter of December 23.

You have raised issues concerning the "proper procedure" for calling an "organizational meeting" of a town board. One question involves the validity of a notice of a special meeting scheduled in the Town of Cicero called by two people elected to the Board, but who do not take office until January 1. You also questioned the propriety of the notice, for it does not specify the topics to be considered.

In this regard, I offer the following comments.

First, although the Open Meetings Law, section 104, requires that a public body provide notice of the time and place of a meeting, it does not specify who may or is required to give notice. As such, the answer to your question likely falls outside the scope of the Open Meetings Law.

Second, as a service and on your behalf, I have contacted Counsel to the Association of Towns, who is an expert concerning the Town Law. In his view, only a member of the Board in office has the authority to seek to convene a meeting. As such, it is his opinion that a newly elected supervisor may validly call a meeting only after having taken office. Further, notice should be given to members of the board in accordance with section 62 of the Town Law, a copy of which is enclosed, as well as under the Open Meetings Law.

With regard to absence of specificity in an agenda, neither the Open Meetings Law nor section 62 of the Town Law requires that a notice of a meeting indicate the topics to be discussed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1248

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

December 31, 1985

Mr. James F. Gaughran
Councilman
Town of Huntington
Town Hall
100 Main Street
Huntington, NY 11743-6990

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. Gaughran:

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

According to your letter, "the Town of Huntington is preparing to build a resource recovery facility". On December 17, the Town Board, upon which you serve, conducted an executive session to discuss the project, despite your protest. You added that "the Town's plan is to develop by February 1, 1986, a request for proposal (R.F.P.), which will be sent to all qualified resource recovery vendors". It is your view that the development of the R.F.P. should be discussed during open meetings, for the issues to be considered include the size of the facility to be built, the type of technology to be employed, how payments will be made to a vendor, and the nature of environmental safeguards that should be established.

You pointed out that the Town Attorney in a letter addressed to Newsday expressed a contrary point of view. He wrote that "Section 100(1)(h) [now section 105(1)(h)] provides for the conducting of Executive Sessions with respect to 'proposed...lease of real property'." You also wrote that that Town Attorney "stated a general policy that meetings can be closed off because of the need to conduct future negotiations with the vendor ultimately selected."

In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law requires that all meetings of a public body, such as the Town Board, be open to the public except to the extent that the subject matter falls within the scope of one or more among eight grounds for entry into an executive session.

Second, based upon the foregoing and specific requirements contained in the Open Meetings Law, a "general policy" of conducting executive sessions concerning the subject matter in question would in my view be inappropriate. Further, in a technical sense, I do not believe that an executive session can be scheduled, with certainty, in advance of a meeting. Section 105(1) contains procedural requirements that must be carried out, during an open meeting, before an executive session may be held. The cited provision states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

As such, again, in a technical sense, it cannot be known that an will be held until a motion for entry into an executive session is carried by a majority vote of the total membership of a public body. It is noted, too, that the Open Meetings Law is permissive. Stated differently, although a public body may enter into an executive session, when appropriate, there is no requirement that a public body must do so, even though there is a basis for entering into an executive session.

Third, the ground for entry into executive session to which the Town Attorney referred, section 105(1)(h), was not quoted in full in his letter to Newsday. While I agree that some discussions concerning the "proposed...lease of real property" could properly be conducted in executive session, not all such discussions would fall within the scope of the exception. Section 105(1)(h) states in its entirety that a public body may conduct an executive session to discuss:

> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of

> securities held by such public body, but only when publicity would substantially affect the value thereof" (emphasis added).

As I understand the situation, the Town Board is engaging in general discussions regarding the construction of a plant; at this stage, however, the discussion has not focused upon a particular site or sites for the facility. If that is so, the qualifying language of section 105(1)(h) would not be applicable, for publicity would not at this juncture "substantially affect" the value of real property.

Lastly, since you referred to "future negotiations with the vendor", I point out that the only direct reference to "negotiations" in the grounds for entry into executive session is found in section 105(1)(e). That provision pertains to collective bargaining negotiations conducted pursuant to the Taylor Law. That exception has no relevance to the negotiations that will ensue. Of potential relevance, however, is section 105(1)(f), which permits a public body to discuss:

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

Under that provision, for example, to the extent that the Board discusses the "financial" or "credit" history of a "particular corporation", an executive session could likely be held.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Howard Schneider
Nicholas A. Sordi, Jr., Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1249

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

December 31, 1985

Mr. Lawrence Dittelman
Town Attorney
Town of New Castle
200 South Greeley Avenue
Chappaqua, New York 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 Mr. Dittelman:

I have received your letter of December 20 in which you requested an advisory opinion.

According to your letter, the Town Board of New Castle called several meetings at which executive sessions were conducted to discuss the merits of candidates for positions on the Planning Board. Subsequently, at an open meeting, an executive session was conducted "to interview final candidates and conclude the evaluation of applicants". At an open session, the Board discussed the process of selection and the "relative merits of the candidates without discussing specific personalities". The Board then voted to appoint a specific individual to the Planning Board. One of the candidates has claimed that the above executive sessions violate the Open Meetings Law and thus rendered any vote illegal. You are requesting an advisory opinion on this matter. In this regard, I offer the following comments.

First, as you know, the Open Meetings Law generally requires that all meetings of a public body be open to the public unless an executive session can be conducted pursuant to section 105. Section 105 permits an executive or closed session to be held to discuss one or more the subject matters listed in paragraph (1)(a) through (h).

Second, an executive session is properly conducted upon a majority vote of the total membership of the public body taken at an open meeting. The vote must be taken pursuant to a motion identifying the general area of the subject to be considered. In

other words, an executive session must be held within an open meeting which has been preceded by public notice of the time and place of the open meeting and at which minutes of all motions, proposals and other matters formally voted upon are recorded.

In my view, if the executive sessions you described in your letter were properly convened, the discussion of the candidates for the Planning Board would fall under section 105(1)(f). That section permits a public body to discuss the "employment history" of a particular person or the "appointment" of a particular person. I believe that that provision was intended to safeguard the privacy of applicants for employment or an appointed position. Since it appears that the New Castle Town Board conducted executive sessions for that purpose, I believe that the executive sessions were properly convened.

Third, you wrote that it was your opinion that, if the executive sessions were held in violation of the Law, it is unclear "that the remedy would necessarily be the voiding of the action" taken in public. In this regard, several courts have held that violations of the Law can be subsequently "cured" by meetings held in compliance with the Open Meetings Law [see Dombroske v. Board of Education, West Genesee School District, 462 NYS 2d 146 (1983); Woll v. Erie County Legislature, 83 AD 2d 792 (1981); New York University v. Whalen, 46 NY 2d 734 (1978)]. In my view, these opinions indicate that action taken by a public body at an open meeting may not be invalidated by a court even though the subject of such action was discussed at prior closed meetings held in violation of the Law.

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

Sincerely,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1250

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

December 31, 1985

Mr. Ronald Rich
President
Stockport Community Residents
Against Pollution
Box 101C
RD#3
Hudson, NY 12534

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. Rich:

I have received your letter of December 23, as well as the news article attached to it.

Your inquiry concerns a problem that has apparently arisen on several occasions, including December 19, when a meeting was effectively closed. Specifically, you wrote that:

> "...the outside door to the Columbia County Office building where the Board of Supervisors and Committees meet is routinely locked at 5:00 unless the full Board is meeting or there is a committee meeting at which many spectators are expected to attend. Although there is an outside bell, it is located in an obscure location and is inaudible in the rooms used for committee meetings. This policy resulted in a significant number of County residents being denied access to the December 19 meeting."

The news article contains a statement by a person present at the meeting, who said that there was no intent "to lock anybody out." He added that "It's happened to [him] before, too."

You have questioned the "legality...of the County's procedures regarding locking doors and thereby limiting access to public meetings..."

In this regard, first, section 103(a) of the Open Meetings Law states that "Every meeting of a public body shall be open to the general public..." From my perspective, that provision, like any provision of law, should be carried out in a manner that gives effect to its clear intent. In short, it appears that a reasonable solution would be to keep the door unlocked when a meeting is scheduled to be held at the County Office Building.

Second, it is unclear from your letter whether the County's "procedures" have been reduced to writing. If there is a written rule or "policy", I point out that section 110(1) of the Open Meetings Law (Public Officers Law, Article 7) states that:

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

If a written rule exists concerning locked doors, to the extent that it is "more restrictive with respect to public access" than the Open Meetings Law, I believe that it would be void.

I hope that 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 Supervisors, Columbia County