STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1251

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

January 6, 1986

Ms. Katherine Stone
[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. Stone:

I have received your letter of December 27 in which you requested an advisory opinion.

Attached to your letter is a newspaper clipping regarding a Columbia County Board of Supervisors Committee meeting. The article explained that the County Office Building was locked while the Committee met inside. Although the Committee members and several residents were able to attend, other residents were locked out. One of the Board members stated that there was no intention to lock anyone out of the meeting and that the outside door is generally locked at 5 p.m. You requested an advisory opinion regarding the legality of the locked doors.

In this regard, I offer the following comments.

First as you know, the Open Meetings Law requires all meetings of a public body to be open unless an executive session may be held pursuant to section 105. Section 102(2) of the Law defines "public body" to include committees and subcommittees of such bodies. In my view, any committee of the Board of Supervisors is subject to the provisions of the Law.

Second, I do not believe that a meeting is open to the general public if some physical barrier prevents an individual from attending the meeting. For example, if locked doors or a room too small to accomodate the public prevents someone from observing a meeting, the meeting is simply not open to those individuals. Moreover, the intent of the Legislature that all

interested individuals be able to observe meetings of public bodies is underscored by section 103(b). That section requires a public body to make all reasonable efforts to ensure that meetings are held in barrier-free facilities to permit access to the physically handicapped.

Third, if it is the intention of the public body to keep individuals from attending a meeting by locking the doors or by meeting in a small room, certainly such a meeting would not be open to the public and would be held in violation of the Law. On the other hand, if the doors were unknowingly and unintentionally locked, or the meeting room could not accomodate the unexpected number of attendees, I do not believe that such a meeting would be found to violate the Law so as to require the invalidation of any action taken. A pattern of such "unintentional" acts, however, may be considered a violation of the Law unless corrected. Thus, the public body should make an effort to ensure that such problems are resolved before subsequent 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

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-1252

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

January 9, 1986

Mr. Terry R. Pickard
County Legislator
10th District
499 South Warren Street
Syracuse, NY 13202-2693

Dear Mr. Pickard:

I have received your letter of January 7 and appreciate your interest in the Open Meetings Law.

As promised, enclosed are copies of the Committee's annual report, legislation introduced by the Governor and a legislative memorandum on the subject.

With respect to the "Resolution Relative to the Open Meetings Law" before the Onondaga County Legislature that you intend to sponsor, I offer the following comments.

First, from my perspective the next to last paragraph renders the resolution ineffective, for it states that:

> "nothing contained in this resolution shall provide the basis for any judicial relief to any party or be deemed to authorize imposition of penalties or sanctions other than in accordance with and as specified by the existing Open Meetings Law."

As I understand the language quoted above, a violation of policy that might be established by means of the resolution could not be challenged, for judicial relief would be foreclosed. Although I am not an expert concerning the legal effect of such a resolution, I question how a court might view it. In short, if the resolution is intended to be meaningful, the paragraph in the resolution quoted earlier should, in my view, be deleted. If the intent is to offer a statement of principle, perhaps something other than a resolution would be a more appropriate vehicle.

Second, the final paragraph of the resolution states that:

> "nothing contained in this resolution shall be deemed to be more restrictive with respect to public access than the requirements set forth in Open Meetings Law (Public Officers Law sections 100 et. seq)."

I believe that this is unnecessary, for it essentially restates a provision in the Open Meetings Law. Specifically, section 110(1) of the 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 respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3975
OML-AO-1253

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

January 14, 1986

Mr. Mark Goichman
[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. Goichman:

I have received your letter of December 3 in which you requested an advisory opinion.

According to your letter and the attached Governance Plan of the City of New York Law School at Queens College, the number of observers permitted to be present at Assembly meetings appears to be limited. The Plan provides that non-members of the Assembly may observe meetings provided that their number does not exceed 10 percent of the number of members in attendance. You want to know whether this provision conflicts with the requirements of the Open Meetings Law. In addition, you asked whether the Freedom of Information Law requires a voting record to be kept for each vote where the Assembly meetings are conducted by consensus.

In this regard, I offer the following comments.

The Open Meetings Law requires that all meetings of a public body be open to the public unless an executive or closed session may be conducted for one or more of the purposes listed in section 105. "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."

In my view, the Assembly meets the statutory definition of a public body.

First, the Assembly is comprised of more than two persons and appears to act by means of a quorum. According to the Law School Internal Governance Plan, a quorum consists of more than one half of the Assembly members. A proposed change would provide that the Assembly shall act only in the presence of a quorum. In any event, section 41 of the General Construction Law may require the Assembly to act by means of a quorum. Section 41 provides that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such 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 of 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 Assembly are charged with a public duty to be exercised by them jointly. According to the Goverance Plan, the Assembly is responsible for considering or discussing matters affecting the educational program, or the carrying on of the work of the Law School. In addition, it reviews the work of the various committees. Moreover, although it is not clear from the portion of the Governance Plan that you enclosed, you have indicated that the Assembly has the authority to quash the recommendations of the committees. Thus, I believe that the Assembly must exercise its duty pursuant to the quorum requirements set forth in section 41 of the General Construction Law.

In addition, I believe that the Assembly performs a governmental function for the City of New York in that it may discuss and reject proposals with respect to the governance of the City Law School. Several courts have recognized that even advisory bodies may be charged with a public duty or perform a governmental function 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]. Based upon the foregoing, I believe that the Assembly meets the definition of "public body" and is thus subject to the provisions of the Open Meetings Law. Likewise, the committees and subcommittees of the Assembly would also be "public bodies" subject to the Law.

Second, assuming that the Assembly is a public body, any gathering of at least a quorum of its members for the purpose of discussing public business constitutes a meeting subject to the provisions of the Open Meetings Law [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)]. Accordingly, notice of the meetings must be given pursuant to section 104 and minutes must be prepared as required by section 106 of the Law.

Third, section 110 of the Open Meetings Law states that:

> "any provision of a...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."

In my view, the Governance Plan is more restrictive than the Open Meetings Law in that it appears to permit the Assembly to limit the number of people who attend its meetings.

Section IIIA of the Governance Plan states that the meetings of "the Assembly are not closed to the members of the Law School community". Moreover, non-members of "the Assembly who are members of committees whose work is to be discussed at a meeting may attend that meeting and participate in discussion". However, the Plan provides that:

> "Other non-members of the Assembly may attend meetings as observers provided that the number of such attenders shall not exceed 10% of the number of members in attendance. When [it is appropriate for members of the Assembly to meet with] larger numbers of the Law School community desire to meet with members of the Assembly, the meeting shall take place as [they shall do so at] an open meeting of the Law School community, following which the Assembly may meet" (proposed amendments in original).

To the extent that this provision permits the Assembly to limit the number of individuals who want to observe its meetings, regardless of whether they are members of the Law School community, I believe that it conflicts with the Open Meetings Law. Moreover, if the proposed language would permit the Assembly to meet in private following an open meeting with "larger numbers of the Law School community", I believe that it, too, would not comply with of the Law. In short, the Open Meetings Law requires public bodies to conduct its meetings open to all interested persons regardless of their number, whenever practicable. Closed or executive sessions may be conducted only for discussions of the enumerated subjects in section 105.

Finally, you asked whether a record must be kept of the vote of the members of the Assembly according to the issues each consented to. In this regard, I note that section 87(3)(a) of the Freedom of Information Law requires all agencies to maintain a record of the final vote of all member in every agency proceeding in which the member votes. However, it appears that the Assembly makes decisions by consensus rather than by voting and it is not clear that each member consents or refuses to consent to every issue before the Assembly. In my view, if each member consents or refuses to consent to a particular issue, a record

similar to a voting record should be prepared and included in the minutes. On the other hand, if only a few members voice support or opposition to an issue and other members remain silent, I do not believe a record of a vote would be appropriate or required by either the Freedom of Information or the Open Meetings Laws. In my view, the Open Meetings Law does not require a public body to alter the way it conducts business. Since the Law requires that minutes include only a summary of "all motions, proposals, resolutions and any other matter formally voted upon", a better practice for bodies that decide by consensus may be to include a more detailed summary of its discussions held during open meetings. A detailed summary would provide interested persons with a better indication of how particular members stand on various issues.

I hope 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-1254

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

January 15, 1986

Ms. Kathy Gerardi
Mr. John Sprague
NYS Division of Housing and
Community Renewal
Two World Trade Center
New York, NY 10047

The staff of the Committee on 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. Gerardi and Mr. Sprague:

I have received your recent correspondence concerning the application of the Open Meetings Law to the Greater Woodhaven Development Corporation (hereafter "the Corporation").

As you are aware, the Open Meetings Law generally pertains to governmental entities. The Law usually does not apply to private or not-for-profit corporations, even though those corporations might have a significant relationship with government. Nevertheless, due to the language of a specific provision of the Not-for-Profit Corporation Law, it is my view that certain of those corporations fall within the requirements of the Open Meetings Law.

Specifically, having reviewed the incorporation papers filed with the Department of State, the Corporation was created on June 16, 1978 as a "local development corporation" pursuant to section 1411 of the Not-for-Profit Corporation Law. That provision describes the purposes of local development corporations and states in relevant 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" (emphasis added).

As such, even though the Corporation might not clearly be a governmental entity, the applicable statute indicates that it performs a governmental function.

The Open Meetings Law pertains to meetings of public bodies, and 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."

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 section 1411 of the Not-for-Profit Corporation Law, which was quoted in part earlier, it appears that a local development corporation conducts public business and performs a governmental function, in this instance for New York City.

If it can be assumed that meetings of the Corporation are subject to the Open Meetings Law, additional requirements must be met. For instance, section 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. It is noted, too, that section 106 of the Open Meetings Law requires that minutes of meetings be prepared and made available in accordance with the Freedom of Information Law.

Lastly, I point out that the Not-for-Profit Corporation Law contains various provisions concerning by-laws, voting and other matters to which you alluded. Since I do not have the expertise or the jurisdiction to advise with respect to those statutes, specific direction cannot be provided. However, 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 respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Therefore, if the meetings of the Corporation or its board are subject to the Open Meetings Law, I do not believe that its by-laws or rules could be 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3989
OML-AO-1255

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

January 28, 1986

Hon. David Pietrusza
Alderman
The City of Amsterdam
[redacted]

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

Dear Alderman Pietrusza:

I have received your letter of January 23 and a news article attached to it, both of which pertain to the activities of the Amsterdam Industrial Development Agency (AIDA).

Specifically, the materials indicate that AIDA engaged in a rental agreement in November that became public on January 16. You wrote that authorization for the agreement on expenditure "was not reached in public session but rather by 'polling' of the members". The article states that the administrative director of AIDA "explained that the decision to pay rent was made by asking individual members for their feelings outside a meeting setting". The Chairman of the AIDA Board said that "approval was given through a 'call-around meeting'."

You have asked whether there were violations of the Open Meetings Law and whether the agreement is void. In this regard, I offer the following comments.

First, pursuant to section 553 of the General Municipal Law, an urban renewal agency is a "corporate governmental agency, constituting a public benefit corporation". AIDA was created by means of section 610 of the General Municipal law.

Second, based upon those provisions of the General Municipal Law, I believe that the Board of AIDA is clearly a "public body" required to comply with the Open Meetings Law. On the same basis, AIDA is also an "agency" subject to the requirements of the Freedom of Information Law.

Third, with respect to the series of telephone conversations among Board members that led to action taken by the Board, there is nothing in the Open Meetings Law that would preclude two members of a public body from conferring by telephone. However, a series of telephone calls that lead to a decision would in my opinion violate the spirit if not the letter of the Law.

From a technical point of view, it is noted that the definition of "public body" appearing in section 102(2) of the Open Meetings Law refers to entities that are required to conduct public business by means of a quorum. In this regard, section 553(3) of the General Municipal Law states that "A majority of the members of an agency shall constitute a quorum". Further, the term "quorum" is defined in section 41 of the General Construction Law, which has existed for decades. The cited provision states that:

> "Whenever three or more public officials are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board 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 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 that board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

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

Moreover, section 102(1) of the Open Meetings Law defines "meeting" to mean "the official convening of a public body for the purpose of conducting public business". In my opinion, the term "convening" means a physical coming together. Further, based upon an ordinary dictionary definition of "convene", that term means:

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

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

I would also like to direct your attention to the legislative declaration of the Open meetings Law, section 100, which states in part that:

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

In view of the foregoing, the AIDA in my opinion can take action or vote only at a "meeting" held in accordance with the Open Meetings Law.

With regard to the validity of the agreement, I believe that action taken by a public body generally remains valid unless and until a court renders a determination to the contrary. However, it might be contended that the Board did not take "official" action. Further, in conjunction with section 107 of the Open Meetings Law (see attached), it appears that the agreement may be voidable.

Lastly, in terms of the vote, I point out that section 87(3)(a) of the Freedom of Information law requires each agency to maintain:

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Henry Bray
Lionel Fallows

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1256

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

February 4, 1986

Mrs. Jo-Ann Burns
[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. Burns:

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

You asked whether certain guidelines must be followed under the Open Meetings Law, or whether individual boards may adopt their own guidelines. You explained that your town board opens its meetings with public discussion and that the remainder of the meeting, while held "in full view of the public", is not open for public participation. In addition, although an agenda is made available before the meeting begins, the agenda does not always clearly state the nature of the items to be discussed. You asked if these procedures are a "recognized and proper way to conduct a board meeting". In this regard, I offer the following comments.

First, the Open Meetings Law requires that all meetings of a public body, such as a town board, be conducted open to the public, unless an executive or closed session may be held pursuant to section 105 of the Law. Section 105 lists eight subjects which may properly be discussed in executive session.

Second, the Open Meetings Law grants the public a right to attend and observe meetings conducted by public bodies. The Law does not, however, require a public body to permit the public to speak at or to participate in the meetings. As a matter of practice, many public bodies set aside time during their meetings for public comment. Such a practice is not required by the Open Meetings Law.

Third, the Open Meetings Law includes no provisions regarding the preparation of meeting agendas. In my view, the Law does not require a public body to prepare an agenda for any of its meetings. If it chooses to do so, I believe that the public body need not detail the items to be discussed. In other words, since the Open Meetings Law does not require that an agenda be prepared, a town board may prepare one to meet the needs of the board. Once an agenda is prepared, however, it becomes a record subject to availability under the provisions of the Freedom of Information Law.

In sum, it appears that the procedures followed at the meetings described in your letter are in compliance with the Open Meetings Law. I point out that the Open Meetings Law sets forth the minimum requirements for openness at meetings of public bodies. Public bodies are free to adopt guidelines which provide for additional public participation and openness at their meetings. For your information, I have enclosed a copy of our pamphlet, "Your Right to Know", which generally describes the requirements of the Freedom of Information Law and the Open Meetings Law.

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

Sincerely,

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1257

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

February 28, 1986

Mr. Joel P. Gagnon
[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. Gagnon:

I have received your letter of February 20 and have enclosed copies of the Freedom of Information and Open Meetings Laws, which are separate statutes. Also enclosed is "Your Right to Know", which describes those laws.

You raised a question concerning so-called "informal meetings" conducted by a town board. You wrote that "Specifically at issue is the local practice of 'informal meetings' (different time and place) before the regular meeting of the Town Board, which are to 'discuss the agenda', but not to take any action. These are scheduled meetings, closed to the public."

In this regard, I offer the following comments.

First, it is emphasized that the courts have construed the definition of "meeting" broadly [see Open Meetings Law, section 102(1)]. 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 constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering might be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, an "informal meeting" held by the town board falls within the requirements of the Open Meetings Law, even though there is no intent to take action.

Second, assuming that the gatherings in question could be characterized as "meetings", I believe that they must be preceded by notice of the time and place, given to the news media and to the public by means of posting as specified in section 104 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1258

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

March 3, 1986

Ms. Sherri Donovan
Vice-President & Community
Affairs Chairman
Village Independent Democrats
224 West Fourth Street
New York, New York 10014

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

Dear Ms. Donovan:

I have received your letter of February 7 in which you requested an "opinion and investigation" concerning the status of the "Small Business Commission" (hereafter the "Commission") under the Open Meetings Law.

In conjunction with your inquiry, I have requested and received from the Office of Corporation Counsel in New York City copies of a news release dated May 7, 1985, announcing the creation of a "Small Retail Business Study Commission" and an opinion rendered by the Corporation Counsel (Opinion No. 27-85, August 7, 1985).

The first sentence of the news release, which consists of a statement by Mayor Koch, indicates that "The City Council and I are creating a Small Retail Business Study Commission to consider how changing commercial rents are affecting the merchants, residents and neighborhoods of New York City". The release states further that:

> "The mission of the panel will be to collect information on small businesses, including the impact of rising rents on established retail merchants and the availability of neighborhood retail

> services. The commission will also undertake surveys to identify and thoroughly research other issues of importance to small business, including taxes, availability of capital, lease terms, zoning and regulatory issues, and the adequacy of municipal services.
>
> "The commission can recommend possible actions, if appropriate, which would address the problem of small business here. Any such recommendations will be seriously weighed by the Council and me."

The Mayor asked the Commission to report to him by the end of the year (1985) and designated a chairman and thirteen other members.

The opinion of Corporation Counsel cited various judicial decisions in which it was held that certain entities are subject to the Open Meetings Law. However, in concluding that the Commission in question is not a "public body" required to comply with the Open Meetings Law, it was stated that:

> "Unlike the committees discussed in these cases, the Commission is neither composed of public officers with responsibility in the area being studied nor a statutorily created body whose members serve for fixed terms and carry out specified statutory responsibilities. Its findings and recommendations will not, of course, be binding on the Mayor or any other officer or body, or receive automatic approval. The Mayor, his agency heads and the City Council are not barred from taking any action concerning small retail businesses without the prior advice or findings of the Commission. The Commission is comparable to the Queens College Review Committee for Faculty Personnel and Budget which was found not to be subject to the

> Open Meetings Law in Bigman v. Siegel, N.Y.L.J., Sept. 29, 1977 p. 11 (Sup. Ct., Queens Co.). The Committee was created by a by-law of the Board of Higher Education to make recommendations to the President of Queens College on personnel matters and on the annual budget proposed by the President. The Court stated that the Open Meetings Law:
>
> > 'does not encompass the innumerable groups which are organized and meet for the purpose of collecting information, making recommendations and rendering advice but which have no authority to make governmental decisions...'"

As such, he concluded that the Commission is not subject to the Open Meetings Law.

Based upon the following rationale, I respectfully disagree with Corporation Counsel, for, in my opinion, the Commission is a "public body" within the scope of the Open Meetings Law.

As you may be aware, the Open Meetings Law is applicable to public bodies, and the phrase "public body" is defined in section 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 Commission.

First, the Commission clearly consists of more than two members.

Second, although there may be no reference to any quorum requirement, I believe that the Commission can conduct its business, as a body, only by means of a quorum. Here I point out that 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 or officers disqualified from acting."

The specific language of section 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 Commission may perform its duties only by means of a quorum, a majority of its 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)].

Third, the Commission has the responsibilities of gathering information and conducting surveys. As stated earlier, Mayor Koch indicated that the Commission can make recommendations, which will be "seriously weighed" by himself and the City Council. The fact that the Commission was created jointly by the

Mayor and the City Council to carry out those duties on their behalf in my view suggests that the Commission conducts public business and performs a governmental function for a public corporation, the City of New York.

Corporation Counsel cited the case of Syracuse United Neighbors v. City of Syracuse [80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)], in which it was held that advisory bodies designated by the Mayor of Syracuse are public bodies. It was found in that case that the recommendations of those bodies were uniformly accepted. It appears to have been suggested by Corporation Counsel that the Commission in question is different, for "Its findings and recommendations will not, of course, be binding on the Mayor or any other office or body, or receive automatic approval". While that may be so, the finding of the Court in Syracuse United Neighbors, supra, that the recommendations of the entities in question were later adopted, lent support to the decision, but was not in my opinion determinative. Presumably, the character, functions, duties and the means by which those entities were created led to the determination that they are public bodies. Moreover, even though their recommendations were adopted, there was and continues to be no requirement that, as advisory bodies, their proposals must receive automatic approval.

Lastly, I believe that the legislative history of the definition of "public body" suggests that the Commission and similar advisory bodies are intended to fall within the requirements of the Open Meetings Law. 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", which initially referred to entities that "transact" public business. Perhaps the leading case on the subject 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", because they did not "transact" public business.

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

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". 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". As such, in my opinion, an advisory body designated by a mayor, as in the Syracuse United Neighbors decision, or by a governing body, as in Bigman v. Siegel, supra, which was decided prior to the changes in the Law, is a "public body" that falls within the scope of the Open Meetings Law. In this instance, the Commission was jointly created by the Mayor and the City Council. In view of the amendments to the Open Meetings Law and its judicial interpretation, the Commission in my view is a "public body" subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frederick A.O. Schwarz, Jr.
Joan Schafrann
Alair Townsend
Regina Belz Armstrong
Ruth Messenger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4015
OML-AO-1259

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

March 6, 1986

Ms. Constance Roberts
[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 Ms. Roberts:

As you are aware, I have received your letter of February 13, as well as the materials attached to it.

Your inquiry concerns a series of events involving the City of Poughkeepsie Zoning Board of Appeals. Having discussed the matter with you by phone, it does not appear that legal action can be taken, for the statute of limitations has expired. I point out that section 107 of the Open Meetings Law enables an "aggrieved person" to initiate suit pursuant to Article 78 of the Civil Practice Law and Rules. The time within which a suit may be initiated is four months from the date of an agency's action. As I understand the situation, more than four months have passed since the Board's determination.

Nevertheless, in an effort to enhance compliance with the Open Meetings Law in the future, I offer the following comments.

First, by way of background, for several years a city zoning board of appeals had the authority to deliberate in private, outside the requirements of the Open Meetings Law, on the ground that the deliberations were "quasi-judicial". The Open Meetings Law exempted from its coverage quasi-judicial proceedings, and the public had no right to attend such proceedings. However, an amendment to the Law enacted in 1983 prohibits zoning boards of appeals from deliberating in private in conjunction with the exemption concerning quasi-judicial proceedings. Since the amendment, zoning boards of appeals have been required to give effect to the Open Meetings Law in the same manner as other public bodies [see attached, Open Meetings Law, section 108(1)].

Second, 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 a ground for entry into an "executive session" may appropriately be cited [see section 105(1)(a) through (h)]. Moreover, the courts have construed the term "meeting" expansively. In brief, it has been held by the state's highest court that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which the gathering is characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Third, since you indicated that the Board gave no notice prior to certain meetings, it is noted that section 104 of the Law requires that notice of the time and place be given prior to every meeting. Specifically, section 104(1) pertains to meetings scheduled at least a week in advance and requires that notice be given to the public by means of posting in one or more designated, conspicuous public locations, and to the news media (at least two), 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 public and the news media as described in the preceding sentence "to the extent practicable" at a reasonable time prior to such meetings.

Fourth, as suggested earlier, the Law permits a public body to hold closed or "executive" sessions to discuss certain topics. It is emphasized, however, that the Law specifies and limits the grounds for entry into an executive session. Moreover, the Law prescribes a procedure that must be accomplished, during an open meeting, before an executive session may be held. 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..."

As such, it is clear that a public body cannot convene an executive session to discuss the subject of its choice. In addition, a motion to enter into an executive session must indicate, in general terms, the subject to be discussed.

And fifth, you indicated that minutes of meetings were not made available promptly. Section 106(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks of such meetings. If action is taken during an executive session, minutes reflective of the action taken must be prepared and made available within one week.

Your remaining question pertains to a request made under the Freedom of Information Law for tape recordings of meetings.

Here I point out that the Freedom of Information Law pertains to existing records and that section 86(4) of that statute defines "record" broadly to include:

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

Therefore, a tape recording constitutes a "record" subject to rights of access.

Like the Open Meetings, the Freedom of Information Law is based upon a presumption of access. All records of an agency are accessible, except those records or portions thereof that fall within one or more grounds for denial listed in paragraphs (a) through (i) of section 87(2) of the Law (see attached).

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]. Therefore, I believe that you have the right to listen to the tape at no charge or obtain a copy of the tape upon payment of a fee for the actual cost of reproduction [see section 87(1)(b)(iii)].

Lastly, since the response to your request has been delayed, I point out that the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401), which govern the procedural aspects of the Law, 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)].

Enclosed is "Your Right to Know", which describes both the Freedom of Information and Open Meetings Laws. A copy of this opinion will be sent to the City's Zoning Board of Appeals and its Zoning Administrator.

I hope that I 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: Zoning Board of Appeals
Michael Haydock, Zoning Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4019
OML-AO-1260

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

March 10, 1986

Ms. Debbie Meisel
Committee on Southern Africa
SUNY-Binghamton
P.O. Box 2000
Binghamton, NY 13901

The staff of the Committee on 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. Meisel:

I have received your letter of February 20 in which you questioned the status of the SUNY-Binghamton Foundation under the Freedom of Information and Open Meetings Laws.

You wrote that:

> "The problem arises from a misbelief that the foundation believes it is not a public corporation and therefore not subject to the Freedom of Information Law and the Open Meetings Laws. Under these laws, the foundation would be responsible to show their investment portfolio to the Committee on Southern Africa, as we requested on February 19, 1986. Also the Board of directors would be required to hold open meetings instead of 'secret' ones."

As such, you have asked whether the Foundation is a "public corporation", whether its portfolio is a "record" subject to the Freedom of Information Law, and whether the meetings of its Board of Directors fall within the requirements of the Open Meetings Law.

In order to learn more about the Foundation, I have reviewed corporate records filed with the Department of State. Originally created in 1957 as the Harpur College Foundation of the State University of New York, Inc., records were amended in 1967, and the name of the corporation was altered to its current name.

The Foundation is not a "public corporation", but rather a not-for-profit corporation created pursuant to section 201 of the Not-for-Profit Corporation Law.

The incorporation papers describe the purposes of the Foundation as follows, in relevant part:

> "a. To assist in advancing the welfare and development of the State University of New York at Binghamton, a unit of the State University of New York, by accepting and encouraging gifts to this Corporation and by using such gifts to advance such purposes in a manner consistent with the educational purposes of the State University of New York.
>
> b. To make such grants of financial assistance to the State University at Binghamton, its faculty and students, as shall be acceptable to, and deemed desirable by, the proper officials of the State University of New York and of the State University of New York at Binghamton, including, without limiting the foregoing, scholarship grants to students, the endowing of professorships and the like."

In addition, paragraph c pertains to the authority of the Foundation's Board to invest and reinvest its funds.

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 determined that such an entity is an "agency" subject to the Freedom of Information Law. In so holding, the Court found that:

> "We 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.

It is emphasized that the incorporation papers indicate that there is a strong nexus between the Foundation and the State University College at Binghamton. In short, it appears that the Foundation carries out its duties for the benefit and on behalf of the University. Its statement of purposes is, in my view, parallel to those of the University. Further, it appears that the Foundation would not exist, but for its relationship with the State University of New York.

Additionally, in similar circumstances arising at other branches of State University of New York, the records pertaining to a Foundation and its work are in possession of officials at the University. If that is so, I believe that the records pertaining to the Foundation in possession of the University 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 section 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 University at Binghamton 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:

> "The statutory definition of 'record' makes nothing turn on the purpose for which a document was produced or the function to which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of 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 Foundation appears to be somewhat analogous to that described by the Court. Consequently, it is reiterated that if the records are maintained by State University of New York officials concerning the Foundation, they are in my opinion subject to the Freedom of Information Law, for they would be in physical possession of the officials of the University.

Further, assuming that the portfolio of investments is subject to the Freedom of Information Law, I believe that it would be available, for no ground for denial could appropriately be cited.

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 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 consist 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 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 Foundation incorporation papers include the promotion of education at the State University at Binghamton, as well as providing scholarships and professorships, and various other purposes that inure to the benefit of the University. 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, section 608. It is also possible that quorum requirements imposed by section 41 of the General Construction Law would be applicable.

Fourth, the statement of purposes of the Foundation indicates that the Foundation performs a governmental function for an agency of the State, and in this instance, the State University at Binghamton.

If my assumptions and contentions are accurate, the Board of Trustees is a public body required to comply with the Open Meetings Law.

Lastly, I point out that public bodies have the authority to convene closed or executive sessions under circumstances described in section 105(1) of the Open Meetings Law. Of possible significance are section 105(1)(f) and (h), which state, respectively, that executive sessions may be held to discuss:

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

If for example, a discussion focuses on the "financial" or "credit" history of a particular corporation, such as a corporation in which the Foundation has investments, it is likely that the discussion could be conducted during an executive session under section 105(1)(f). Under section 105(1)(h), if the Foundation is considering selling its stock in a particular corporation, an executive session would be justified if open discussions would "substantially affect the value" of the stock.

I hope that I 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: Clifford Clark
Rollin Twinings
Anthony Miceli, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4020
OML-AO-1261

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

March 12, 1986

Mr. Joel P. Gagnon
P.O. Box 106
West Danby, NY 14896

The staff of the Committee on 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. Gagnon:

I have received your letter of March 8. Please accept my apologies for failing to include with my earlier correspondence copies of the Freedom of Information and Open Meetings Laws, and "Your Right to Know". Those materials are attached.

You raised questions concerning any requirements that might exist relative to records, such as the preparation of minutes, of a planning board.

In this regard, I point out that section 106 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, subdivision (1) of section 106 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."

In view of the foregoing, minutes of a meeting of a planning board must, at a minimum, contain the types of information described above. It is emphasized that there is nothing in the Law that precludes a board from preparing minutes that are more expansive and detailed than required by the Open Meetings Law.

Subdivision (2) of section 106 concerns minutes of an executive session. It is noted that, as a general rule, a public body may vote during a properly convened executive session, unless the vote is to appropriate public monies. If action is taken during an executive session, the provision cited above requires that:

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

If, for example, an issue is discussed during an executive session, but no action is taken, minutes of the executive session need not be prepared.

Subdivision (3) of section 106 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."

As such, minutes of open meetings must be prepared and made available within two weeks of such meetings. If action is taken during an executive session, minutes indicating the nature of the action taken, the date and the vote must be prepared and made available within one week.

In the event that minutes are not approved within the time periods prescribed in section 106(3), it has been suggested that the minutes nonetheless be made available after having been marked "unapproved", "draft", or "non-final", for example.

The minutes are considered "public records" due in part to the requirements of the Open meetings Law and also due in part to the provisions of the Freedom of Information Law. The Freedom of Information Law is applicable to records of an "agency", a term 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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since a planning board is a "municipal...board", it is an "agency" required to comply with the Freedom of Information Law.

Lastly, with respect to voting, section 87(3)(a) 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 members votes..."

In view of the foregoing, any final action taken by the planning board must be recorded by means of minutes and, in addition, a record of votes must be prepared that identifies the manner in which each member cast his or her vote.

Once again, I apologize for neglecting to send to you the enclosed materials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1262

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

March 13, 1986

Mr. Harry E. Hornbeck
President Local 461
Kingston Professional Fire Fighter's Association
C.P.O. Box 233
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. Hornbeck:

I have received your letter of February 20 in which your raised a series of questions concerning executive sessions.

Specifically, you asked:

> "1. When can the executive session be called?
>
> 2. What can be discussed during such session?
>
> 3. What action can be taken during such session?
>
> 4. Does the public have the right to know what the agenda is going to be in the executive session?
>
> 5. What happens if items that are not allowed in executive session are discussed and action is taken on such items?
>
> 6. Does any action that is taken in executive session have to be brought out out again in regular session meeting for additional action?"

In this regard, I offer the following comments.

First, an executive session may be called only after having convened an open meeting. It is noted that section 102(3) of the Law defines "executive session" as a portion of an open meeting during which the public may be excluded.

Second, the Law specifies and limits the topics that may properly be considered during an executive session. Rather than enumerating those topics, enclosed is a copy of the Law. Paragraphs (a) through (h) of section 105(1) list the grounds for entry into an executive session.

Third, as a general matter, a public body may vote to take action during an executive session, unless the vote is to appropriate public moneys.

Fourth the public has the right to know generally which subjects will be discussed during an executive session. 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..."

As such, prior to entry into an executive session, a motion must be made during an open meeting that identifies, in general terms, the subject or subjects to be considered during an executive session.

Fifth, if action if taken during an improper executive session, a court has discretionary authority to invalidate the action. Section 107(1) of the Law states in part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in

> its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

Lastly, if action is taken in an executive session, the result may be but need not be announced in public during the open session that follows. However, section 106(2) provides 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."

Further, Section 106(3) states that minutes of executive session must be prepared and made available within one week.

As you requested, also enclosed are copies of the Freedom of Information Law, and "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

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4027
OML-AO-1263

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

March 18, 1986

Ms. Christine Egeland
[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. Egeland:

I have received your letter of March 13, as well as the materials attached to it.

Your first question is whether the Board of Education of the St. Regis Falls Central School District should "make available to the public present at an open meeting, copies of a document they are going to discuss at that time". Technically, although an agency may make records available at meetings, and many agencies routinely do so, there is no general requirement of which I am aware that requires that records be made available at meetings. However, records may be requested prior to meetings in accordance with the Freedom of Information Law and an agency's regulations which must, according to section 87(1) of the Freedom of Information Law, be consistent with the Law and the general regulations promulgated by the Committee (see attached regulations of the Committee, 21 NYCRR Part 1401).

It is noted that the issue has arisen frequently. Specifically, often records used by members of public bodies are reviewed and discussed at open meetings but are not distributed to members of the public who attend. The result may be a discussion of facts and figures that are unknown to the public. Due to the expressions of frustration, the Committee has recommended to the Governor and the Legislature that the Open Meetings Law specify that, with certain restrictions, records discussed at an open meeting must be available to the public prior to or at the beginning of a meeting. Further, many have contended that a discussion of a record in public results in what might be viewed as a waiver of any basis for withholding that might otherwise be asserted.

One of the focal points of your correspondence is an "Intent to Participate Form" transmitted by your local BOCES for completion by District officials. As I understand it, the Form describes certain options available to the District and BOCES' estimate of the cost to the District. If "yes" is circled on the Form, the District essentially agrees to pay at least the estimated expense. As stated at the beginning of the Form used in 1985, a copy of which you enclosed:

> "The Bureau of School District Organization has approved or is in the process of approving the following 1985-86 BOCES Services for your school district. Please indicate your intention to participate in specific services BY CIRCLING YES OR NO. Your action on this notice represents a commitment by your district to participate in the services selected and is an authorization for the District Superintendent to secure personnel for any new service and retain present staff members for continuing services."

As indicated above, when "yes" is circled, that notation "represents a commitment" by the District to participate in certain services and to expend public monies.

In terms of access to the Form, I point out initially that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

From my perspective, although one of the grounds for denial is applicable, due to its structure, I believe that the completed form must be made available. Specifically, 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.

Under the circumstances, since circling a "yes" represents a "commitment", I believe that it also represents a final agency determination accessible under section 87(2)(g)(iii).

You wrote that the Superintendent based his denial in part on the contention that the Form is a "working paper". While it may be a "working paper", that alone is not determinative of rights of access. It is reiterated that all records are available, except to the extent thal one or more grounds for denial may appropriately be asserted. Section 86(4) of the Law defines "record" to mean:

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

As such, "working papers" are "records" subject to rights of access.

It is also noted that it has been held that budget estimates and other kinds of statistical or factual data are accessible under section 87(2)(g)(i), even though they might not be reflective of "objective reality" [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 NY 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977); also Polansky v. Regan, 440 NYS 2d 356, 81 AD 2d 102 (1981)]. Therefore, even though figures prepared in the budget process may be considered as estimates or subject to change, it has been held that they constitute "statistical or factual tabulations" accessible under the Freedom of Information Law, whether or not action has been taken with respect to those figures.

With regard to the "preliminary budget", again, I believe that budget worksheets and similar records reflective of statistical or factual data are subject to rights of access as soon as they exist.

In addition, section 1716 of the Education Law, entitled "Estimated expenses for ensuing year" states that:

> "It shall be the duty of the board of education of each district to present at the annual meeting a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specifying the several purposes and the amount for each. The amount for each purpose estimated necessary for payments to boards of cooperative educational services shall be shown in full, with no deduction of estimated state aid. This section shall not be construed to prevent the board from presenting such statement at a special meeting called for the purpose, nor from presenting a supplementary and amended statement or estimate at any time. Such statement shall be completed at least seven days before the annual or special meeting at which it is to be presented and copies thereof shall be prepared and made available, upon request, to taxpayers within the district during the period of seven days immediately preceding such meeting and at such meeting. The board shall also as a part of the notice required by section two thousand four of this chapter give notice that a copy of such statement may be obtained by any taxpayer in the district at each schoolhouse in the district in which school is maintained during certain designated hours on each day other than a Saturday, Sunday or holiday during the seven days immediately preceding such meeting."

Your remaining questions pertain to the Open Meetings Law.

It is emphasized at the outset that the term "meeting" has been expansively construed 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, whether or not there is an intent to take action, and regardless of the manner in which a gathering is characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Your specific questions are whether two boards can meet privately "with or without the Consultant to discuss an Efficiency Study" and whether there are "any circumstances under which a Board of Education may discuss in executive session ANY aspects of an Efficiency Study" (emphasis yours).

Like the Freedom of Information Law, the Open Meetings Law is based upon a presumption of openness. A meeting of a public body must be conducted open to the public unless and until a topic arises that may appropriately be discussed during an executive session. I point out in passing that it has been held that meetings jointly held by two public bodies are subject to the Open Meetings Law, assuming that a quorum of at least one public body is present [Oneonta Star, Division of Ottaway Newspapers, Inc. v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)].

Since the nature of the efficiency study to which you referred is not described, I cannot provide specific guidance. However, it appears that only one of the grounds for entry into executive session is likely relevant, the so-called "personnel" exception for executive session.

It is noted that the provision in question differs in current Open Meetings Law from the provision that appeared in the Law as originally enacted.

The former section 105(1)(f) permitted a public body to enter into executive session to discuss:

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

Under the language quoted above, public bodies entered into executive sessions to consider issues that related tangentially or indirectly to personnel as a group. It was the Committee's contention, however, that section 105(1)(f) was largely intended to protect privacy, not to shield matters of policy under the guise of privacy.

In an effort to remedy the deficiency and clarify the Law, the Committee recommended amendments to section 105(1)(f) that were approved by the State Legislature and which became effective on October 1, 1979.

Section 105(1)(f) now permits a public body to enter into an executive session to discuss:

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

Consequently, the "personnel" exception may in my view be cited to enter into an executive session only when the matter pertains to a "particular" person in conjunction with one or more of the topics included in section 105(1)(f). I do not believe that the cited provision can serve to exclude the public when an issue concerns personnel generally.

Therefore, if the efficiency study involves issues relating to programs, policy, the functions of an office, or the duties accorded to positions, I do not believe that an executive session could properly be held. Contrarily, to the extent that a discussion focuses on the performance of a "particular person", an executive session would likely be validly 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: Clerk of the Board
Robert Whitman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4033
OML-AO- 1264

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

March 20, 1986

Mr. Isidore Gerber
[redacted]

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

Dear Mr. Gerber:

I have recently received a variety of letters from you concerning the Freedom of Information and Open Meetings Laws. Please note that two letters dated February 5 reached this office on March 10.

One of your letters of February 5 concerns a motion for entry into an executive session by the Board of Trustees of the Village of Liberty on which the basis cited was apparently "litigation", without more. As you are aware, section 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". However, in the case of an executive session held to discuss litigation that has been commenced, it has been held that a motion to go into executive session must identify the title of the litigation [Daily Gazette v. Town Board, Town of Cobleskill, 444 NYS 2d (1981)]. It has also been held that the purpose of section 105(1)(d) is to enable a public body to discuss its "litigation strategy" in private, so as not to bare its strategy to its adversary [see Weatherwax v. Town of Stony Point, 97 AD 2d 840 (1983)]. Therefore, even though an issue might result in a lawsuit, that alone would not necessarily qualify for discussion in an executive session.

Another letter dealt with closed meetings held to review an audit performed by the Department of Audit and Control. It appears that representatives of the Department and the Village met. However, it also appears that a quorum of the Board of Trustees was not present. In short, the Open Meetings Law applies to meetings of "public bodies". From my perspective, a

board does not become or function as a public body unless and until a quorum, a majority of its total membership, is present. As such, if no quorum was present, the Open Meetings Law would not in my view have applied. Conversely, if a majority of the Board met to review the audit, the Open Meetings Law would have applied and notice of such a meeting should have been given.

Another of your letters pertains to difficulties that you faced relative to a board of elections and the placement of your name on the ballot. The issues that you raised fall outside the jurisdiction of this office, for they do not involve either the Freedom of Information Law or the Open Meetings Law.

The remaining letter pertains to your requests for information relating to HUD grants. Without additional knowledge regarding the nature of the grants and the conditions under which grants are awarded, I cannot provide specific direction. However, I offer the following general remarks.

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

Second, the Freedom of Information Law enables an agency to withhold records or portions of records the disclosure of which would result in an unwarranted invasion of personal privacy. While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view enable government to prevent disclosures concerning the personal details of individuals' lives. As such, with respect to grant programs, often the question involves the extent to which disclosure would constitute an unwarranted as opposed to a permissible invasion of personal privacy.

Third, from my perspective, a disclosure that permits the public determine the general income level of a participant in a grant program would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrased by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., section 697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted" invasion of personal privacy.

Therefore, if, for example, if grants are made to "low income" persons, it is likely that disclosure of portions of records indicating their identities might justifiably be withheld. On the other hand, if a grant is not conditioned on an income qualification, but rather perhaps upon the location of property, disclosure of the identities of those recipients of grants would likely be proper.

Lastly, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states, as a general rule, that an agency need not create or prepare a record in response to a request. Consequently, if a request involves "information" or totals, for instance, that do not exist in the form requested, the Freedom of Information Law does not require an agency to create a new record on behalf of an applicant.

I hope that I 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: Jeffrey A. Carmen, Village Manager
Bernice Nicholson, Clerk Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOML-AO-1265

March 20, 1986

Mr. Jerry Brixner
[redacted]

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

Dear Mr. Brixner:

I have received your letter of February 25, in which you raised an issue that appears to relate to the Open Meetings Law.

According to your letter, an issue arose concerning fees charged at the Chili Community Center. Although brief reference to the issue was made in discussions by the Town Recreation and Youth Commission, you indicated that "no formal action" was taken at a Commission meeting held on February 12. Nevertheless, you enclosed a copy of a letter dated February 18 indicating that a new fee structure had been adopted by the Commission. As such, it is your view that "some time between February 12 and February 18, the Recreation Commission must have met to formalize the new fee structure..."

In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law pertains to public bodies. Based upon your letter and the attached correspondence, it appears that the Chili Recreation Commission is a "public body" subject to the Open Meetings Law. Assuming that is so, I believe that any action taken by the Commission must occur during a meeting convened open to the public and recorded in minutes of such a meeting. My view is based in part open section 41 of the General Construction Law, which has long required that a public body can carry out its powers and duties only at a meeting and only based upon an affirmative vote of a majority of its total membership. If no such gathering was convened, or if no vote was taken, it would not appear that action was validly taken. Further, with respect to 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."

Therefore, if action was taken by the Commission, presumably a description of that action should be included within its minutes.

As an aside, in an effort to research the issue, I learned that certain provisions of the Town Law deal with "self-supporting improvements". Specifically, section 141 of the Town Law states that:

> "The town board of any town in Suffolk County and of any suburban town may, by ordinance, provide for the acquisition, construction, lease or purchase of any self-supporting improvement, or may establish any existing dock, pier, wharf, bathing beach or recreational facility, and parking areas in connection therewith as a self-supporting improvement, pursuant to the provisions of this article."

Moreover, section 142 of the Town Law states in part that:

> "The town board of any town in Suffolk County and of any suburban town, may, by ordinance, rule, or regulation after a public hearing held on notice published at least once in a newspaper circulating in the town, not less than ten days prior to such hearing, establish or revise charges for the use or enjoyment of any self-supporting improvement. Such town board shall establish charges for the use or enjoyment of any such improvement for a daily, hourly or single use of such improvement."

Assuming that the Community Center is characterized as a "self- supporting improvement", it would appear that the provisions cited above would be applicable, for I also learned that the Town Clerk notified the Secretary of State on January 5, 1965 that the Town of Chile is a "suburban town".

In short, since the Town is a suburban town, if sections 141 and 142 of the Town law are pertinent, I believe that different issues likely arise that are outside the scope of the Committee's jurisdiction.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Recreation Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1266

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

March 20, 1986

Ms. Yvette Kitchen
Assistant Counsel
Bureau of Child Welfare
Services Law
New York State
Department of Social Services
40 North Pearl Street
Albany, NY 12243

<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. Kitchen:

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

According to your letter, the Children and Family Trust Fund Advisory Board was created by the Children and Family Trust Fund Act (Ch. 960, Laws of 1984). The Board assists the Department of Social Services in developing program standards, receives and reviews applications for funding, establishes family violence prevention and service programs and evaluates the funded programs. The Board consists of thirteen members appointed by the Governor and the Legislature. You want to know whether the Board is a "public body" subject to the provisions of the Open Meetings Law. In addition, you asked whether the Board may conduct an executive session to discuss "requests for proposals" and contracts submitted in response to those requests. In this regard, I offer the following comments.

The Open Meetings Law requires all meetings of a public body to be conducted open to the public except when an executive or closed session may be held to discuss one or more of the topics listed at section 105(a) through (h) of the Law. "Public body" is defined at 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."

In my view, the Children and Family Trust Fund Advisory Board meets the definition of a public body.

First, the Board is an "entity" consisting of two or more persons for it appears to have been created to utilize the combined expertise and experience of thirteen individuals. It also appears to conduct public business by advising and making recommendations to the Department regarding family violence programs. Moreover, while the Board's enabling legislation is silent with respect to a quorum, section 41 of the General Construction Law provides that:

> "Whenever three or more public officers are given any power or authority , or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such 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 Board consists of three or more public officers and "persons charged with a public duty...". Some of the Board members are public officers and others, in my opinion, are "charged with a public duty" in that they are appointed by the Governor to advise, recommend and review proposals for family violence programs. 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); Pisarre v. City of Glens Falls, Sup. Ct., Warren Cty., March 7, 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.

Second, I believe that the Board performs a governmental function for the state, particularly the Department of Social Services, in that it advises with respect to the implementation of family violence programs funded with public money. Moreover, the Board is responsible for developing requests for proposals and evaluating the effectiveness of funded programs.

For the reasons stated, it is my opinion that the Board meets the statutory definition of a public body and therefore must comply with the provisions of the Open Meetings Law.

Third, the Open Meetings Law permits a public body to conduct an executive session only for the enumerated purposes stated in section 105. You asked whether any of those purposes would include discussions concerning evaluations of contract proposals or discussions of the substance of draft requests for contract proposals.

You suggested that section 105(1)(g) may permit such discussion in executive session. Section 105(1)(g) provides that discussions of the preparation, grading or administration of examinations may be held in executive session. In my view, only discussions of examinations fall within section 105(1)(g). That provision was meant to prevent the obvious harm of disclosing examination questions and answers. I do not believe that the same type of harm would result from a public discussion of contract requests or proposals.

Fourth, although none of the topics enumerated in section 105 specifically refer to discussions of contract proposals, I believe that section 105(f) may be relevant. That provision allows an executive session to 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."

For example, if the financial history of a not-for-profit corporation needed to be discussed in relation to an evaluation of a proposed contract, I believe that an executive session could be conducted.

On the other hand, I do not believe there is any basis for conducting an executive session to discuss the substance of a draft "request for proposal". The specifications and the requirements of a program are not subjects that are, in my opinion, appropriate for discussion in an executive session. Thus, I believe that such discussions must be held open to the public.

In sum, it is my opinion that the Children and Family Trust Fund Advisory Board is a public body subject to the provisions of the Open Meetings Law. Based upon its statutory purposes, it appears that the Board may conduct executive sessions only in limited situations.

I hope 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-1267

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

March 20, 1986

Mr. William W. Watson
[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. Watson:

I have received your letter of February 21.

According to your letter, at a meeting of the Board of Education of the City of Tonawanda, upon which you serve, the Board conducted an executive session to evaluate applicants for a particular position. The Board apparently showed support for hiring a particular individual and directed the Superintendent "to seek additional information in regard to further contractual details". You asked whether, by so doing, the Board violated the Open Meetings Law.

In this regard, I point out that, as a general rule, a public body subject to the Open Meetings Law may vote to take final action during a properly convened executive session [see Open Meetings Law, section 105(1)]. If final action is taken during an executive session, minutes reflective of that 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 final 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, it would appear that final action taken by a board of education should be accomplished by means of a vote taken during an open meeting.

In terms of the situation that you described, it does not appear that the Board took any final action. If that was so, neither the Open Meetings Law nor the Education Law would in my opinion have been violated.

I hope that 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-1268

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

March 24, 1986

Mr. Charles G. Soderblom
[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. Soderblom:

I have received your letter of February 21 in which you requested advice concerning the Open Meetings Law.

You asked whether an individual had a right to tape record a town board meeting. In addition, you asked whether a work session, at which the preliminary budget would be reviewed by the Town Board, would have to be open to the public. Finally, you asked whether a "roll-call" vote must be taken whenever the Board votes on a matter. In this regard, I offer the following comments.

First, I believe that a Town Board cannot prohibit the use of a tape recorder at the open portions of its meetings. Although the Open Meetings Law is silent with respect to tape recording or broadcasting meetings, the Committee on Open Government has long advised that prohibiting the use of a tape recorder during an open meeting is inconsistent with the intent of the Law. Moreover, the Appellate Division, Second Department, has held that a school board has no justifiable basis for prohibiting the use of "unobtrusive, hand-held tape recording devices" at its public meetings. Such a prohibition, the Court found, would be far too restrictive when viewed in light of the legislative scheme embodied in the Open Meetings Law (Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)].

Second, "work sessions" of a board are generally subject to the provisions of the Open Meetings Law. The State's highest court, the Court of Appeals, has broadly interpreted the statutory definition of a "meeting". In short, whenever a quorum of a public body gathers to discuss public business, the gathering constitutes a meeting subject to the Law, 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)]. Thus, when at least a quorum of the Board gathers for a work session, notice of the meeting must be given and minutes prepared pursuant to sections 104 and 106 of the Law. Moreover, the work session must be held open to the public unless an executive or closed session may be held to discuss one of the topics listed at section 105(1)(a)-(h).

Third, whenever the Board votes, the minutes must indicate the matter voted upon and the vote thereon. Section 87(3)(a) of the Freedom of Information Law requires that an agency maintain a record of the "final vote of each member in every agency proceeding in which the member votes". Therefore, I believe that the minutes of a meeting should indicate how each of the Board members voted.

Finally, I have enclosed copies of the Freedom of Information and Open Meetings Laws and a copy of our pamphlet, "Your Right to Know". The pamphlet generally describes the scope of both Laws. If you have any further questions please do not hesitate to call the office at 474-2518.

Sincerely,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1269

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

March 27, 1986

Ms. Janet L. Alloway
[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. Alloway:

I have received your letter of March 4 in which you requested an advisory opinion concerning the application of the Open Meetings Law.

According to your letter, "as a concerned citizen", you recently "tried to attend a regular monthly meeting of Citizens Hose Company #5 (Fire Department), Catskill, NY." However, your effort to attend was unsuccessful, and you were told that the meeting was not open to the public. As such, your question is whether the Fire Company and Rescue Squad, which are volunteer organizations, are subject to the Open Meetings Law.

In my opinion, any person may attend the meetings of the board of volunteer fire company, for I believe that such a board is a "public body" subject to the Open Meetings Law. Since I am not completely familiar with the status of the Rescue Squad, I cannot offer specific guidance. However, the following analysis regarding the meetings of the boards of volunteer fire companies might also be applicable with respect to the board of a rescue squad.

Specifically, the Open Meetings Law (see attached) applies to meetings of all public bodies. In this regard, 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 govern-

> mental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

I believe that each of the conditions necessary to a finding that the board of a volunteer fire company is a public body can be met.

The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the conditions precedent can be met, I believe that a volunteer fire company is a "public body" subject to the Open Meetings Law.

I would also like to point out that the status of volunteer fire companies had long been unclear. Such companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not such bodies conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, in a landmark decision, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland Newspapers v. Kimball, it is in my view clear that a volunteer fire company also falls within the definition of "public body" and is required to comply with the Open Meetings Law.

I would like to point out, too, that both the Open Meetings and Freedom of Information Laws are based upon presumptions of openness. In the case of the Open Meetings Law, all meetings must be conducted open to the public, except to the extent that an executive session may be held in accordance with section

105(1) of the Law. Similarly, under the Freedom of Information Law, all records of a volunteer fire company are available, except to the extent that they fall within one or more of the grounds for denial of access appearing in section 87(2) of the Law.

As you requested, a copy of this opinion and the Open Meetings Law will be sent to the individuals identified in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Al Valentine
Dolly Cavicchioni
Anthony Jubie
William Rappelyea
Stevan Valk
Tina Bell
Board of Trustees
Al Hendricks
Thomas Lackie

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1270

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

April 8, 1986

Mr. Robert J. Koslow
Representative
South New Berlin Bus
Drivers Association
P.O. Box 47
South New Berlin, NY 13843

The staff of the Committee on 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. Koslow:

I have received your letter of March 12 in which you allege that the Board of Education of the South New Berlin Central School District engaged in several violations of the Open Meetings Law.

Specifically, you wrote that, on January 15, between 7 p.m. and 7:40 p.m., an executive session was convened by the Board of Education to receive a report involving "complaints and concerns" of the South New Berlin Bus Drivers' Association. It appears that the Board's regular meeting was scheduled to begin at 7:30 p.m.

You have alleged that no motion was made during an open meeting to enter into an executive session, that "no public notice was ever given", that the meeting was held "secretly", that the Association Representative and others were "barred" from attending, and that the matter discussed could not legally have been considered during an executive session. You also alleged that various District officials violated section 806 of the General Municipal Law.

In this regard, the Committee is not legally authorized to offer advice with respect to the provision of the General Municipal Law to which you referred. However, I offer the following comments concerning the Open Meetings Law.

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 suggested, the phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded. Further, 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 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..."

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 section 105(1).

Lastly, with respect to the substance of the discussion held in executive session, it is unclear whether there was a basis for entry into an executive session. Of possible relevance 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."

If, for example, the discussion focused upon a "particular" person or persons relative to those individuals' performance or employment history, section 105(1)(f) could likely have properly been invoked to enter into an executive session; on the other hand, if the discussion involved bus drivers or part time bus drivers generally or in terms of policy, it would not appear that there was a basis for holding an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Frederick A. Hall, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4060
OML-AO-1271

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

April 9, 1986

Mr. John Semeniak
Superintendent of Schools
New York Mills Union Free
School District
1 Marauder Boulevard
New York Mills, NY 13417

The staff of the Committee on 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. Semeniak:

I have received your letter of March 2 in which you requested an advisory opinion.

Your inquiry concerns "information that should be shared with the public during a Board budget review session". Specifically, you asked:

> "-Is the first draft budget document, which includes staffing; tax impact; current and estimated costs information, given to the Board of Education during a budget review session, required to be shared with the public?
>
> -Does this information need to be shared with the public curing a regular Board review session?"

In this regard, I offer the following comments.

First, it is assumed that the budget review sessions conducted by the Board of Education are open to the public. As a general matter, when a quorum of a public body convenes for the purpose of conducting public business, such a gathering constitutes a "meeting" subject to the Open Meetings Law. Further, none of the grounds for entry into a closed or "executive session" could likely be asserted to discuss the preparation of a budget.

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

I point out that the introductory language of section 87(2) refers to the capacity to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. Therefore, I believe that the Legislature envisioned situations in which a single record or report might be both accessible and deniable. Further, in my opinion, in view of the quoted language, an agency is required to review a record sought in its entirety to determine which portions, if any, might justifiably be withheld.

While one of the grounds for denial is relevant to the records in question, due to the structure of that provision, it is likely in my view that much of the information contained in the records should be available. Specifically, the provision in question, section 87(2)(g), states that an agency may withhold records that:

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

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

Under the circumstances, I believe that the documentation could be characterized as "inter-agency" material. Nonetheless, to the extent that it consists of "statistical or factual tabulations or data", I believe that it should be made available. It is noted that numerical figures in the nature of estimates or projections found within so-called budget worksheets in possession of the State Division of the Budget, that were subject to change, were found to be accessible under the Law [see Dunlea v. Goldmark, 390 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 74 (1977).

Lastly, although the Board may share the records with the public at a meeting, an agency may in my opinion require that the records be made available in accordance with applicable rules and regulations adopted pursuant to section 87(1) of the Freedom of Information Law. Such rules generally indicate that an applicant may submit a request to the agency's designated records access officer during regular business hours, and that the agency has up to five days from the receipt of a request to respond.

It is noted that the public has on occasion complained that it is difficult to follow a public body's discussion when the discussion focuses on a document in possession but which has not been made available to the public attending the meeting. The issue was addressed in the Committee's most recent annual report to the Governor and the Legislature in which it was written that:

> "Many members of the public have brought to the attention of the Committee a frustrating situation that relates to discussions at meetings and access to records. Often a public body will review and discuss a particular record at an open meeting, but the record may not be available or distributed to the people attending the meeting. For instance, a board in reviewing its expenditures might refer to an item appearing on 'page 3, line 6'. While that information is referenced at a meeting, the public may be unaware of the contents of the record that is the subject of the discussion. Therefore, although the meeting is open, the public is unable to know of what the discussion specifically concerns."

In an effort to remedy the situation, it was recommended that "with certain exceptions, a record that is the subject of a discussion at an open meeting should be available to the public at the time of the meeting".

Although the proposal has not been enacted, it may be relevant to your concerns.

I hope that I 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 4061
OML-AO-1272

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

April 10, 1986

Mr. Kevin 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 recent letter and the correspondence attached to it.

According to your letter, during a meeting of the Town Board of the Town of Catherine:

> "The Town Supervisor showed the Town Board members a letter and asked them if they had all had a chance to see the letter, they agreed they had, and the supervisor then asked if the Town Board were all in agreement, and they said yes. This was done without refering to any name or subject for this letter and very quickly and quietly - moving right on to another matter."

On the day after the meeting, you requested all letters shown to the Town Board during the meeting. You later received the requested records, with exception of the "secret" letter. It was explained to you that:

> "The letter you requested was actually an inner-office memo prepared by Supervisor Delvan Decker, to be distributed to the Town Board members only, regard-

> ing a rough draft of a proposed letter which was not formally acted upon by the Supervisory of the Town Board."

You have requested an advisory opinion concerning the denial and, in this regard, I offer the following comments and suggestions.

First, 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 records or portions thereof that fall within the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, relevant to your inquiry is section 87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

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

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, to the extent that inter-agency or intra-agency materials are reflective of advice, opinion or recommendation, for example, they could in my view be withheld.

Under the circumstances, it appears that the record in question could be characterized as "intra-agency" material that would be accessible or deniable under section 87(2)(g), in whole or in part, depending upon its contents.

Third, with respect to the meeting, you said that the Board agreed with the contents of the record, If their agreement represented the taking of some action, I believe that the minutes of the meeting should indicate the nature of such action. Here I direct your attention to the Open Meetings Law, which states in section 106(1) 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."

Lastly, in terms of recourse, you have the right to appeal the denial of your request. Section 89(4)(a) of the Freedom of Information Law provides that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought..."

Enclosed is a copy of "Your Right to Know", which describes the provisions of both the Freedom of Information and the 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: Susan N. Reynolds
Town Board, Town of Catherine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1273

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

April 11, 1986

Mr. Charles J. Theophil
[redacted]

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

Dear Mr. Theophil:

I have received your letter of March 27 in which you raised questions relative to the Open Meetings Law.

The focal point of your inquiry concerns a "district service cabinet", which apparently holds closed meetings. As you indicated, district service cabinets were created by means of section 2705 of the New York City Charter.

In this regard, having reviewed the minutes of a recent meeting of the District Service Cabinet that you attached to your letter, and having discussed the issue with a representative of the Office of Corporation Counsel, although a district service cabinet may have some characteristics of a public body, it does not appear to be a public body. If that is so, its meetings would not be subject to the Open Meetings Law, and there would be no quorum requirements.

As you may be aware, the Open Meetings Law is applicable to public bodies, and the phrase "public body" is defined in section 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 more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as de-

> 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, quorum requirements apply to entities consisting of three or more who are charged with a public duty "to be exercised by them jointly or as a board or similar body..." Once again, according to the minutes, a district service cabinet does not appear to carry out a duty "jointly", by means of voting, for example. Section 41 of the General Construction Law also indicates that if an entity is charged with a duty to be performed or exercised jointly as a body, it may carry out such a duty only by means of an affirmative vote of a majority of its total membership.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

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

The minutes indicate that the District Service Cabinet does not function as a public body. Generally, a public body is in my view, an entity that carries out a function collectively, as a body, and that seeks to reach a consensus as a body. According to the minutes, no action was taken by those present, there were no motions or votes. On the contrary, it appears that various reports and comments were made concerning the community.

Further, although section 2705 of the Charter states that certain officials serve as members of the Cabinet, others are representatives of City agencies who might participate, comment or provide information as needed. For instance, if an issue arises that might be dealt with by the Department of Sanitation, that agency might send one or more representatives. If the issue is resolved, those same representatives might not attend future meetings. Stated differently, the "membership" is apparently flexible and dependent upon the nature of issues that might arise in a community.

If my assumptions are accurate, a district service cabinet would not have a specific membership, nor would those in attendance function collectively, as a body.

At the end of your letter, you referred to an absence of any statement in the minutes that a quorum was present. Here I direct your attention to section 41 of the General Construction Law, entitled "Quorum and majority", and which 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

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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4065
OML-AO-1274

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

April 15, 1986

Mr. John Goetschius
Greenburgh No. 11 Federation
of Teachers
P.O. Box 184
Dobbs Ferry, NY 10522

The staff of the Committee on 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. Goetschius:

I have received your recent letter addressed to Ms. Mugno of this office, as well as a copy of a "personnel report" prepared by the Superintendent of the Greenburgh School District.

More specifically, you wrote that:

> "1) A personnel report is prepared by the Superintendent of Schools prior to a Board of Education meeting. This report contains all hirings, firings, salary adjustments, etc. (March 1986 personnel report attached).
>
> 2) The Board refuses to divulge the particulars of the report prior to its approval.
>
> 3) The motion is made to 'approve the personnel report' and all items are approved by a single vote.
>
> 4) No discussion of the items on the personnel report takes place in public session."

Your question is whether "this practice is permissible under the Open Meetings Law". In this regard, I offer the following comments.

First, it is emphasized that the report consists of recommendations concerning proposed personnel actions for review and eventual action by the Board of Education. Here I point out that section 87(2)(g) of the Freedom of Information Law states that an agency may withhold intra-agency materials that are reflective of opinion, advice or recommendation, for example. Further, section 89(7) states in part that nothing in the Freedom of Information Law requires the disclosure of "the name or home address of an applicant for appointment to public employment". As such, I do not believe that the Board is required to divulge the particulars of the report prior to its approval.

Second, with respect to public discussion of the report, there is nothing in the Open Meetings Law that pertains to the extent to which an issue must be discussed during an open meeting. Moreover, the Open Meetings Law permits a public body to engage in an executive session under section 105(1)(f) to consider:

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

Therefore, if, for example, the Board sought to discuss a personnel action with respect to a "particular person", it is likely that an executive session could properly be held.

Lastly, although the report is approved by means of a single vote, I would think that such a practice would be permissible, so long as the minutes, either specifically, or by means of incorporating the report by reference, indicate the nature of the action taken, by individual and the action taken with respect to them.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1275

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

May 2, 1986

Mr. Tom Bergin
Press-Republican
170 Margaret Street
Plattsburgh, NY 12901

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

Dear Mr. Bergin:

I have received your letter of April 17, as well as the news article attached to it.

The article pertains to a gathering held by various officials of the City of Plattsburgh and Clinton County. Mayor Rennell apparently contended that the gathering was not subject to the Open Meetings Law, and County Attorney Patrick McGill "claimed that the meetings should be closed because the city's attempt to include the county in the special assessment district might be challenged in court". You added that, since the article appeared, you have "been ordered out of two other Clinton County government meetings, both on the pretext that the issues to be discussed 'may' or 'could' lead to litigation or end up in court."

In this regard, I 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 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 point out that the quotation in the sidebar portion of the article referred to a public body as "two or more people that conduct public business and perform a governmental function..." Nevertheless, the definition refers to an "entity" that consists at least two members and which conducts public business and performs a governmental function. Therefore, although the group of individuals who attended the gathering described in the article might all have been representatives of government, it does not appear that the group constituted a "public body", for it is not apparently an entity that conducts public business collectively as a body. Further, when an entity is a public body subject to the Open Meetings Law, the Law is applicable when a quorum of that body convenes to conduct public business. Consequently, if, for example, three members of a seven member board gathered to discuss public business, such a gathering consisting of less than a quorum of the public body would fall outside the requirements of the Law; however, if four members of the same board sought to convene to conduct public business, such a gathering would be subject to the Open Meetings Law, for a quorum would be present for the purpose of conducting public business.

Second, with respect to the issue of "litigation", section 105(1)(d) of the Law permits a public body to enter into an executive session to discuss:

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

In this regard, the Committee has consistently advised that the possibility of litigation does not without more constitute a valid basis for entry into an executive session. On the contrary, it has been held by appellate courts that the purpose of section 105(1)(d) is to enable a public body to discuss its litigation strategy behind closed doors in order to prevent the public disclosure of that strategy to its adversaries, who might be present at the meeting. In the most expansive decision concerning the issue, it was found 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 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" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the direction provided by the Court, I agree with your contention that the mere possibility that legal action might some day be initiated would not result in a valid assertion of section 105(1)(d) as a basis for entry into an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor Rennell
Patrick McGill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1276

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

May 13, 1986

Mr. Richard J. Kaplan
Village of Ellenville
81 North Main Street
Ellenville, NY 12428

The staff of the Committee on 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. Kaplan:

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

Your inquiry concerns "special meetings" held by the Village of Ellenville on April 18 and 19. In brief, your memorandum to the Board, a copy of which you enclosed, indicates that the Board had difficulty in reaching an agreement regarding the Village budget, which must be adopted by a date certain in accordance with provisions contained in Article 5 of the Village Law. One of the Board members indicated that April 14 was the last day that she would be available to vote on the budget, and you added that:

> "On Wednesday, April 16 the Mayor called for a Special Meeting of the Board for purposes of voting on the Budget and scheduled it for Friday, April 18 at 8:00 o'clock in the Village Hall. The announcement of the meeting was broadcast over the local radio on Thursday and the Ellenville Police Department served notices of the meeting at the homes of each of the Trustees on Thursday afternoon. The April 18 meeting was attended by only the Mayor and Elliott Auerbach and as there was not a sufficient quorum attending the meeting, it was adjourned

> until 7:30 a.m. on Saturday April 19. Immediately following the adjournment of Friday night notices of the Saturday morning meeting were served by the Ellenville Police at the homes of each of the Trustees. The Saturday morning meeting was attended by the Mayor, Elliott Auerbach and Joseph Stoeckeler, Jr. at which time the budget resolution was passed by a unanimous 3-0 vote."

Further, you wrote that on Friday evening, notice of the Saturday meeting was given to a reporter and others who may have been present.

Although you addressed several issues in your memorandum, the only issue that pertains to the Open Meetings Law or falls within the scope of the Committee's advisory authority involves the notice requirements imposed by section 104 of the Open Meetings Law.

The cited provision states in relevant part that:

> "1. Public notice of the time and place of a meeting scheduled at least a 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."

As you indicated in your memorandum, subdivision (1) would not have applied, for the meetings in question were scheduled less than a week in advance. Subdivision (2), which pertains to other meetings, those scheduled less than a week in advance, in my view enables public bodies to convene quickly, so long as the notice requirements are met. Those requirements involve posting notice of the time and place of a meeting for the public and providing notice to the news media "to the extent practicable" at a reasonable time prior to the meeting.

From my perspective, the phrase "to the extent practicable" is intended to enable public bodies to take whatever steps may be reasonable to inform the public and the news media when and were a meeting scheduled less than a week in advance will be held.

Based upon your rendition of the facts, it appears that, under the circumstances, reasonable efforts were made to comply with the notice requirements.

It is noted, too, that section 107(1) of the Open Meetings Law states in part that:

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

I hope that I 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 - 1277

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

May 13, 1986

Hon. Carlton E. Rennell
Mayor
City of Plattsburgh
City Hall
Plattsburgh, NY 12901

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

Dear Mayor Rennell:

I have received your letter of April 29 and appreciate your interest in complying with the Open Meetings Law.

Your inquiry pertains to the legislative proceedings of the Common Council of the City of Plattsburgh. Specifically, you wrote that:

> "The Common Council has six members. One of the Aldermen whose term expires December 31, 1987, is in poor health and his physician will not permit him to attend Council meetings for the indefinite future. Although the Alderman cannot be physically present, the City of Plattsburgh has the technical capability of installing a two-way radio system in the Council Chambers and at the Alderman's home which will permit him to hear all of the proceedings and be heard by the other members of the Council and the public. A City Police Officer could be assigned to the Alderman's home and at the conclusion of the meeting would sign an affidavit attesting to the fact that the Alderman was present at his home throughout the meeting and that the proceedings of the meeting were clearly audible."

Further, you added that:

> "Section 36 of the Charter of the City of Plattsburgh provides in pertinent part:'..The Common Council shall hold regular or stated meetings in the Common Council Rooms at such times as they shall by resolution designate... A majority of the Aldermen present and voting at any meeting of the Common Council at which a quorum shall be present shall be sufficient to pass any resolution or ordinance...'"

You have asked whether, under the proposal you have described, the Alderman "can be considered present for the purpose of constituting a quorum and voting if he is not physically present in the meeting room..." If my opinion is in the negative, you also asked whether the Charter could be amended "to provide that participation by such means as we have described shall constitute presence at a Common Council meeting".

While I appreciate your predicament, it does not appear that either your proposal, which in my view is reasonable, or an amendment to the City Charter would comply with law. It is noted that the crucial provision is not necessarily the Open Meetings Law, but rather a different statute.

Specifically, from a technical point of view, the definition of "public body" appearing in section 102(2) of the Open Meetings Law refers to entities that are required to conduct public business by means of a quorum. In this regard, the term "quorum" is defined in section 41 of the General Construction Law, which has existed since 1909. The cited provision 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 or officers disqualified from acting."

Based upon the language quoted above, a public body cannot carry out any of its powers or duties unless it conducts a "meeting".

In turn, section 102(1) of the Open Meetings Law defines "meeting" to mean "the official convening of a public body for the purpose of conducting public business". In my opinion, the term "convening" means a physical coming together. Further based upon an ordinary dictionary definition of "convene", that term means:

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

In view of the ordinary definition of "convene", I believe that a "convening" requires the assembly of a group in order to constitute a quorum of a public body. In the context of your question, I believe that an Alderman must be physically present at a meeting for the purpose of constituting a quorum or voting.

With respect to the amendment of the Charter, since section 41 of the General Construction Law is a state statute, it would in my opinion supersede any inconsistent provisions found in local enactments. As such, I do not believe that amendment to the Charter would serve to remedy the problem.

Lastly, I would like to share with you that, within the past few months, proposals similar to yours have been suggested to this office. From my perspective, when such proposals seek to accomplish the type of goal that you described while concurrently preserving the principles of the Open Meetings Law, they are not objectionable. It is my view that an amendment to the Open Meet-

ings Law could serve as the basis for enabling public bodies to take advantage of the technology that would enable a member who cannot physically be present to fully participate in the deliberative process, and I intend to raise the issue before the Committee for possible inclusion as a recommendation to amend the Law in its December report to the Governor and the Legislature.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1278

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

May 23, 1986

Mr. Roger Stock
[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. Stock:

I have received your letter of April 30, 1986 in which you requested clarification of the Open Meetings Law as it applies to "work sessions" conducted by a governing body of a municipality.

According to your letter, the Common Council of the City of Little Falls held a budget workshop approximately one week after notifying the media of the upcoming meeting. You appeared at the session. However, prior to starting the meeting, the Mayor asked you to leave "since the city officials had business to conduct". The Mayor further advised you that the meeting was not open to the public and that if you did not leave they would go into executive session. At that point you left the meeting. You note that all eight Councilmen were present at the meeting. Specifically, you ask whether work sessions can be closed to the public when they involve the city budget, and whether the Council is allowed to go into executive session to discuss the tentative budget. Finally, you ask what recourse a taxpayer has in such a situation. In this regard, I offer the following comments.

First, the Open Meetings Law, section 103(a) states that "Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred of this article."

Section 102(1) defines "meeting" as "the official convening of a public body for the purpose of conducting public business."

Second, when the Open Meetings Law became effective in 1977, the term "meeting" was defined as the formal convening of a public body for the purpose of "officially transacting public business". That language resulted in many conflicting interpretations of what constitutes a "meeting".

Thereafter, the Appellate Division rendered its unanimous, landmark decision in Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh (60 AD 2d 409). That decision was later unanimously affirmed by the Court of Appeals [45 NY 2d 947 (1978)]. In its discussion, the Appellate Division held that:

> "(the definition of the term 'meeting') 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...

> There would be no need for this law if this was all the Legislature intended. ... It is the entire decision making process that the Legislature intended to affect by the enactment of this Statute" (60 AD 2d 409, 414-415).

In its discussion of so-called "work sessions", the Appellate Division stated:

> "In further support of the fact that the Open Meetings Law was intended to apply to all discussions of a public body of matters pending before it, we need only look to the provisions made for executive sessions... . 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" (id. at 417).

In short, I believe that the decisions of the Appellate Division and the Court of Appeals indicate that when a quorum of a public body convenes to discuss public business, there is no distinction between a "workshop" or a "work session" and a "meeting", whether or not there is an intent to take action, and regardless of the manner in which a gathering is characterized.

Third, in my opinion, discussions of matters relative to a city budget or a tentative city budget clearly constitute the conduct of public business. Therefore, I believe that the gathering of all members of the city council at a "work session" to discuss the city budget and/or tentative budget, such as you have described, would be a" meeting" subject to the Open Meetings Law.

Fourth, meetings must be conducted 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 section 105(1). Thus, in response to your first question, I believe that work sessions attended by a quorum of the City Council, involving the city budget should be held open to the public except to the extent that any of the grounds for executive session are applicable.

Fifth, you also inquire as to whether the Council is allowed to go into executive session to discuss the tentative city budget. Section 105 of the Law sets forth the procedural

requirements for entering into an executive session and specifically enumerates the purposes for which an executive session may be conducted. In my opinion, the statute indicates that 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 and the motion must be carried by a majority vote of the total membership of the public body. Further, section 105 specifies and limits the topics that may be considered during an executive session.

Unless the procedure for entry into an executive session is followed, and unless the subject matter to be discussed falls within the scope of one or more of the grounds for entry into an executive session, I do not believe that a public body may properly convene an executive session. In my view, it is unlikely that a discussion of budgetary matters would fall under any of the enumerated purposes. Therefore, I believe it is improbable that the City Council could properly go into executive session to discuss the tentative budget.

Sixth, you ask what recourse a member of the public has against a public body which may have violated the Open Meetings Law. The enforcement provisions for the Law are set forth in section 107 which states in part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgement 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."

Additionally, under section 107, the court has the discretion to award costs and reasonable attorney fees to the successful party.

Finally, for your use and information, I am enclosing copies of the Open Meetings Law, "Your Right to Know", which describes the Freedom of Information and Open Meetings Law, and "A Pocket Guide to New York's Open Government Laws".

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Enc.

cc: City Council, City of Little Falls

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOML-AO-1279

May 27, 1986

Ms. Helen G. Norjen
[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. Norjen:

I have received your letter of May 5 and the materials attached to it. You specified that you wrote to this office in your capacity, individually, as a member of the Republic Airport Commission (RAC), and not on behalf of the Commission "as a whole".

You referred to and enclosed a copy of a letter that you sent to the Chairman of the Commission on March 17, in which you sought a legal opinion "on the appropriateness of conducting an executive session on a topic identified during public session as 'various communications'." You added in that letter that "the topic was identified during executive session as a category 'f' of the 'Open Meetings Law'." As such, you have raised the following questions:

> "1. Is it appropriate to enter into Executive Session to discuss a topic identified in public as 'various communications'?
>
> 2. Is it sufficient to publically identify the purpose for and Executive Session as 'category f'?
>
> 3. Specifically, how must the purpose for entering Executive Session, be identified to the public? (What is the appropriate language?)

4. Commissioners are peers who share an equal rather than a superior/subordinate relationship; therefore, do any of the items of Section 100, subd. 1, par. f, apply to discussion of a Commissioner?

5. Does the RAC have the authority to censure a member?

6. If the topic of censure is discussed by RAC, should the discussion take place in Open or Executive Session?

7. Does RAC Resolution 84-18 (enc.) prevent a Commissioner from issuing a dissenting opinion (enc.) or otherwise communicating with the public or elected officials on airport issues?

8. May a vote to enter into Executive Session be taken at a meeting designated as a workshop?"

Several of your questions can be answered by means of the Open Meetings Law and its judicial interpretation; others, however, fall outside the scope of the jurisdiction or expertise of the Committee, for they do not pertain to the Open Meetings Law.

First, as a general matter, 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 be convened pursuant to section 105 of the Law.

Second, the Law prescribes a procedure that must be accomplished during an open meeting prior to entry into an executive session. Specifically, the introductory language of 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..."

Further, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

Third, in terms of the sufficiency of a motion for entry into an executive session, I do not believe that a motion indicating that the topic to be discussed involves "various communications" would, according to case law, comply with the Law. Similarly, a motion to enter into executive session under "category f" would not in my view comply. As stated in Daily Gazette v. Town Board, Town of Cobleskill, "any motion to go into executive session must 'identify the general area' to be considered. It is insufficient to merely regurgitate the statutory language" [444 NYS 2d 44 (1981)]. Therefore, neither a citation of "various communications" nor "category f" would in my view satisfy the requirements of the Law.

Paragraph (f) of section 105(1) states that a public body may enter into an executive session to discuss:

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

It has been advised that a motion to discuss "personnel", for example, without more, is inadequate. A motion to go into executive session under section 105(1)(f) should contain two components: the term "particular" to indicate that the discussion focuses upon a specific individual as opposed to personnel generally; and reference to one of the categories described in that provision, such as the employment history or a matter leading to the appointment. As such, a proper motion might be "I move to enter into executive session to discuss a matter leading to the discipline of a particular person". To protect the privacy of the person who is the subject of the discussion, that person need not be identified in the motion [see Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981].

Fourth, several of your questions relate to whether the RAC may censure one of its own members. In this regard, I am not sufficiently familiar with the RAC and its powers and duties to offer an opinion. Assuming that it may censure one of its members, it appears that section 105(1)(f) would serve as a basis for entry into an executive session. It is noted, too, that

section 105(1) states that a public body may enter into an executive session to discuss certain topics. There is no obligation, however, to conduct an executive session, even if a ground for entry into an executive session may be asserted.

Fifth, you asked whether a vote to enter into an executive session may be taken "at a meeting designated as a workshop". If a quorum of a public body convenes to conduct public business at a "workshop" or similar gathering, even if there is no intent to take action, such a gathering constitutes a "meeting" subject to the Open Meetings Law in all respects [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Consequently, in the case of a "workshop", a public body has the same obligations to comply with the Open Meetings Law in terms of openness as a "formal" meeting; it also has the same authority to enter into an executive session.

Lastly, you asked whether RAC resolution 84-18 prevents a "Commissioner from issuing a dissenting opinion or otherwise communicating with the public or elected officials on airport issues". The resolution states in relevant part that "the Chairman or his designee, upon the call of duty, [shall] be the official spokesperson of the Commission expressing the Commissioner's viewpoints and actions as a whole". From my perspective, unless a statute specifically prohibits the making of the type of communication that you described, no such prohibition exists, so long as it is clear that a member clearly indicates that his or her comments should be considered as his or her own, and that the comments should not be construed as those of the Commission as a whole.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Van Schoor, Chairman
Ross Pusatere, Office of Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOIL-AO-1280

May 27, 1986

Hon. Peter Iasillo
Mayor
Village of Port Chester
Port Chester, NY 10573

The staff of the Committee 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 Mayor Iasillo:

I have received your letter of May 5, in which you requested a "final determination" concerning a gathering held by certain members of the Board of Trustees of the Village of Port Chester on April 22.

Attached to your letter is a statement in which you questioned "the legality of a meeting held by the majority members of the Board..." Specifically, you wrote that:

> "After the conclusion of a legally constituted budget work session by the full Board of Trustees, this legal open meeting of the entire Board was concluded and adjourned. After the Mayor and Trustees Branca and Gianfrancesco left the meeting, the majority members of the Board (Trustees Fusco, Mutino, Sapione and Coletti) continued to meet in an illegal meeting to continue discussions on the budget without the minority members present. They also demanded that Village Manager Ritchie, Clerk Falanka, Treasurer Cotte, Accountant Munnick and Corporation Counsel Mann also remain to continue the discussions".

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to "issue advisory opinions" concerning the Open Meetings Law (see section 109). The Committee does not have the authority to render what might be characterized as a "final determination".

Second, some time after our conversation, I received a call from Mr. Mann, Corporation Counsel, who presented a somewhat different view of the facts. If my recollection is correct, Mr. Mann stated that some of the members, as well as himself, remained present after the adjournment of the meeting for a brief period during which those present discussed various matters for approximately ten minutes. He indicated that any member of the public could also have been present.

Under the circumstances, since there are conflicting views of the facts, I could not conjecture as to whose rendition is more accurate than the other. As a general matter, it is noted that the definition of "meeting" [see section 102(1)] has been expansively interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conducting public business whether or not there is an intent to take action [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

If a majority of the Board met after the adjournment, by design, to discuss public business, it would appear that such a gathering constituted a new "meeting" held in violation of the Open Meetings Law. However, if there was no intent to discuss public business, as a body, but merely a brief conversation held while people were in the process of leaving, it is doubtful, in my view, that such a gathering would have constituted a "meeting". If that was so, I do not believe that there would have been a violation.

In short, whether or not those present at the gathering in question violated the Open Meetings Law is unclear and is dependent upon the presences of specific facts, which are also 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: Board of Trustees
Mr. Mann

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1281

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

May 27, 1986

Alexandra J. Lane
Supervisor
Town of Warsaw
Warsaw, NY 14569

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

Dear Supervisor Lane:

I have received your letter of May 7 in which you raised questions regarding the Open Meetings Law. Your interest in complying with the Law is much appreciated.

According to your letter, members of the Town Board have raised the following questions:

> "1. Is it improper to call more than one 'executive session' during a Board meeting?
>
> 2. Is a Town Board required to allow citizens to speak at a Town Board meeting if they have not previously requested permission? Can a limit be set on the time a citizen is allowed to address the Board?
>
> 3. What is required in terms of minutes for matters discussed in executive session? Are those minutes a part of the regular meeting or are they maintained separately?"

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that limits the number of executive sessions that may be conducted during the course of a meeting of a public body. It is noted that section 102(3) of the Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, section 105(1) prescribes a procedure to be followed during an open meeting before an executive session may be conducted. Specifically, the cited provision states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion 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 may identify one area of discussion, or it may identify more than one topic to be discussed during an executive session. In addition, a public body might conduct an executive session, return to an open meeting, and later determine that another subject has arisen that may appropriately be considered during an executive session. In such a situation, the procedure described above would also be applicable, and another executive session could be held. As you are aware, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be discussed during an executive session.

Second, with respect to citizens speaking at meetings, the Open Meetings Law is silent regarding public participation. Consequently, it has consistently been advised that the Open Meetings Law does not confer a right on the public to speak or otherwise participate at meetings. However, a public body may in my opinion permit the public to participate if it chooses to do so. Presumably, when a public body seeks to permit public participation, it carries out such a policy by means of reasonable rules that treat all members of the public equally. I believe that such a rule could limit the amount of time permitted to an individual to speak.

And third, as a general matter, a public body may vote to take action during a properly convened executive session, so long as the vote does not involve the appropriation of public monies. In a case in which action is taken during an executive session, section 106(2) 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."

Whether minutes of executive sessions are kept separately or as part of "regular" minutes is likely a matter of your discretion. It is noted that subdivision (3) of section 106 states that minutes of executive sessions must be prepared and made available within one week of the date of the executive sessions. In addition, it is important to point out that, if an executive session is held and no action is taken, minutes need not be prepared.

As you requested, enclosed are six copies of "Your Right to Know", which describes the provisions of the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4119
OML-AO-1282

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

May 27, 1986

Mr. Jim Kenyon
Reporter
WSTM-TV
1030 James Street
Syracuse, NY 13203

<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. Kenyon:

I have received your letter of May 7 in which you raised questions concerning the Freedom of Information and Open Meetings Laws.

According to your letter and the correspondence attached to it, you requested records pertaining to "tests of air and ceiling samples" conducted at Hancock Airport. You expressed the belief that samples were tested in the 1970's "for asbestos and other harmful materials". You were informed by Dennis S. Lerner, Assistant Corporation Counsel, that the information is not subject to disclosure under the Freedom of Information Law "because these are interdepartmental materials which are not final determinations". As such, he denied the request on the basis of section 87(2)(g) of the Freedom of Information Law.

The remaining issue deals with the status of an "Asbestos Committee" under the Open Meetings Law. You wrote that:

> "The committee is comprised of a panel of Syracuse Department personnel, the Corporation Counsel, private consultants and a Syracuse Councilor. [You were] told their purpose is to investigate the asbestos problem at public buildings throughout the city, including Hancock Airport. The committee will make recommendations regarding the handling of these problems."

You were told that the meetings of the Committee could be closed because it is a "non-governmental body".

In this regard, I offer the following comments.

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

Second, if the records are "interdepartmental materials", I would agree that section 87(2)(g), one of the grounds for denial, is applicable. However, due to the structure of that provision, I believe that the information sought should be made available. Specifically, section 87(2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Under the circumstances, assuming that test results and analyses consist of "statistical or factual tabulation or data", they would be available under section 87(2)(g)(i), whether or not a "final determination" has been made. In other words, any of the the three types of information described in subparagraphs (i), (ii) or (iii) of section 87(2)(g) are accessible. In this instance, while the records sought might not be reflective of or related to any "final determination", they are nonetheless available to the extent that they consist of statistical or factual information as described in section 87(2)(g)(i).

The second issue is more difficult in terms of providing specific direction, for there is no indication in your letter of the means by which the Asbestos Committee was created or the manner in which its members may have been designated.

For purposes of background, the Open Meetings Law is applicable to meetings of public bodies, and 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."

If each condition described in the definition is present, the Committee in question would constitute a public body.

On the basis of your letter, the Committee is an entity consisting of at least two members. While the act that created it might not refer to any quorum requirement, such a requirement might nonetheless exist in conjunction with section 41 of the General Construction Law. The cited provision states that an entity can carry out its duties only by means of a quorum, an affirmative vote of a majority of its total membership, "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..." Further, since you indicated that the Committee "will make recommendations" regarding the asbestos problem, it would appear that it "conducts public business" and "performs a governmental function" for a public corporation, the City of Syracuse [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)]. If those conditions are present, the Asbestos Committee would be a public body subject to the Open Meetings Law. However, as indicated earlier, without additional information, unequivocal advice regarding the status of the Committee cannot be offered.

I hope that I 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: Dennis S. Lerner
James Gelormini

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1283

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

May 28, 1986

Mr. Frank Johnson
Hard Metals Disease
Committee
125 Ruhsmah Avenue
Syracuse, New York 13205

The staff of the Committee on 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 May 3, which reached this office on May 15.

You expressed the belief that "a serious violation of the Open Meetings Law occurred in 1984" when the Senate majority conducted a closed meeting, "called a Republican caucus", to discuss legislation concerning toxic torts.

In this regard, I offer the following comments.

First, when an aggrieved person initiates a suit under the Open Meetings Law, the vehicle generally is a proceeding commenced under Article 78 of the Civil Practice Law and Rules. The statute of limitations for the initiation of such a proceeding is four months. Since the event in question occurred nearly two years ago, I do not believe that any legal action could now be commenced.

Second, the Open Meetings Law has, since its enactment, exempted "political caucuses" from its coverage. Further, based on an amendment enacted a year ago, the type of gathering that you described could be closed. Specifically, section 108(2) of the Open Meetings Law provides that the Law does not apply to:

"a. deliberations of political committees, conferences and caucuses.

b. 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..."

As such, while I appreciate you concerns, I do not believe that the Open Meetings Law can serve as a basis for challenging the activities of the Senate majority that you described.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4130
OML-AO-1284

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

May 30, 1986

Hon. Victoria Siegel
Mayor
Village of Bayville
34 School Street
Bayville, NY 11709

The staff of the Committee 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 Mayor Siegel:

As you are aware, I have received your letter of May 14 in which you requested an advisory opinion.

The facts, as I understand them, are as follows. Approximately two years ago, there was a proposed development of two minor subdivisions in the Village of Brookville. Based upon our telephone conversation, the subdivisions involved two units in one case, and four in the other. You also stated that the County Health Department obtains jurisdiction to approve or disapprove subdivisions when there are five or more units. As such, two years ago, you received letters from the Health Department and the County Planning Commission indicating that neither had jurisdiction. Nevertheless, in April of this year, you received a letter from Mr. Stanley Juczak of the Land Resource Management Bureau of the County Board of Health indicating that the developments were "being judged illegal by his department because they had not been notified". When you questioned the apparent reversal, "his response was that he received a phone call". Thereafter, you requested records concerning the issue under the Freedom of Information Law. The request was denied based upon a contention that the records are "Part of Investigatory Files". It is your view that, as chief executive officer of the Village, you are entitled to the records.

In this regard, I offer the following comments.

First, the phrase "part of investigatory files" appeared in the Freedom of Information Law as originally enacted in 1974 [see original Freedom of Information law, section 88(7)(d)]. Under the original statute, an agency could withhold records that were "part of investigatory files compiled for law enforcement purposes". However, in 1977, the original statute was repealed and replaced with a completely revised version, effective January 1, 1978.

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

The provision most closely associated with the former exception concerning "investigatory files" is section 87(2)(e), which states that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Unlike the original provision, which excepted investigatory files compiled for law enforcement purposes irrespective of the status of an investigation, the language quoted above permits an agency to withhold records "compiled for law enforcement purposes" only to the extent that disclosure would result in the harm described in subparagraphs (i) through (iv) of section 87(2)(e).

Under the circumstances, the "reversal" by County agencies appears to indicate that any "investigation" has been completed and that, therefore, section 87(2)(e) could not be asserted as a basis for withholding. Further, it is questionable in my view whether records maintained by the Planning Commission or Health Department regarding a subdivision could be characterized as records "compiled for law enforcement purposes". In short, it does not appear that section 87(2)(e) is applicable.

Third, you wrote that you are interested in knowing who contacted Mr. Juczak. If a record containing that information exists, it would be subject to rights of access. Without additional knowledge concerning the nature of the communication, it is difficult to provide specific direction. It appears that the only ground for denial of potential significance might be section 87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". However, it is possible that there may be no privacy considerations, particularly if the call was made by a public employee.

Fourth, viewing the matter from a different perspective, it appears that one or perhaps two public bodies might have been involved in the decision-making process regarding the subdivisions. In my view, both the County Planning Commission and Board of Health constitutes public bodies subject to the Open Meetings Law. If either or both of those entities took action, the nature of the action would be recorded by means of minutes required to be prepared pursuant to the Open Meetings Law. Specifically, section 106(1) of the Open Meetings Law provides that:

> "Minutes shall be taken at all open meeting 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. As such, you might want to seek minutes, as well as other materials related to action taken.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nassau County Planning Commission
Nassau County Board of Health
Stanley Juczak

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1285

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

June 2, 1986

Mr. Michael Desmond
WGRZ-TV
259 Delaware Avenue
Buffalo, NY 14202

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

Dear Mr. Desmond:

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

You asked that I comment with respect to an opinion prepared by Anthony D. Mancinelli at the request of Richard T. Swist, Executive Director of the Erie County Industrial Agency, concerning executive sessions held by the Board of the Agency. In a reference to a specific lease, Mr. Mancinelli wrote that the lease "was considered and approved in Executive Session because financial or credit information relating to a particular corporation might have been discussed..." (emphasis added). In a more general discussion of policy, it was stated that:

> "The main types of actions taken in Executive Session; namely, Inducement Resolutions, Special Resolutions and Bond Sale Resolutions all could involve the discussion of credit histories or other financial information of particular corporations. Additionally, none of these actions are actions to appropriate public monies. Therefore, it has always been the Agency's justifiable position that these matters should be considered and acted upon in Executive Session rather than in the Public Session" (emphasis added).

In this regard, I offer the following observations.

First, as a general matter, 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 a public body engages in a discussion of one or more of the topics described in paragraphs (a) through (h) of section 105(1) of the Law.

Second, it appears that the relevant ground for entry into an executive session in terms of Mr. Mancinelli's opinion is section 105(1)(f). That provisions 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 capacity to enter into executive session, as stated by Mr. Mancinelli, is overbroad. A discussion of a particular transaction often involves a variety of issues. During the course of a discussion, perhaps one or more among those issues would qualify for entry into an executive session; however, the remainder of the discussion might not qualify for consideration during an executive session and should, therefore, be conducted during an open meeting. More specifically, Mr. Mancinelli referred to the possibility that the financial or credit history of a particular corporation "might have been discussed", or that various topics "could involve" such a discussion. In my opinion, the mere possibility that a ground for entry into an executive session might arise does not permit an executive session to be held. Unless and until the financial or credit history of a particular corporation becomes the subject of discussion, an executive session could not in my view be conducted. Further, assuming that when the discussion of the financial or credit history of a particular corporation has ended, the board should return to an open meeting for the remainder of its discussion and, depending upon specific circumstances, to vote.

Lastly, in the event that action is taken during an executive session, section 106 of the Open Meetings Law requires that minutes indicating the nature of the action taken, the date and the vote be prepared and made available within one week. When action is taken during an open meeting, minutes must be prepared within two weeks.

I hope that I 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: Richard T. Swist
Anthony D. Mancinelli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-A0-1286

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

June 5, 1986

Mr. Emanuel Weldler
Town of Ramapo
[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. Weldler:

I have received your letter of May 21 concerning minutes of meetings.

As a member of the Town Board of the Town of Ramapo, you wrote that you (the Board) "are now being asked to approve the minutes of May 1985". You added that "this indicates that the minutes are not available to the public until a year has elapsed".

You have requested advice on the matter and, in this regard, I offer the following comments.

First, as you may be aware, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. It is noted that section 106 of that statute provides what might be characterized as minimum requirements concerning the contents of minutes. More specifically, the cited provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> "2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and the vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> "3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

Second, while the Open Meetings Law does not require that minutes be approved, it is recognized that many public bodies routinely review minutes prepared by a clerk, for example, and officially vote to approve them. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes are unapproved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Lastly, you asked "what procedure [you] should follow if [you] do not receive compliance". Section 107 of the Open Meetings Law provides guidance regarding the enforcement of the Law. Specifically, section 107(1) states in relevant part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief."

It is my hope, however, that this opinion will serve to gain compliance with the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1287

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

June 9, 1986

Mr. John Kaufmann
[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. Kaufmann:

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

Specifically, you wrote that:

> "On Saturday, May 24, The Saratoga Springs Planning Board met. Prior to their public meeting they gathered in the city planners office for an 'informal discussion' of the issue for which the formal meeting had been called. At 10:00 A.M. they entered the meeting room. The chairman of the Planning Board, Mr. William Cummings, announced that there would be no public input allowed and that they would proceed immediately to a vote. Inspite of public protest he simply read the resolution, recieved [sic] the necessary second, called for yeas and nays, proclaimed the resolution as passed and adjourned the meeting.
>
> "A witness in the planning office overheard the full board discuss the proposed action prior to the meeting. With the exception of the Chair's statement, there was no discussion of the resolution whatsoever at the meeting."

You asked whether, assuming that your description of the facts is accurate, there was a "violation of the Open Meetings Law". In this regard, I offer the following comments.

First, although the gathering was described as "informal", I believe that it was nonetheless subject to the Open Meetings Law in all respects. It is emphasized that the definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I would like to point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "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" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal", stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the clear direction given by the courts, the gathering of May 24 in my opinion should have been 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(1) of the Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 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 section 104(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is reiterated that notice must be provided prior to all meetings, regardless of whether the meetings are considered formal or otherwise.

Third, the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, 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 pub-

> lic body may conduct an executive session for the below enumerated purposes only..."

In view of the foregoing, it is clear in my view that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting during which the public may be excluded. It is also clear that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss a subject listed in the Open Meetings Law as appropriate for discussion behind closed doors.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Cummings

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4152
OML-AO-1288

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

June 11, 1986

Mrs. Maureen Powell
[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. Powell:

I have received your letter of May 27 in which you raised a series of issues pertaining to the Open Meetings and Freedom of Information Laws.

The majority of your questions concern executive sessions held by the Board of Education of the Roosevelt Union Free School District to discuss "personnel". In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. All meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted 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)].

Second, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 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..."

Third, the focal point of your inquiry concerns the sufficiency of motions to enter into executive sessions and the nature of the discussions that transpire during executive sessions. It appears that a variety of issues have been considered during executive sessions following a motion to discuss "personnel matters". For example, following a recent District vote on the budget and the selection of Board members, issues arose concerning bussing students to the polls. As I understand your letter, after some discussion of the issues, the Board went into an executive session on the ground that "it's personnel."

It is noted that, under the Open Meetings Law as originally enacted, the so-called "personnel" exception for executive session differed from the language of the analagous exception in the current Law. In its initial form, section 105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" in a tangential manner or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

In an attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding section 105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

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

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in section 105(1)(f) are considered. The issue that you described concerning the bussing of students to the polls would not in my view have been proper under the "personnel" ground for entry into executive session, or any other grounds.

Further, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session or "personnel", for example, without more, 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 section 100[1].

> "With respect to 'personnel', Public Officers Law section 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 section 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)].

The remaining issues that you raised pertain to rights of access to records under the Freedom of Information Law. Like the Open Meetings Law, the Freedom of Information Law is based on a presumption of access. All records of an agency are available, except those records or portions thereof that fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i).

With respect to budget information, section 1716 of the Education Law, entitled "Estimated expenses for ensuing year", states that:

> "It shall be the duty of the board of education of each district to present at the annual meeting a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specifying the several purposes and the amount for each. The amount for each purpose estimated necessary for payments to boards of cooperative educational services shall be shown in full, with no deduction of estimated state aid. This section shall not be construed to prevent the board

> from presenting such statement at a special meeting called for the purpose, nor from presenting a supplementary and amended statement or estimate at any time. Such statement shall be completed at least seven days before the annual or special meeting at which it is to be presented and copies thereof shall be prepared and made available, upon request, to taxpayers within the district during the period of seven days immediately preceding such meeting and at such meeting. The board shall also as a part of the notice required by section two thousand four of this chapter give notice that a copy of such statement may be obtained by any taxpayer in the district at each schoolhouse in the district in which school is maintained during certain designated hours on each day other than a Saturday, Sunday or holiday during the seven days immediately preceding such meeting."

Additionally, records prepared in the budget process, such as estimates and similar statistical or factual materials, must, according to case law, be made available under the Freedom of Information Law [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

Lastly, you wrote that, when a request is made under the Freedom of Information Law, a form must be completed, and that requests must be approved by the Superintendent.

I point out that, although an agency may require that a request may be made in writing, nothing in the Law refers to the use of a particular form. In short, it has been advised that any request made in writing that reasonably describes the records sought should suffice.

With respect to an approval by the Superintendent, I direct your attention to section 89(1)(b)(iii) of the Freedom of Information Law, which requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Law. In turn, section 87(1) requires the governing body of a public corporation, such as a school board, to adopt agency regulations consistent with the Law and the Committee's regulations, which are found in the New York Code of Rules and Regulations (21 NYCRR Part 1401). One of the aspects of the regulations involves the designation of a "records access

officer", a person who has the duty of responding to requests made pursuant to the Freedom of Information Law. If the Superintendent is the designated records access officer, certainly that person's approval would be appropriate. If a different official has been designated as records access officer by the Board, that person is responsible for making an initial decision to grant or deny access. Nevertheless, there is nothing that would preclude one official from conferring with another prior to determining rights of access.

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

Enc.

cc: Board of Education
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1289

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

June 13, 1986

Barry Liebowitz, M.D.
President
Doctors Council
21 East 40th Street
8th Floor
New York, NY 10016

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

Dear Dr. Liebowitz:

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

By way of background, you indicated that the Doctors Council, which you serve as President, represents attending physicians and dentists employed by the New York City Health and Hospitals Corporation, and that you "attend and monitor most meetings" of the Board of Directors of the Corporation. You wrote that the Board "has gone into 'Executive Session' for long periods of time at all its recent meetings". To demonstrate your contention that topics discussed during executive session should have been considered in public, you attached minutes of a meeting held on April 11.

Two aspects of the minutes are relevant to issues involving compliance with the Open Meetings Law. Specifically, the minutes state that:

> "After calling the meeting to order, Mr. Botnick entertained a motion to convene in Executive Session. The Board unanimously adopted the motion."

The last portion of the minutes states that:

> "Mr. Botnick reported on the discussion which took place in the Executive Session.

> - The Board was briefed on two matters involving EMS which received recent publicity.
>
> - The JCAH Article 28 review of Harlem Hospital was discussed. The concerns of Board members were expressed.
>
> - The Board requested the President to contact Columbia to make certain appropriate chairs and chiefs are available for the July 1st residency program.
>
> - On-going legal and personnel issues at Bronx Municipal Hospital were discussed."

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. All meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted 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)].

Second, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 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..."

As indicated in the language quoted above, a motion to enter into an executive session must include reference to the "general area or areas of the subject or subjects to be considered" during the executive session. Based upon the minutes, the motion to convene an executive session failed to include any indication of the topics to be discussed.

It is noted, too, that the Open Meetings Law specifies and limits the subject matter that may appropriately be considered during an executive session [see Open Meetings Law, section 105(1)(a) through (h)]. Unless and until one or more of those topics may be discussed, a public body must in my view conduct its business in public.

Third, with respect to the executive session held on April 11, the topics described in the minutes appear to indicate that the majority of the discussion during the executive session, if not the session in its entirety, should likely have been conducted in public. While two of the grounds for entry into an executive session might have been relevant, it is questionable, in my opinion, whether or to what extent those grounds might validly have been asserted. The two potential grounds for entry into an executive session pertained in terms of the minutes to "On-going legal and personnel issues".

With respect to "legal issues", section 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 that the purpose of the "litigation" exception for executive session "is to enable a public body to discuss pending litigation privately, without hearing its strategy to its adversary through mandatory public meetings" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (9183); also Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Board, 83 Ad 2d 612, 613, appeal dismissed, 54 NY 2d 957 (1981)]. The reference in the minutes to "legal issues" does not, without more, indicate that section 105(1)(d) could have been asserted. Further, the phrase "legal issues" could pertain to a variety of subjects, some of which might involve litigation, some of which would not.

Moreover, with respect to the nature of a motion to enter into executive session pursuant to section 105(1)(d), it has been determined 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 Cobleskill, 444 NYS 2d 44, 46 (1981)].

The so-called "personnel" exception for entry into executive session has been clarified since the initial enactment of the Open Meetings Law. I believe that the amendment to that provision is relevant to your concerns and the topics to which reference was made in the minutes.

In its initial form, section 105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding section 105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

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

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

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in section 105(1)(f) are considered.

Further, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session, or "personnel", for example, without more, fails to comply with the Law. For instance, in a decision containing a discussion of minutes that referred to various bases for entry into executive session, it was found 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 section 100[1].
>
> "With respect to 'personnel', Public Officers Law section 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, Sup. Ct., Chemung Cty., Oct. 20, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

In view of the foregoing, it has been advised that a motion to enter into executive session to discuss "personnel", or "personnel matters", without additional description, is inadequate. Where section 105(1)(f) may be asserted, I believe that motion for entry into an executive session should contain two components, inclusion of the term "particular", and reference to one or more of the topics appearing in that provision. For instance a motion to discuss "the employment history of a particular person" (without identifying the person) would be proper; a citation of "personnel" would not in my view be sufficient to comply with the statute.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Board of Directors, Health and Hospitals Corporation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1290
FOIL-AO-4159

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

June 19, 1986

Mr. Harold Mondshein
[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. Mondshein:

I have received your letter with its attachment, dated June 2, 1986, in which you requested an advisory opinion from the Committee on Open Government.

Specifically, you stated that the Board of Collective Bargaining held a "special meeting" on March 22, 1983. As evidence that this meeting took place, you point to a statement in correspondence which you received from General Counsel Malcolm McDonald. Mr. McDonald wrote:

> "After consulting informally with the other two impartial Members of the Board, Members Collins and member Friedman after the Board meeting of of March 22, 1983, Board Chairman Arvid Anderson instructed Trial Examiner Berger on March 23 or March 24, 1983 to inform you that your request of March 7, 1983 was denied."

You indicated that your June 2, 1986 request under the Freedom of Information Law to Mr. McDonald for a variety of records *includes a request for "a copy of the agenda/minutes* or memorandum of understanding, time of meeting and name of other persons present at this special meeting." In this regard, I offer the following comments.

First, as you have been previously advised, 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.

Second, the Freedom of Information Law pertains to existing records. Therefore, if any of the records you requested do exist, I believe that they would be available to you, except to the extent that any of the grounds for denial are applicable.

However, if any of the requested records do not exist, the Office of Collective Bargaining would not, in my view, be required to create such records in response to a request [see Freedom of Information Law, section 89(3)].

Third, subdivisions (1) and (2) of section 106 of the Open Meetings Law contain what might be characterized as minimum requirements for the contents of minutes taken at meetings of public bodies, as follows:

> "1. Minutes shall be taken at all open meeting 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."

It is my opinion that any additional details of the meeting other than those stated in section 106(1) and (2) may be included in the minutes at the discretion of the Board. Thus, there is no requirement under the Law that the time of the meeting or the names of persons present be included in the minutes.

Fourth, 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, in my view, gatherings of members of a public body, such as the Board, where a quorum is not present, are not "meetings" under

the Law and are not governed by the Law. Stated differently, until a quorum of a public body convenes, the Open Meetings Law does not apply. Further, if there is no meeting, there is no requirement that minutes be prepared.

It is also noted that you describe the gathering in question as a "special meeting". I do not know the meaning of that term as you used it, nor have you defined the term or pointed to any statutory or regulatory authority which refers to it. Thus, I can only treat the term "special meeting" as I would treat the term "meeting" in this advisory opinion.

Further, I point out that section 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... 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..."

It is noted that the term "quorum" is described as "a majority of the...total number which the board...would have were there no vacancies..."

I believe that the Board of Collective Bargaining consists of eleven members. Mr. McDonald indicates in "item 5" quoted above, that three members of the Board were present on March 22, 1983 when Chairman Anderson "consult(ed) 'informally' with Member Collins and member Friedman". Thus, it does not appear that a quorum of the board was present at that time. If a quorum was not present, the gathering was not a "meeting" under the Open Meetings Law, and would not be subject to the requirements of the Law.

In my view, if the Open Meetings Law does not apply, there is no statutory requirement that minutes be taken. Thus, although your request for records is not, in my opinion, improper, if there was no "meeting" and no minutes were taken, the Board would not, in my opinion, be required to create such records in response to your request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

cc: Malcolm D. McDonald, Deputy Chairman/General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4161
OML-AO-1291

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

June 19, 1986

Mr. Charles J. Theophil
[redacted]

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

Dear Mr. Theophil:

I have received your letter dated May 25, 1986, with attachments, in regard to the Open Meetings Law and Freedom of Information Law.

According to your letter, you believe that Community Board No. 13 in Queens is regularly committing several violations of the Open Meetings Law and the Freedom of Information Law, as well as violations of a variety of other local, state and federal statutes. You describe a number of situations which have occurred or are ongoing and ask that the Committee on Open Government render an advisory opinion as to whether they constitute violations of the laws. In this regard, I offer the following comments.

First, it is noted initially that the Community Board as described in section 2800 of the New York City Charter is in my opinion an "agency" subject to the Freedom of Information Law and a "public body" required to comply with the Open Meetings Law.

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

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

From my perspective, a community board is a municipal entity that performs a governmental function for a municipality, New York City. Therefore, it is in my view an "agency" subject to the Freedom of Information Law.

Section 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 construction law, or committee or subcommittee or other similar body of such public body."

In view of the foregoing, I believe that a community board is clearly a "public body" subject to the Open Meetings Law in all respects.

Second, 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 Community Board must comply with the provisions of the Open Meetings Law when at least a quorum of the Board gathers to conduct public business.

Conversely, in my view, gatherings of the members of a public body, such as the Board, where a quorum is not present, are not "meetings" under the Law and are not governed by the Law. Stated differently, until a quorum of a public body convenes, the Open Meetings Law does not apply.

Third, based upon the definition of "public body" quoted above [section 102(2) of the Open Meetings Law], I believe that a committee or subcommittee of a public body, such as the Community Board, would constitute a public body and would be required to ~~comply with the Open Meetings Law when a quorum of the committee~~ or subcommittee is present.

You advise that during several recent meetings of the Board where a quorum of the Board was not present, the members present convened a "committee of the whole" in order to vote on matters under discussion. The action taken by the "committee" is then "put over to be RATIFIED (emphasis yours) at future meetings".

However, you do not define the term "committee of the whole" nor do you indicate whether this term is defined or referred to in any relevant body of laws or rules. Since I do not know the meaning of the term in conjunction with your reference to it, I cannot comment on the correctness of the Board's actions in convening and conducting business as a "committee of the whole".

Thus, in my opinion, there can be no violations of the Open Meetings Law by the Board at meetings where a quorum is not present. However, when a "committee of the whole" is convened, assuming that it is properly convened, and a quorum of that body is present, the committee is required to comply with the Open Meetings Law.

It is also noted that in my view a committee or subcommittee can only act within the scope of authority granted to it and cannot take final action. It is my opinion that a binding decision may be made only by the public body of which the committee is a part and it can do so only when a quorum of the entire body is present, unless there is specific legal authority that indicates otherwise.

Assuming that there is no by-law or rule that specifically establishes the "committee of the whole", I do not believe that members of the Board constituting less than a quorum of the entire Board could act to create or transform themselves into a "committee of the whole". Here I point out that section 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 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."

Thus, it appears that the Community Board could not properly convene a "committee of the whole" for the purpose of taking action where a quorum of the Board is not present at a Board meeting, if such a committee had not previously been created.

Fourth, you state that minutes of the Board's meetings "are never made available within a period of ten working days." Section 106 of the Open Meetings Law relates to minutes. Subdivision (1) of section 106 pertains to the contents of minutes of open meetings. Subdivision (2) concerns minutes that must be prepared when 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, 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 min~~utes 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.

Fifth, you indicate that the following items are generally not included in minutes of the Community Board's meetings: the final vote of each member on matters formally voted upon; a record or summary of motions made; the times of the openings and closings of public hearings; and the time of the Call to Order of executive sessions or Community Board meetings. Section 106, subdivisions (1) and (2) of the Open Meetings Law contain what might be characterized as minimum requirements for the contents of minutes. Section 106(1) and (2) state, in part:

> "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 thereof.
>
> 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..."

Accordingly, in my view, the Law does require minutes of open meetings of the Board to contain the final vote of each member present on matters formally voted upon and a record or summary of all motions. It is noted, too, that section 87(3)(a) of the Freedom of Information Law requires that each agency including a community board, shall maintain "a record of the final vote of each member in every agency proceeding in which the member votes." It is my opinion that any additional details of the meeting, other than those stated in section 106(1) and (2), may be included in the minutes at the discretion of the Board. Thus, there is no requirement under the Law that the time of the openings and closings of public hearings (assuming that the public hearings are "meetings" under the Law) or the time of the call to order of executive sessions or Board meetings be included in the minutes.

It is noted that I cannot conjecture as to whether the Open Meetings Law is applicable to the "public hearings" you mention. As stated above, the Law is generally applicable to ~~"meetings" of a "public body"~~. ~~If a hearing is conducted by a~~ hearing officer, for example, no public body would be involved [see Open Meetings Law, section 102(2)] and the Open Meetings Law would not be applicable. In addition, section 108(1) exempts quasi-judicial proceedings from the requirements of that statute. Since you have not described the "public hearings" to which you refer, I cannot render an opinion as to whether the Open Meetings Law is applicable to them.

Sixth, according to your letter, "notice of meetings have not appeared in...local newspapers or other news media (and) (n)otices to the public are never posted in one or more designated public locations."

According to section 104 of the Open Meetings Law, 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 not.

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. There is nothing in the Open Meetings Law that requires a newspaper to print a notice of a meeting that it receives. Thus, there is no guarantee that a notice given to a newspaper will be printed. Therefore, so long as the Community Board complies with the notice requirements, a failure on the part of the news media to publish the notice would not in my view constitute a violation of the Open Meetings Law. However, a failure by the Board to post public notice in a public location prior to the meeting, would, I believe, violate the Law.

Seventh, you state that the site of the Board meetings "does not permit 'barrier free physical access' to physically handicapped persons." 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."

In my view, 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.

~~The Law does, however, impose a responsibility to make~~ "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier free access to physically handicapped persons.

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 accomodate the needs of persons with handicapping conditions. For instance, if a meeting can be held on the first floor rather than in the basement of a building, or if perhaps another available building permits "barrier free access", a "reasonable effort" would in my view involve holding the meetings in an alternative site.

Eighth, your letter describes a number of ongoing existing conditions at the meeting site. The conditions described relate to a lack of toilets, posting by the fire department, public assembly permit, lighted exit signs and ventilation. The Open Meetings Law generally grants rights to the public to receive notice of and to attend meetings of public bodies. The Law does not pertain to safety or sanitary standards of meeting sites. Matters related to physical building standards would, I believe, generally be governed by local ordinances such as the City Building Code.

Ninth, you inquire as to whether the Community Board is required under the Freedom of Information Law to designate a records access officer. The Committee on Open Government has promulgated regulations (21 NYCRR Part 1401) implementing the Freedom of Information Law pursuant to statutory authority found in section 89(1)(b)(iii) of the Law. Section 1401.2(a) states, in part, that the governing body of an agency "shall designate one or more persons as records access officer...who shall have the duty of coordinating agency response to public requests for access to records."

As indicated above, the Community Board is, in my view, an agency subject to the Freedom of Information Law. Therefore, I believe that the agency is required to comply with the regulations and designate a records access officer.

For your use and information, I am enclosing copies of the Freedom of Information Law, the Open Meetings Law and "Your Right to Know", a pamphlet which describes the Open Meetings and Freedom of Information Laws.

Finally, as you have requested, a copy of this letter is being sent to Mrs. Noreika, along with copies of the Freedom of Information Law, the Open Meetings Law and "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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Encs.

cc: Mrs. Susan M. Noreika

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1292

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

June 26, 1986

Ms. Norma M. Braude
Buffalo News
Box 243
Fredonia, NY 14063

The staff of the Committee on 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. Braude:

I have received your letter of June 6, which pertains to the Open Meetings Law.

According to your letter, the Mayor of the Village of Fredonia designated an advisory body, consisting of seven members, known as the Fredonia Cable Television Advisory Board. On June 4, the Board held a "workshop" meeting, which was closed. The Village Attorney apparently advised you that "a quorum of village officials was not present and the session could be closed."

In this regard, I 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 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 facts that you provided, I believe that the Board in question is a public body, for each of the conditions found within the definition referenced above can be met.

The Board is an "entity" consisting of at least two members. Further, although the action of the Mayor that created the Board might not refer to any quorum requirement, I believe that section 41 of the General Construction Law would permit the Board to carry out its duties only by means of a quorum. The cited provision 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 or officers disqualified from acting."

In my view, the members of the Board are "persons charged with [a] public duty to be performed or exercised by them jointly". The Board was apparently established to advise the Mayor and the Village generally in relation to issues relating to the use and franchising of cable television. 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]. It is noted that the decision rendered in Syracuse United Neighbors, supra, involved advisory bodies designated by a Mayor, rather than by a governing body. 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.

In addition, I believe that the Board conducts public business and performs a governmental function for a public corporation, the Village of Fredonia. Based upon the foregoing, I believe that the Board meets the definition of "public body" and is thus subject to the provisions of the Open Meetings Law.

Second, 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)]. The cited decision specifically held that a "work session" held solely for the purpose of discussion, and without an intent to take action, constitutes a meeting subject to the Open Meetings Law. As such, a work session must be convened open to the public, conducted in accordance with the Open Meetings Law, and preceded by notice as required by section 104 of the Law.

Lastly, assuming that the Board is a public body subject to the Open Meetings Law, executive sessions may be conducted only in conjunction with the topics enumerated as appropriate for consideration in an executive session appearing in section 105(1) of the Law.

As you requested, a copy of this opinion will be sent to the Village Attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Samuel Drayo, Jr., Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1293

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 1223[illegible]
(518) 474-2518, 279[illegible]

June 30, 1986

Hon. Frank Coccho, Sr.
Alderman, 8th Ward
City of Corning
14 Maple Street
Corning, New York 14830

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

Dear Alderman Coccho:

I have received your letter of June 13 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry concerns the status of a committee under the Open Meetings Law. Specifically, you wrote that, on January 6, the Common Council of the City of Corning adopted the following resolution:

> "RESOLVED: that the Mayor and the Common Council do respectfully request that Alderman Butts and Frawley, the Chairpersons of the Democratic and Republican City Committees along with a fifth individual agreeable to the majority of the above named four to do the following.
> 1) Investigate compensation for Councilman, City Attorney, and Mayor in similar cities and in the surrounding area.
> 2) Based on their investigation issue a majority recommendation to the Common Council on proposed pay rates for the City of Corning for the three positions.
> 3) Report back to the Council through the Alderman appointees no later than July 1, 1986."

You have asked whether the committee created by resolution of the Common Council is subject to the requirements of the Open Meetings Law.

In this regard, I 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 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."

Since the language quoted above specifically refers to committees, I believe that the committee in question is a "public body" subject to the Open Meetings Law in all respects. Further, the same conclusion can be reached by viewing the definition of "public body" in terms of its components. Based upon the facts that you provided, I believe that the Board in question is a public body, for each of the conditions found within the definition referenced above can be met.

The Committee is an "entity" consisting of at least two members. Further, although the action of the Council that created the Committee does not refer to any quorum requirement, I believe that section 41 of the General Construction Law would permit the Committee to carry out its duties only by means of a quorum. The cited provision 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 or officers disqualified from acting."

In my view, the members of the Committee are "persons charged with [a] public duty to be performed or exercised by them jointly". The Committee was established to advise the Council in relation to compensation of certain classes of public officials. 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 Committee must exercise its duty pursuant to the quorum requirements set forth in section 41 of the General Construction Law.

In addition, the Committee, in my view, conducts public business and performs a governmental function for a public corporation, the City of Corning. Based upon the foregoing, I believe that the Committee meets the definition of "public body" and is thus subject to the provisions of the Open Meetings Law.

Second, 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)].

Further, all meetings must be preceded by notice given in accordance with section 104 of the Open Meetings Law and conducted open to the public, unless and until an executive session may be held for the limited topics of discussion described in section 105(1) of the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1294

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 1223
(518) 474-2518, 279

June 30, 1986

Ms. Peggy Voight
Managing Editor
Westchester Rockland Newspapers
733 Yonkers Avenue
Yonkers, NY 01704

The staff of the Committee on 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. Voight:

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

Your inquiry pertains to the implementation of the Open Meetings Law by the Bronxville Board of Education. Specifically, you wrote that:

> "The board goes into executive session after nearly every meeting, stating only that they are closing for 'personnel reasons.' When we question them, they refuse to give any further indication of what they are going to discuss. Afterwards, they maintain that they do not have to tell us what was discussed because they took no action."

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based ~~on a presumption of openness. All meetings of public bodies must~~ be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted 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)].

Second, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 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..."

As indicated in the language quoted above, a motion to enter into an executive session must include reference to the "general area or areas of the subject or subjects to be considered" during the executive session. It is noted, too, that the Open Meetings Law specifies and limits the subject matter that may appropriately be considered during an executive session [see Open Meetings Law, section 105(1)(a) through (h)]. Unless and until one or more of those topics may be discussed, a public body must in my view conduct its business in public.

By way of background, the so-called "personnel" exception for entry into executive session has been clarified since the initial enactment of the Open Meetings Law. I believe that the amendment to that provision is relevant to your concerns and my view that a motion to enter into an executive session for "personnel reasons" is, without more, inadequate to comply with the Law.

In its initial form, section 105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding section 105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

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

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in section 105(1)(f) are considered.

Further, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session, or "personnel", for example, without more, fails to comply with the Law. For instance, in a decision containing a discussion of minutes that referred to various bases for entry into executive session, it was found 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 section 100[1].
>
> "With respect to 'personnel', Public Officers Law section 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, Sup. Ct., Chemung Cty., Oct. 20, 1981; see ~~also Becker v. Town of Roxbury,~~ Sup. Ct., Chemung Cty., April 1, 1983].

In view of the foregoing, it has been advised that a motion to enter into executive session to discuss "personnel", or "personnel matters", without additional description, is inadequate. Where section 105(1)(f) may be asserted, I believe

that a motion for entry into an executive session should contain two components, inclusion of the term "particular", and reference to one or more of the topics appearing in that provision. For instance, a motion to discuss "the employment history of a particular person" (without identifying the person) would be proper; a citation of "personnel reasons" would not in my view be sufficient to comply with the statute.

As you requested, copies of this opinion will be sent to the President of the Board, the other Board members, and the Superintendent of Schools.

I hope that I 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: Christina Eldridge, President
Dr. William Greenham, Superintendent
A. Wright Elliott
Frances Hardart
Dr. Michael Herman
John Hill
Mary Anne O'Callahan
Joseph Rice III

FOIL-AO-4125
OML-AO-1295

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

COMMITTEE MEMBERS
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GILBERT P. SMITH
PRISCILLA A. WOOTEN

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 1, 1986

Mr. James Strathearn
[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. Strathearn:

I have received your letter of June 12 in which you raised a series of questions relative to volunteer fire companies and an advisory opinion prepared at the request of Peter LaGrasse on December 16, 1986.

The first question is whether, under the Freedom of Information Law, the treasurer of an incorporated volunteer fire company has the right to "distribute financial statements of the Fire Co. at will, and without the authority of the Fire Co.?"

In this regard, it is assumed that the financial statements are available to the public under the Freedom of Information Law. With respect to the authority to disclose, by way of background, I point out that section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Law. The Committee has done so (see attached, 21 NYCRR Part 1401 et seq.). In turn, each agency is required to adopt similar procedural rules and regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee. One aspect of the regulations involves the designation of one or more "records access officers" who would have the ~~duty of coordinating an agency's response to requests for~~ records. I point out that section 1401.2(a) of the Committee's regulations states in part that "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."

Therefore, if, for example, the treasurer had been authorized in the past to make records available, it would appear that he or she could continue to do so, unless specific direction to the contrary has been given.

Second, you asked whether the decision rendered in Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, gives the Treasurer "the right to distribute financial statements of the Fire Co. without authority from the Fire Co.?" In this regard, I do not believe that the decision specifies who or which officer may distribute records; rather the decision in my view stands for the principle that a volunteer fire company is considered an "agency" that must comply with the Freedom of Information Law.

Your third questions is whether my letter to Mr. LaGrasse is "the law". As stated at the top of the letter to Mr. LaGrasse, that document is an advisory opinion. As such, it is not "the law", but rather an interpretation of the Freedom of Information Law with respect to volunteer fire companies.

Fourth, you asked "what rights, if any, does the public have at" meetings of a fire company. Here I direct your attention to the Open Meetings Law (see attached). As a general matter, when the Open Meetings Law is applicable, the public has the right to attend and listen to the deliberations of public bodies. Although a public body may permit the public to speak or participate at meetings, there is nothing in the Open Meetings Law that confers upon the public the right to speak or otherwise participate at open meetings.

Lastly, you asked what I would "consider to be a generally accepted method of receiving requests for financial disclosure, and compliance". In my view, there are several considerations. First, while section 89(3) of the Freedom of Information Law permits an agency to require that a request be made in writing, an agency may make records available pursuant to an oral request [see regulations, section 1401.5(a)]. Second, the same provision of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought, and that the agency must respond to such a request within five business days of the receipt of the request. It is noted that a request need not identify a particular record, for it has been held that, if the agency can locate the records based upon the terms of a request, ~~the applicant has met the requirement that records be "reasonably~~ described".

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 of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

If a "financial statement" is prepared by officials of the fire company, as indicated earlier, it is assumed that the statement would be available. While certain aspects of "intra-agency materials" may be denied (i.e., opinion, advice or recommendations), those portions consisting of "statistical or factual tabulations or data" would be available pursuant to section 87(2)(g)(i) of the Freedom of Information Law.

Also enclosed for your consideration are copies of the Freedom of Information Law, model regulations designed to enable agencies to adopt appropriate regulations easily, and "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-1296

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

July 1, 1986

Ms. N. Wally Smith
Town of Colonie
Office of the Town Attorney
Memorial Town Hall
Newtonville, NY 12128

The staff of the Committee on 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:

As you are aware, I have received your letter of June 13.

According to your letter, the Zoning Board of Appeals of the Town of Colonie is in the process of rewriting its rules and procedures. During public hearings conducted by the Board, the public has the right to participate. However, you questioned the right of the public to participate at meetings of the Board. Further, since the Board seeks to meet "on an informal basis for the purposes of training and for discussions concerning administrative functions", you requested guidance relative to such "informal" gatherings.

In this regard, I offer the following comments.

First, although both may be open to the public, there is, in my view, a distinction between a public hearing and a meeting. From my perspective, a public hearing is generally intended to enable interested members of the public to express their views concerning certain matters that come before the Board. To be distinguished is a "meeting", which is held to enable members of the Board to deliberate as a body.

I point out that, while the Open Meetings Law permits the public to attend and listen to the deliberations of public bodies [see Open Meetings Law, section 100], the Law is silent with respect to public participation at meetings. As such, it has consistently been advised that, since the Open Meetings Law con-

fers no right upon the public to speak at meetings, a public body may but is not required to permit public participation. If a public body chooses to permit public participation, presumably it should do so pursuant to reasonable rules that treat members of the public equally.

Second, with respect to the informal gatherings that you described, the Court of Appeals in a landmark decision rendered in 1978 interpreted the definition of "meeting" expansively [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In brief, it was held that any gathering of a quorum of a public body held 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 the gathering may be characterized. It is noted that the decision of the Appellate Division in Orange County Publications, supra, which was unanimously affirmed by the Court of Appeals, specifically dealt with so-called "work sessions" and similar informal gatherings in which there was an intent to discuss, but no intent to take action.

Therefore, in sum, I believe that an "informal" meeting of the Board, assuming that a quorum is present, would fall within the requirements of the Open Meetings Law. However, the Board would not, in my opinion, be required by the Open Meetings Law to permit the public to participate at those meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1297

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

July 1, 1986

Ms. Lisa G. Eikenburg
Report
Evening Observer
10 East Second Street
Dunkirk, New York 14048

<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. Eikenburg:

I have received your letter of June 13 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, you recently attended a hearing conducted by the Pomfret Zoning Board of Appeals concerning an application for a variance. During the hearing, the Board recessed to discuss the issue in private. You raised the following questions:

> "Can the zoning board meet in what was apparently private session to discuss a variance request and is it considered a quasi-judicial proceeding?
>
> "Can the zoning board, after it adjourns a hearing, meet in private for any type of discussion?"

In this regard, I offer the following comments.

By way 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 Meet-

ings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. 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 section 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.

Further, prior to entry into an executive session, a public body must carry out the procedure described in section 105(1) of the Open Meetings Law. 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..."

In sum, as a general matter, even though the deliberations of a zoning board of appeals might be characterized as "quasi-judicial", they are no longer exempt from the Open Meetings Law. Moreover, the deliberations of the Board must be conducted in public, except to the extent that one or more of the grounds for entry into an executive session may properly be asserted.

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 Board of Appeals of the Town of Pomfret.

I hope that 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.
cc: Zoning Board of Appeals, Town of Pomfret

OML-AO-1298-
FOIL-AO-4128

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 27[illegible]

July 1, 1986

Mr. Harold Mondshein
[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. Mondshein:

I have received your letter of June 9 in which you requested an advisory opinion of the Committee on Open Government.

Once again, you write to this office regarding your attempts to obtain certain records of the Office of Collective Bargaining pertaining to two alleged meetings of the Board of March 15 and March 22, 1983. Specifically, you ask for the opinion of this office as to whether the Board is required to disclose the following records under the Freedom of Information Law:

> "1. Agenda of the aforesaid March 15, 1983 and March 22, 1983 public meetings and full Board meeting of April 20, 1983.
>
> 2. Minutes of the within three (3) meetings.
>
> 3. Time when March 22, 1983 public hearing started and was completed, and persons, other than the public Members and Chairman Anderson who ~~attended this public hearing~~."

In this regard, I offer the following comments.

First, as you know, this office has corresponded with you a number of times concerning this matter. Also, it appears that the opinion of this office, dated June 19, crossed in the

mail with your June 9 letter. I believe that the June 19 opinion together with the previous opinions of this office respond fully to all of the questions you are now asking.

Second, as you have previously been advised, a gathering of members of a public body is not a "meeting" under the Open Meetings Law unless a quorum is present. You request records of a "meeting" that allegedly took place on March 15, 1983. As evidence that the meeting took place you point to several bills which refer to a "Meeting of Public Members to review cases docketed for 3/23/83 consideration of the Board." There are, I believe, eleven members on the Board, of which three or four are "public members". Therefore, it appears that the March 15 gathering was not a "meeting" subject to the Open Meetings Law or the requirement in the Law that minutes be prepared.

Third, in regard to the March 22, 1983 meeting, you have already been provided with the minutes of that meeting. Also, this office has previously advised that the informal gathering which took place after the March 22 meeting did not appear to have a quorum present and was, therefore, not a "meeting".

Fourth, there is no requirement by law, of which I am aware, that written agendas be kept or that the starting or ending times of meetings or the names of persons attending a meeting or public hearing be recorded. If such records are maintained by the Office of Collective Bargaining, they would likely be available to you. However, you have already been advised by that office that all existing records regarding these matters, including minutes of meetings, have been provided to you.

Fifth, it appears from the May 14, 1986 letter of Malcolm D. McDonald, Deputy Chairman and General Counsel, that your request for a further hearing was denied in March, 1983, and that the matter was not raised again thereafter. Therefore, it appears that the matter would not have been discussed at an April 20, 1983 meeting that may have taken place. Of course, if there are any records of such a meeting or gathering, they would likely be available to you except to the extent that they fall under one or more of the grounds for denial set forth in the Freedom of Information Law.

In sum, based upon the facts presented in your numerous correspondences, it is my view that there has been no impropriety on the part of the Office of Collective Bargaining in its handling of your requests for records. Additionally, I believe that this office has fully advised you with respect to all Freedom of Information and Open Meetings Laws issues relevant to your requests. Thus, I do not believe there is anything further that the Committee on Open Government can add in regard to this matter.

Lastly, since receipt of your letter of June 9, I have also received your letters of June 25 and June 27. From my perspective, those letters do not raise any issues that have not been substantially considered in this and earlier correspondence. Consequently, I will consider that this and other advisory opinions are responsive to those letters as well.

Should any new questions arise that have not been considered, I will be happy to respond.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:ew

cc: Malcolm D. MacDonald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 1299

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

July 2, 1986

Hon. John Driscoll III
Councilman
Town of Bethel
P.O. Box 123
White Lake, NY 12786

The staff of the Committee on 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 Driscoll:

As you are aware, your letter of June 16 addressed to the Department of Audit and Control has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Open Meetings Law.

As a newly elected member of the Town Board of the Town of Bethel, you raised a series of issues concerning the Open Meetings Law. Specifically, you wrote that the "Town Supervisor called an executive session at our regular town board meeting held on June 4, 1986 for Monday June 9, 1986 between the town board an the youth commission". You added that there was no public notice of the June 9 meeting published in the newspaper and that I advised that you could not tape record the executive session. In terms of the discussion at the executive session, most of it dealt with procedures to be followed by the youth commission, but one aspect of the session involved the rehiring of one of the commission's program supervisors. At the next meeting, which was held on June 9, the issue of rehiring arose again, and you and other members of the Board felt that the discussion should be held in executive session. However, the Supervisor apparently stated that "as chief executive officer of this Town I do not feel we have to go into executive session."

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law applies to all meetings of public bodies, and the term "meeting" has been interpreted broadly by the courts. In a landmark decision rendered by the Court of Appeals, the state's highest court, it was held that any gathering of a quorum of a public body held for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Second, every meeting must be preceded by notice. Section 104(1) of the Open Meetings Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (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 posted in the same manner as described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. I point out that, although notice must be given to the news media, there is no obligation on the part of a newspaper, for example, to publish the notice.

Third, for the reasons described below, I believe that it was inappropriate to schedule an executive session on June 4 to be held on June 9. Section 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. Further, section 105(1) of the Law requires that certain steps be taken, during an open meeting, before an 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, ~~provided, however, that no action by~~ formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, it is clear, in my view, that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting. Moreover, a motion to enter into an executive session that gen-

erally identifies the subject to be considered must be carried, during an open meeting, by a majority of the total membership of a public body. It does not appear, on the basis of your letter, that any of those steps were taken.

Fourth, a public body cannot enter into an executive session to discuss the subject of its choice, for paragraphs (a) through (h) of section 105(1) of the Law specify and limit the topics that may appropriately be considered during an executive session. Unless and until one of those topics arises, the discussion must in my view be conducted open to the public.

With regard to the issues that you described, I do not believe that a discussion of procedures to be followed by the youth commission, matters of policy, could validly have been discussed in executive session, for none of the grounds for entry into an executive session could, in my opinion, have been asserted. The other issue, the rehiring of a certain individual could likely have been considered during an executive session held under section 105(1)(f). That provision permits a public body to enter into an executive session to discuss:

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

It would appear that the discussion involved the "employment history of a particular person". If that was so, that portion of the meeting could in my view justifiably have been closed.

I point out, too, that while the Supervisor may be an influential member of the Town Board, he or she has one vote. Under the circumstances, you or another member might have introduced a motion to enter into executive session, which , if carried by a majority of the Board, would have enabled you to convene an executive session, notwithstanding the objection or negative vote of the Supervisor.

Lastly, with respect to the use of the tape recorder, I recall that the Town Clerk contacted this office. I believe that I advised that the courts have held that any person may unobtrusively use a tape recorder at an open meeting of a public body [see Mitchell v. Johnston, Sup. Ct., Nassau Cty., April 6, 1984; Feldman v. Town of Bethel, 106 AD 2d 695, 484 NYS 2d 147 (3rd Dept., 1984); and People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979)]. I do not believe that I advised that

there is a prohibition against using a tape recorder during an executive session, but rather that the use of a tape recorder during an executive session was a matter that should be resolved by the Town Board. Stated differently, the Board could permit the presence of a tape recorder during an executive session, but there would be no right on the part of a member individually to use a tape recorder during a proper executive session. I note in passing that I believe that it was also advised that the portion of the gathering involving a discussion of procedures to be followed by the Youth Commission should be conducted in public.

Enclosed for your consideration are copies of the Open Meetings Law, an explanatory brochure on the subject, and an article that seeks to provide a common sense view 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1300

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279-

July 3, 1986

Ms. Lynn Yellott
Cayuga County League of
Women Voters
28 MacDougall Street
Auburn, NY 13021

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

Dear Ms. Yellott:

I have received your letter of June 17 in which you requested an advisory opinion concerning the implementation of the Open Meetings Law by the Auburn City Council.

Your first question involves the sufficiency of motions to enter into executive sessions. For instance, you wrote that the motions make reference to:

> "(a) Personnel; (b) Purchase of land and buildings; and (c) Possible litigation".

You added that "No specific information is provided which identifies or describes the issue to be discussed". You also asked what constitutes "action" taken in executive session that would require that minutes be kept. You cited a situation in which the Council directs the City Manager or one of its members "to look further into a matter". Lastly, you asked whether it is appropriate to conduct an executive session:

> "~~to discuss the inadequacy of garages~~ housing city equipment and ask questions of a Department Head to determine if present plans for expansion of the facilities are adequate? (An anti-

> cipated justification by Corporation Counsel is that if the present facilities are inadequate, then purchase of additional land might be a possible solution)."

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. All meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted 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)].

Second, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 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..."

As indicated in the language quoted above, a motion to enter into an executive session must include reference to the "general area or areas of the subject or subjects to be considered" during the executive session. Based upon judicial interpretations of the Open Meetings Law, the motions as you described them would be insufficient.

With respect to "possible litigation", section 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 that the purpose of the "litigation" exception for executive session "is to enable a

public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (9183); also Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Board, 83 Ad 2d 612, 613, appeal dismissed, 54 NY 2d 957 (1981)]. The Court in Weatherwax, in its discussion of a claim that litigation might possibly ensue, added that:

> "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" (id. at 841).

Moreover, with respect to the nature of a motion to enter into executive session pursuant to section 105(1)(d), it has been determined 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 Cobleskill, 444 NYS 2d 44, 46 (1981)].

The so-called "personnel" exception for entry into executive session has been clarified since the initial enactment of the Open Meetings Law. In its initial form, section 105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding section 105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

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

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in section 105(1)(f) are considered.

~~Further, judicial decisions indicate that a motion con~~taining a recitation of the language of the grounds for executive session, or "personnel", for example, without more, fails to comply with the Law. For instance, in a decision containing a discussion of minutes that referred to various bases for entry into executive session, it was found 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 section 100[1].

"With respect to 'personnel', Public Officers Law section 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, Sup. Ct., Chemung Cty., Oct. 20, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

In view of the foregoing, it has been advised that a motion to enter into executive session to discuss "personnel", or "personnel matters", without additional description, is inadequate. Where section 105(1)(f) may be asserted, I believe that motion for entry into an executive session should contain two components, inclusion of the term "particular", and reference to one or more of the topics appearing in that provision. For instance a motion to discuss "the employment history of a particular person" (without identifying the person) would be proper; a citation of "personnel" would not in my view be sufficient to comply with the statute.

The remaining ground for entry into an executive session to which you alluded is section 105(1)(h). The cited provision permits a public body to enter into an executive session to discuss:

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

It is emphasized that, based upon the language quoted above, not every discussion of a real estate transaction could be discussed appropriately during executive session, for the provision specifies that closed sessions could be held "only when publicity would substantially affect the value" of the property. As such, in the context of your last question, the possibility of the purchase of land, under the circumstances that you described, would not in my opinion permit a discussion held in executive session pursuant to section 105(1)(h). Further, the issue in question, "the inadequacy of garages housing city equipment" and "plans for expansion of the facilities" would not in my opinion fall within any of the other grounds for entry into an executive session.

Finally, with regard to "action", subdivision (2) of section 106 of the Open Meetings Law pertains to minutes of executive session 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 provision quoted above refers to a "formal vote". Therefore, unless a "formal vote" is taken, it would appear that minutes need not be prepared. Nevertheless, if "action" is taken upon which the City or the Council relies, it would appear that a formal vote might be required, in which case minutes would have to be prepared.

I hope that I 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: Auburn City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4182
OML-AO-1301

162 WASHINGTON AVENUE ALBANY NEW YORK 1223
(518 474-2518 279

July 7, 1986

Ms. Sharon R. Kibbe
Ms. Caroline K. Drake
[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. Kibbe and Ms. Drake:

I have received your letters of June 18 and 19 respectively, as well as the materials attached to them.

You have raised a series of issues concerning the implementation of the Freedom of Information Law by the Dolgeville Central School District. In brief, in your attempts to review and/or copy financial records, some of which were unsuccessful, you learned that the District has no records access officer or appeals officer, that minutes of meetings are incomplete, and that the District does not maintain a "subject matter list".

In this regard, I offer the following comments.

First, by way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Freedom of Information Law, as well as the subject matter list. The Committee has done so, and its regulations appear as 21 NYCRR Part 1401 et seq. In turn, section 87(1) of the Law requires the governing body of a public corporation, i.e., a board of education, to adopt procedural rules and regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee.

Relevant to the facts that you described, section 1401.2 of the regulations requires that the Board of Education designate one or more "records access officers", persons who have the duty of coordinating an agency's response to requests for records. Similarly, section 1401.7 requires that the Board designate a

person or body to render determinations on appeal following a denial of a request. The cited provision also specifies that the records access officer and the appeals officer cannot be the same person.

Second, as a general matter, the Freedom of Information Law pertains to existing records. Unless specific direction is provided to the contrary, an agency is not required to create a record in response to a request. However, two areas of your requests involve exceptions to the rule. Specifically, section 87(3) states in part that:

> "Each agency shall maintain...
>
> "(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and
>
> (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 Freedom of Information Law requires that a list be prepared that identifies every officer or employee of an agency, including individual salaries. It is noted, too, that the "subject matter list" must refer by category, to all agency records, and not only those considered to be accessible to the public. The regulations contain additional guidance concerning the subject matter list in section 1401.6.

Third, in terms of 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law. Although it is not completely clear which records you are seeking, records prepared by the School District concerning its financial transactions are, in my view, clearly available. Relevant is one of the grounds for denial which, due ~~to its structure, requires the records in question to be made~~ available. Section 87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Under the circumstances, it appears that the records sought solely involve "statistical or factual tabulations or data" accessible pursuant to section 87(2)(g)(i).

Moreover, there are other provisions of law that may be cited for the purpose of obtaining the type of information that you want. For instance, section 170.2 of the regulations promulgated by the Commissioner of Education sets forth rules regarding financial recordkeeping. One among several provisions that may be relevant to your request indicates that a board of education has the duty:

"To require the treasurer to render a report, at least quarterly (monthly in the event that budget transfers have been made since the last report), for each fund including no less than the revenue and appropriation accounts required in the annual State budget form. This report shall show the status of these accounts in at least the following detail:

(1) Revenue accounts.

(i) Estimated revenues.

(ii) Amounts received to date of report.

~~(iii)~~ Revenues estimated to be received during balance of the fiscal year.

(2) Appropriation accounts..

(i) Original appropriations.

(ii) Transfers and adjustments.

(iii) Revised appropriations.

(iv) Expenditures to date.

(v) Outstanding encumbrances.

(vi) Unencumbered balances."

In view of the foregoing, it would appear that the District is required to maintain various types of records concerning its finances.

Fourth, I point out that the Freedom of Information Law and the regulations 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)].

Lastly, you contended that minutes of meetings are sometimes incomplete. Here I direct your attention to the Open Meetings Law. Subdivision (1) of section 106 pertains to the minimum requirements concerning the contents of 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."

Further, subdivision (3) of section 106 requires that minutes of open meetings be prepared and made available within two weeks. Where minutes are not or cannot be approved within two weeks of a meeting, to comply with the Open Meetings Law,it has been advised that minutes be prepared within the appropriate time, and marked as "draft" or "non-final", for example. By so doing, the public can learn generally of what transpired at a meeting; concurrently, the public is effectively informed that the minutes are subject to change.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, model regulations designed to enable agencies to adopt their own regulations easily, the Open Meetings Law, and "Your Right to Know", which describes both the Freedom of Information and Open Meetings Laws. To enhance compliance, copies of those materials and this opinion will be sent to Mr. Smith, the new Superintendent, and the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Robert Smith, Superintendent
Board of Education

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4183
OML-AO-1302

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

July 7, 1986

Mr. Jim Switzer
School District Clerk
Wayne Central School District
6200 Ontario Center Road
Ontario Center, New York 14520

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

Dear Mr. Switzer:

I have received your letter of June 12, 1986 in which you request the assistance of the Committee on Open Government.

Specifically, you ask:

1. "Can a school board limit the persons who may speak at 'Comment Time' at a public meeting to those who are residents of the school district, only?

2. "Are all items presented at a school board meeting (reports, information), some apart from the published agenda, public records accessible under FOIL?

3. "Would this include information provided to the school board by the superintendent in an informational packet separate from the formal board agenda?"

In this regard, I offer the following comments.

First, the Open Meetings Law generally requires that meetings of a public body be open to the public. The Law [section 102(1)] defines "meeting" as "the official convening of a public body for the purpose of conducting public business."

Second, however, the Open Meetings Law is silent with respect to public participation. Thus, 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. Since the Law does not address the issue of public participation, it does not touch upon the question of limited participation. Thus, the propriety of limitations on public participation are not issues arising under the Open Meerings Law but rather under other provisions of law, as well as the reasonableness of rules that might be adopted by a board. It is noted that the case of Arnold Baum, et al. v. The Board of Education of the Delaware Valley Central School District, Supreme County, State of New York, County of Sullivan, September 28, 1984 and January 15, 1985, dealt, in part, with regulation of the time, place and manner of speech at school board meetings. The September 28, 1984 decision found that a regulation adopted by the Board was unconstitutional for violating the freedom of speech guaranteed by both the Federal and State Constitutions, but noted that "The time, place and manner of speech may be regulated by government provided such regulation is both limited and reasonable." The January 15, 1985 decision held in part that "that portion of (the regulation) which limits comments and questions at regular school board meetings to topics related to education and the board's conduct of the school and comments at special meetings to the purpose for which the special meeting was called, does not violate the Federal and State constitutional provisions protecting the freedom of speech." I point out that neither of these decisions deal with a limitation specifying categories of members of the public who may speak or participate at meetings.

Third, in regard to your last two questions, all items presented at a school board meeting, including "information provided to the school board by the superintendent in an informational packet separate from the formal board agenda" would be subject to the Freedom of Information Law.

As you may know, 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. Rights of access would be dependent upon the specific contents of the records. For example, records concerning a particular student might be confidential, in whole or in part, pursuant to the federal Family Educational Rights and Privacy Act; a memorandum might be wholly advisory and deniable under section 87(2)(g) of the Freedom of Information Law. Other types of records would be accessible in accordance with the Freedom of Information Law. In short, it could not be advised that the records in question would always be accessible or deniable, for their specific contents would determine rights of access.

As you requested, I am enclosing copies of the 1985 Annual Report of the Committee on Open Government, which includes the most up to date index to advisory opinions, 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1303

162 WASHINGTON AVENUE ALBANY NEW YORK 12231
(518) 474-2518 276-

July 8, 1986

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 June 24 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter and the article attached to it, four of the five members of the Huntington Town Board met on June 18. You added that "No notice was given to the press or public". Persons other than members of the Board were present, such as "town employees and outside consultants, including legal, financial and engineering experts', as well as Pickett Simpson, program manager of the State Environmental Facility Corporation". The Assistant Town Attorney, Gregory Hensas, contended that the Open Meetings Law did not apply based upon the assertion that the discussion fell within the scope of the attorney-client privilege. He also said that "he anticipated that the discussion would involve 'the avoidance of litigation' and 'potential strategies'" that should not be discussed in public. You wrote that, after the gathering, one of the Board members said that "only about five minutes of the three-and-a-half hour meeting involved legal advice and that policy decisions were made". Further, Mr. Simpson, a state agency representative, said "I was just sitting in because we're doing the financing".

In this regard, I offer the following comments.

First, in my opinion, when certain ingredients to be described in greater detail in the ensuing paragraphs are present, a municipal official or body may engage in a privileged relationship with an attorney. In such cases, I believe that the communications between an attorney and his or her client, a municipal board or official, would fall outside the scope of the Open Meetings Law.

Section 108 of the Law contains three "exemptions". From my perspective, when a discussion falls within the scope of an exemption, the provisions of the Open Meetings Law do not apply. Relevant to your inquiry is section 108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law".

When an attorney-client relationship has been invoked, it is considered confidential under section 4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However,such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney. As such, it is suggested that the mere presence of an attorney with a municipal board, for example, would not in my view automatically result in a privileged relationship and an exemption from the Open Meetings Law, for the subject matter of a discussion and the nature of the communication determine the applicability of an attorney-client relationship and the existence of an exemption from the Open Meetings Law.

In a judicial determination that described the parameters of the attorney-client relationship and the conditions precedent to its initiation, it was held by the Appellate Division that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact ~~of which the attorney was informed~~ (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for

> the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

In my view, if the consultants present at the closed session were employed by the Town, their attendance would not have disturbed the existence of what might otherwise have been privileged communications within the scope of the attorney-client relationship. However, the presence of Mr. Simpson, who is not an employee of or hired by the Town, but rather is a representative of a state agency who was, in his words, "just sitting in", would likely in my opinion have resulted in a waiver of the attorney-client privilege. Even if Mr. Simpson's presence did not result in a waiver of the existence of the privilege, it appears that only a small portion of the gathering would have been outside the requirements of the Open Meetings Law.

Second, with respect to the remainder of the gathering, I believe that it constituted a "meeting" subject to the Open Meetings Law that should have been preceded by notice given to the public and the news media pursuant to section 104 of the Law. Here I point out that, as a general matter, the Open Meetings Law is based on a presumption of openness. All meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted 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)].

Third, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 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..."

As indicated in the language quoted above, a motion to enter into an executive session must include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

With respect to "possible litigation" or "the avoidance of litigation", section 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 that the purpose of the "litigation" exception for executive session "is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (9183); also Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Board, 83 Ad 2d 612, 613, appeal dismissed, 54 NY 2d 957 (1981)]. The Court in Weatherwax, in its discussion of a claim that litigation might possibly ensue, added that:

> "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" (id. at 841).

It does not appear that litigation relative to the issues discussed has been initiated or is imminent.

Moreover, with respect to the nature of a motion to enter into executive session pursuant to section 105(1)(d), it has been determined 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 Cobleskill, 444 NYS 2d 44, 46 (1981)].

In sum, it is questionable in my view whether the Board could have closed the gathering based upon a claim that the discussions fell within the scope of the attorney-client privilege and, therefore, outside the requirements of the Open Meetings Law. Further, even if some portions of the gathering could have been considered confidential, the remainder would, in my view, have been subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Gregory Hensas, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

162 WASHINGTON AVENUE ALBANY, NEW YORK, 12231
(518) 474-2518 279

FOML-AO-1304

July 8, 1986

Mr. Eric W. Schoen
[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. Schoen:

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

According to your letter, the Yonkers Privacy Industry Council "has meetings at a catering hall where luncheon is served to the Board Members". It is your view that a meeting held at that kind of facility is not "in keeping with the intent of the Open Meetings Law."

In this regard, I offer the following comments.

First, the Committee on Open Government does not have the authority to issue a "ruling" that should be considered binding. Section 109 of the Open Meetings Law, however, authorizes the Committee to render advisory opinions.

Second, I believe that a Private Industry Council (PIC) is 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."

A PIC 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, a PIC is created and authorized by state and federal law pursuant to the terms and provisions of Public Law 97-300, as enacted on October 13, 1982. Those provisions indicate that the board of a PIC conducts public business and performs a governmental function for one or more public corporations, including the City of Yonkers or perhaps Westchester County.

Third, it is noted that the definition of "meeting" [see attached, Open Meetings Law, section 102(1)] has been expansively interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that the term "meeting" includes any gathering of a quorum of a public body held for the purpose of conducting public business, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. I would like to point out, too, that the Appellate Division decision that preceded the Court of Appeals' determination made specific reference to the inclusion of so-called "work sessions" and "agenda sessions" within the requirements of the Law. If a quorum of the Board of the PIC convenes at the catering hall for the purpose of discussing public business, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law in all respects.

Further, from my perspective, the intent of the Open Meetings Law is clear. As stated in a legislative declaration, the first section of the Law (section 100):

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

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

While a restaurant or catering hall might be open to the public, as a general matter, entry into a restaurant most often involves the purchase of food. Whether or not that is so in this instance, it is possible that many interested members of the public might feel constrained to enter a restaurant or catering

hall without ordering food or joining in the luncheon, if that is possible. As such, while the Open Meetings Law does not prohibit meetings from being held in a restaurant, I believe that such a site might represent an impediment to access to many who might otherwise want to attend.

Lastly, section 103(b) of the Open Meetings Law states that:

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

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

As you requested, a copy of this opinion will be sent to Mr. Zakian, Executive Director.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: John Zakian, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIC-AO- 4189
OML-AO- 1305

162 WASHINGTON AVENUE ALBANY NEW YORK 1223[illegible]
(518 474-2518 27[illegible]

July 8, 1986

Mr. Charles A. Forma
Counsel-Cable Operations
Cablevision
One Media Crossways
Woodbury, NY 11797

The staff of the Committee on 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. Forma:

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

You have questioned the propriety of an executive session held by the Public Safety Committee of the Suffolk County Legislature. Specifically, according to your letter:

> "On or about May 5, 1986, a federal prisoner who was in the custody of Suffolk County on separate charges was apparently released by the County when local charges were dropped, instead of being returned to a federal penitentiary. The Public Safety Committee of the Suffolk County Legislature held its regular scheduled meeting on May 21, 1986. Representatives from the District Attorney, the Sheriff and the system court were called to testify as to the events leading up to the release of the prisoner. The Committee, on the advise [sic] of counsel, determined to go into executive session on the grounds that the information which could be adduced at the hearing could 'imperil public safety by laying out a blueprint for other people' and on the

> ground that there is 'an ongoing investigation'. Despite the protests of the representatives of the media and, as Legislature Bachety said, the fact that the Committee was 'talking about something that's already done', the Committee voted to go into executive session by a vote of 4 to 2 with 2 members not present."

It is your view that the Committee had no "reasonable basis for assuming that information which could 'imperil the public safety' would be brought out". Nevertheless, a transcript of the meeting, a copy of which you enclosed, provides the view of Mr. Paul Sabatino, Counsel to the Committee. Mr. Sabatino stated that:

> "...we don't want to imperil the public safety by laying out a blueprint for other people who can take advantage of certain information and perhaps effectuate the same result. We also have an ongoing investigation, therefore, it would be the judgment of the Counsel to the Legislature that there is basis to go into executive session."

In this regard, I offer the following comments.

First, the substance of your question pertains to one or perhaps two of the grounds for entry into an executive session. Specifically, a public body may enter into an executive session to discuss:

> "a. matters which will imperil the public safety if disclosed...
>
> c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed..."

In fairness, without knowledge of the specific facts relating to the incident that was the subject of the discussion, or the nature of the discussion itself, it is impossible to advise with certainty that the executive session was held legally or otherwise. As a general matter,it is my view that the the Open Meetings Law seeks to require that public business be discussed in public, unless and until a discussion would result in harm to an individual, for example, or a governmental process. From my

perspective, the issue should likely have been discussed in public until the Committee reached the point at which public disclosure would indeed "imperil the public safety" in the manner suggested by Mr. Sabatino -- where the discussion would offer "a blueprint" that would enable prisoners to escape or evade detection. By means of analogy, in a decision rendered by the Court of Appeals relative to the Freedom of Information Law, which excepts from disclosure records "compiled for law enforcement purposes" when disclosure would result in the harmful effects described in section 87(2)(e) of that statute, it was held that "The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" [Fink v. Lefkowitz, 47 NY 2d 567, 573 (1979)].

If indeed public discussion would have offered a "blueprint" for escape or evasion of the law, or if public discussion would have imperiled effective law enforcement in relation "to current or future investigation or prosecution of a criminal offense", to that extent, I would agree that a ground for entry into executive session could have been asserted. However, once again, it is unclear on the basis of the information that you provided whether the topic could properly have been considered during an executive session. The article published by Newsday that is attached to your letter suggests that public discussion would have neither provided a "blueprint" for prisoners to escape, nor would it have interfered with a criminal investigation. It appears that any criminal investigation had been terminated, and that the incident that precipitated the discussion was, in the words of a County legislator, "a comedy of errors". The legislator, according to Newsday, added that: "It would only happen again if everyone was as stupid as they were the first time". In my opinion, that comment suggests that a series of errors, all unusual, occurred. If that is so, it does not appear that the discussion of the incident would have laid out a "blueprint" for escape by other prisoners.

Lastly, whether or not the issue fell within the scope of one or more of the grounds for entry into executive session, it appears that the executive session was improperly held. Section 105(1) of the Open Meetings Law prescribes the procedure to 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:

> "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..."

As indicated in the initial clause of the provision quoted above, a motion to enter into an executive session must be carred by "a majority vote of [the] total membership" of a public body. Based upon your letter, six members of the Public Safety Committee were present at the meeting; two members were absent. The motion to enter into executive session received four affirmative votes. A minimum of five affirmative votes would have been required to carry the motion [see also General Construction Law, section 41]. Since four constitutes less than a majority of the Committee's total membership, the motion in my opinion did not carry. If my interpretation of the facts regarding the membership of the Committee is accurate, I do not believe that the executive session could have been held, whether or not the issue fell within one or more of the grounds for entry into executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul Sabatino
Public Safety Committee

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1306

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

July 9, 1986

Ms. Jane E. Love
City Attorney
City of Dunkirk
Department of Law
City Hall
Dunkirk, NY 14048

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

Dear Ms. Love:

I have received your letter of June 27 in which you requested an advisory opinion from the Committee on Open Government.

Specifically, you state that the local news media has raised questions regarding the circumstances under which the City of Dunkirk Zoning Board of Appeals has been convening executive sessions. You describe the procedures used by the board as follows:

> "The Board...hears the cases...including all evidence and sworn testimony, in open session. After hearing all the cases, the Board adjourns, convenes in executive session to discuss each appeal in detail and then reconvenes in public to deliver its decisions. The votes are announced in public and all findings of fact and determinations are officially read into the record. The Board takes no official vote in executive session."

In this regard, I offer the following comments.

First, in terms of background, 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. In 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, section 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. In other words, 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. Paragraphs (a) through (h) of section 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.

Second, section 105(1) of the Open Meetings Law prescribes the procedure that must be followed by a public body, including a zoning board of appeals, during an open meeting before an executive session may be convened. 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..."

Thus, a motion to enter into executive session must, in my view, be made during an open meeting and carried by a majority vote of the total membership of a public body. Further , the motion must indicate, in general terms, the subject or subjects to be discussed during the executive session.

Third, you note that during these "executive sessions" "each Petitioner's financial status is discussed in great detail, as is the value and potential worth of the property." Section 105(1)(f) of the 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."

Therefore, to the extent that the Board discusses the financial or credit history of a particular person or corporation, I believe that an executive session could likely be held. However, based upon the facts that you provided, it would appear that section 105(1)(f) would constitute the only basis for entry into an executive session, and that the cited provision would involve only a portion of the Board's deliberations.

Finally, I am enclosing copies of the Open Meetings Law and "Your Right to Know", a pamphlet which describes the Freedom of Information Law and the Open Meetings Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:et

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4191
OML-AO- 1307

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

July 9, 1986

Mrs. Judy Freeman
[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. Freeman:

I have received your letter of June 24, in which you requested advice under the Freedom of Information Law.

Specifically, you state that you hand delivered two letters, one dated June 19 and the other June 20 to the Seguin Community Services Office. On June 24, you received a certified letter from Gary McIlvain of that office acknowledging receipt of the letter dated June 19. The June 20 letter, receipt of which was not acknowledged contained your request under the Freedom of Information Law to inspect and copy the tape recording of the open meeting held at the Owasco Town Hall on April 28, 1986. On June 24 you hand delivered a third letter to Mr. McIlvain advising him that he failed to acknowledge your June 20 letter which contained your request to review the tape recording. In this regard, I 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 physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets,

> forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the language quoted above, I believe that a tape recording prepared by or in possession of a unit of local government 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 NY 2d 575 (1980); Washington Post Co. v. New York State Insurance Department, 61 NY 2d 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 of the grounds for denial appearing in section 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].

Fourth, it is noted that both the Freedom of Information Law and the regulations promulgated by the Committee on Open Government pursuant to section 89(1)(b)(iii) of the Law (21 NYCRR Part 1401 et seq.) prescribe time limits within which an agency may respond 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)].

I am enclosing copies of the Freedom of Information Law, the Open Meetings Law and "Your Right to Know", a pamphlet which describes both laws.

Copies of this letter and the enclosures will also be sent to Mr. McIlvain at the Seguin Community Services Office.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Encs.

cc: Mr. McIlvain

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1308

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

July 9, 1986

Mr. Gene Russianoff
Staff Attorney
Straphangers Campaign
9 Murray Street
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. Russianoff:

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

According to your letter, at a meeting of the Board of the Metropolitan Transportation Authority (MTA) held on June 27, MTA Chairman Robert Kiley "announced that the MTA Board would go into executive session to discuss three collective bargaining agreements and a proposed merger of the Transit Authority police force with the New York City Police Department". Three days prior to the meeting, a subcommittee of the Board voted to approve a "memorandum of understanding" to consolidate the Transit Authority Police Department and the City Police Department. The meeting of June 27 involved a discussion to approve or reject the memorandum.

You wrote that Chairman Kiley contended that an executive session was necessary because the merger "might entail litigation", and because it "touched on collective bargaining agreements". It is your view that the executive session was held in violation of the Open Meetings Law.

In this regard, I offer the following comments.

As you suggested in your letter, the Board was, based on the facts as described in your letter, engaged in a discussion of policy in relation to the proposed merger of the two police forces. It does not appear that litigation had been initiated or was imminent, or that collective bargaining negotiations were involved in the discussion. If those contentions are accurate, I do not believe that an executive session could properly have been convened.

More specifically, with respect to a contention that the merger "might entail litigation", it has been found that a threat or fear of litigation does not, without more, constitute a valid basis for entry into an executive session. Section 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 that the purpose of the "litigation" exception for executive session "is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (9183); also Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Board, 83 Ad 2d 612, 613, appeal dismissed, 54 NY 2d 957 (1981)]. The Court in Weatherwax, in its discussion of a claim that litigation might possibly ensue, added that:

> "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" (id. at 841).

Moreover, with respect to the nature of a motion to enter into executive session pursuant to section 105(1)(d), it has been determined 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 Cobleskill, 444 NYS 2d 44, 46 (1981)].

With respect to the impact of the merger upon collective bargaining agreements, section 105(1)(e) of the Open Meetings Law permits a public body to enter into an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". It does not appear that the discussion involved collective bargaining negotiations, but rather the effect of the proposed merger on existing collective bargaining agreements. If my interpretation of the facts is accurate, I do not believe that section 105(1)(e) could appropriately have been asserted to enter into an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Kiley, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML - AO - 1309

162 WASHINGTON AVENUE ALBANY, NEW YORK, 1223[illegible]
(518 474-2518 279[illegible]

July 8, 1986

Mr. John Zwierecki
[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. Zwierecki:

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

According to your letter, the Town of Oswego is considering a plan to buy its water from the Metropolitan Water Board (MWB) instead of the City of Oswego, from which it is currently buying its water. Under the agreement being considered, the Town would drop its $1,330,000 tax assessment on the MWB's pumping and filtering facilities located in the Town. In return, MWB would pay for the extension of water lines to a larger area and take over the existing water districts in the Town. You indicate that "The town supervisor, however, has been calling the town board into executive sessions for these discussions after every public meeting without even going through the procedure of voting during the public session to go into executive session". In this regard, I offer the following comments.

First, the Open Meetings Law, section 103(a) states that:

> "Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred of this article."

Second, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law 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 open meeting, but rather is a part of an open meeting. Moreover, paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may be considered during an executive session. Based on the facts that you have presented, it appears that only one basis for holding an executive session might be applicable. Section 105(1)(h) states that an executive session may be held for the purpose of discussing "the proposed acquisition, sale or lease of real property...but only when publicity would substantially affect the value thereof". However, it is unclear whether the proposed transactions would entail the acquisition of property by or the lease of property to the MWB, or whether publicity would in any way "substantially affect" the value of the property.

Third, section 105(1) of the Law 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..."

Thus, the procedural requirements described above must be accomplished, during an open meeting, prior to entry into an executive session. According to your letter, the Board did not follow the required procedures.

Lastly, I am enclosing copies of the Open Meetings Law and "Your Right to Know", a pamphlet which outlines the Freedom of Information Law and the Open Meetings Law. In addition, in an effort to enhance compliance, those documents and a copy of this opinion 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive

RJF:DAK:jm
Encs.
cc: Town Board, Town of Oswego

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4213
OML-AO-1310

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

August 19, 1986

Ms. Frances C. Nugent
Town Clerk
Town of Rye
10 Pearl Street
Port Chester, NY 10573

The staff of the Committee on 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. Nugent:

I have received your letter of July 18 as well as the materials attached to it. Please accept my apologies for the delay in response.

The first issue raised in your letter concerns a meeting of the Town Board of the Town of Rye scheduled to begin at 5 p.m. on July 2. You enclosed a news article containing a notice of the meeting and which also stated that "After the meeting, the board will meet in executive session to discuss personnel". In your capacity as Town Clerk, you were apparently prepared to attend. However, you wrote that "At 5:07, the Supervisor's Secretary gave an oral message from him that a quorum was not expected and that [you] could be excused". As such, you "recorded that no quorum was present and the meeting would not be held and left the building". Nevertheless, on the following morning, you learned that the meeting was held at 5:50, that certain actions were taken, and that minutes were prepared by the Town Attorney. Those minutes were later made "official" by the Board on July 15.

In this regard, I offer the following comments.

First, based upon the facts as you described them, it appears that the meeting as originally scheduled was cancelled, for you, and perhaps others, left the site of the meeting following the receipt of a message from the Supervisor's office. If it was determined later that a quorum would be available for the

purpose of conducting a meeting, it is my view, due to your responsibility as clerk, that you should have been so informed. Further,it appears that a new notice concerning an unscheduled meeting should have been given to the public and the news media in accordance with the requirements of the Open Meetings Law.

I point out that the Open Meetings Law does not preclude a public body from convening a meeting quickly. In terms of notice, 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 (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 by means of posting "to the extent practicable" at a reasonable time prior to such meetings. It is unclear whether efforts were made to provide notice prior to the unscheduled meeting that began at 5:50.

Further, somewhat related is your capacity to carry out your powers and duties as town clerk pursuant to section 30 of the Town Law. Subdivision (1) of the cited provision states in part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep an complete and accurate record of the proceedings of each meeting". Without notice to you, it appears that you were effectively precluded from carrying out your powers and duties imposed by section 30 of the Town Law. In view of the specific direction in the Town Law, it is questionable in my view whether minutes prepared by a person other than the clerk or deputy clerk may be considered as "official".

Second, viewing the matter from a different vantage point, it was noted earlier that a news article concerning the scheduled meeting stated that an executive session would be held after the meeting to discuss personnel.

In a technical sense, an executive session cannot be scheduled prior to a meeting. I point out that the phrase "executive session" is defined in section 102(3) of the Open Meetings Law 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 open meeting, but rather is a part of an open meeting. Further, section 105(1) of the Law prescribes a procedure that must be accomplished, during an open meeting, before an executive session may be held. Specifically, section 105(1) states in 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..."

As such, again, technically, it cannot be known that an executive session will indeed be held until a motion is made and carried by a majority vote of the total membership of a public body during an open meeting.

In addition, due to the language of the "personnel" exception for executive session and judicial interpretations of the Law, a motion to enter into executive session to discuss "personnel", without greater description, would in my view be inadequate. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

It has been held that a motion to enter into an executive session relative to the provision quoted above should contain reference to two elements. It should include the term "particular" to indicate that the discussion involves a specific person or corporation; and it should refer to one or more of the topics listed in 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, 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.

The second issue raised in your letter concerns your [redacted] who apparently is or had been a tenant of a building owned by the Town. In brief, as I understand the situation, [redacted] A letter addressed to Mr. Nugent by the Town Attorney on January 30 indicated that "The Town Board of the Town of Rye has

met to discuss the issue of your continued occupancy", and that the Board made decisions relative to the issue. Subsequently, Mr. Nugent requested copies of minutes of the meeting. In response, the Town Attorney in a letter of July 10 wrote that:

> "There was no formal meeting of the Rye Town Board called for the express purpose of discussing your tenancy. Rather, at two announced meetings, the subject of your tenancy was brought up. These meetings were held, to the best of my recollection and after a review of calendars on the morning of January 21, 1986, and on January 29th, 1986 at 5:00 P.M.
>
> "My letter of January 30th, is a consensus I assembled from the Board members. As I recall, each of the Board members reviewed my letter to you, prior to it having been mailed. As such, no minutes of any action exists."

Although an informal "consensus" may have been reached, it is questionable in my opinion whether such a consensus could be considered as valid and binding action. Assuming that the Town Board has the sole authority to render a determination on the matter, I believe that such a determination could only be made at a meeting of the Board pursuant to a motion carried by a majority vote of its total membership. Relevant to the powers and duties of public bodies is the quorum requirement imposed as follows by section 41 of the General Construction Law:

> "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 or officers disqualified from acting."

In view of the foregoing, I believe that a public body may carry out its powers and duties only at a duly convened meeting during which action is taken by means of an affirmative vote of a majority of its total membership.

Lastly, I point out that a record of votes indicating the manner in which each member cast a vote must be prepared when final action is taken. Specifically, section 87(3) of the Freedom of Information Law 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."

I hope that I 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: Aldo V. Vitagliano, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OMC-AO-1311

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

August 19, 1986

Alderman Frank Coccho
City of Corning
[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. Coccho:

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

By means of a hypothetical example, you described a situation in which it is reported to a city council that a firm is able to revise city ordinances for a fee of approximately $8,000. Later, it is resolved that the mayor be authorized to enter into a contract with the firm to revise and update city ordinances. Your question is whether "a local governmental body" has "the authority to approve a $9,500 contract cited in the above example during an executive session..."

In this regard, I offer the following comments.

First, as you are 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 a discussion may properly be considered during an "executive session", a portion of an open meeting during which the public may be excluded. It is noted, too, that a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) of the Law specify and limit the topics that may be considered during an executive session.

Second, the introductory language of 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..."

Based upon the final clause of the provision quoted above, a public body may generally vote during a proper executive session; however, any vote to appropriate public monies must be taken during an open meeting. As such, there may be situations in which a discussion may be conducted during an executive session, but where a public body may be required to return to an open meeting to vote to appropriate public monies in relation to the subject previously considered behind closed doors.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1312

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

August 19, 1986

Mr. Patrick F. Fronckowiak
[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. Fronckowiak:

I have received your letter of July 20 and the attachments, in which you presented several issues under the Open Meetings Law.

Specifically, in both your letter and our telephone conversation you described a number of incidents that occurred in relation to meetings of the Board of Trustees of the Village of Fleischmanns. You indicate that on several occasions, meetings of at least a quorum of the Board have taken place without public notice. Additionally, one such meeting was held at "Gales", rather than the Skene Memorial Library where meetings are usually held. You further indicate that you were told that the gathering at "Gales" was not a meeting under the Open Meetings Law because it was a "formula" meeting, but that the meeting was held for the purpose of discussing public business and a quorum of the Board was present. Further, at that gathering, the members present "o.k.'d" the use of a gun by the village traffic control officer. You advise that at the July 12 Board meeting, it was stated that no votes could be taken by the Board, because one trustee was absent. Finally, you indicate that portions of minutes of meetings have been deleted without a motion being made for the deletions. In this regard, I offer the following comments.

First, the Open Meetings Law generally requires that meetings of a public body be open to the public. The Law [section 102(1)] defines "meeting" as "the official convening a public body for the purpose of conducting public business". Therefore, when there is a gathering of at least a quorum of a public body for the purpose of discussing public business, the gathering is a "meeting" under the Open Meetings Law and is subject to the Law.

Second, section 104 of the Open Meetings Law requires that notice be given prior to meetings. Section 104 states in relevant part that:

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

Based on the facts you have presented, it appears that on at least several occasions, the Board of Trustees may have failed to comply with the notice requirements.

Third, you inquire as to the propriety of the "formula meeting" that took place at "Gales". I do not know the meaning of the term "formula" meeting nor have I found that term in any provision of law. Additionally, although you do not explain what "Gales" is, it appears that it is a restaurant or similar type of establishment. It is noted that the Court of Appeals has held that a "meeting" within the meaning of the Open Meetings Laws includes any gathering of a quorum of a public body for the 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 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 "Gales" for the purpose of discussing the use of a gun by the traffic control officer or other matters of public business, it was 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 the scope of the Law.

Fourth, your inquiry regarding the statement by the Mayor at the July 12 Board meeting that no votes could be taken due to the absence of one trustee is not a question arising under the Open Meetings Law. However, it is my understanding that section 41 of the General Construction Law is relevant to this question. According to section 41, I believe that the presence of a quorum of a public body is sufficient, generally, for voting (see enclosed).

Fifth, you advise that portions of minutes of an open meeting were deleted without a motion by the Board. I am not award of any provision of law that relates specifically to the approval of alteration of minutes. However, such deletion is, in my view, an action taken by the Board. If that is the case, a motion by the Board would likely be required to accomplish the deletion.

Finally, a copy of this letter is being sent to Mayor Hans Pasternack, in an effort to share with the Village Board of the contents of this opinion.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

cc: Mayor Hans Pasternack

COMMITTEE ON OPEN GOVERNMENT

OML-AO-1313

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 20, 1986

Mr. Morris Kumm
[redacted]

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

Dear Mr. Kumm:

I have received your letter of July 25 and the materials attached to it. Please accept my apologies for the delay in response.

The materials generally pertain to your dissatisfaction with the activities of certain persons associated with United Senior Citizens of Greater New York, Inc. With respect to the jurisdiction of this office, it appears that it is your contention that meetings of boards of United Senior Centers have been conducted in violation of the Open Meetings Law.

From my perspective, the Open Meetings Law is not likely applicable. In this regard, I 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(3) 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."

As I understand the situation, United Senior Citizens of Greater New York, Inc. is a not-for-profit organization which, although associated with certain agencies of New York City, is not a governmental entity. Further, it does not appear that the organization "conducts public business" in the manner envisioned by the Open Meetings Law, or that it performs a "governmental function", for example, for New York City. If my assumptions are accurate, the Open Meetings Law would not apply, for the board or component boards of the entity in question would not constitute a public body.

Second, even if the Open Meetings Law is applicable, there is nothing in the Law that confers a right upon members of the public in attendance to speak or otherwise participate. Similarly, there is no requirement that statements be read aloud or that issues be discussed for any particular amount of time.

In short, based upon my understanding of the organization, its meetings would not be subject to the requirements of the Open Meetings law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4222
OML-AO-1314

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

August 20, 1986

Mr. C. Bruce Lawrence
Suter, Doyle, Kesselring,
Lawrence & Werner
Attorneys at Law
950 Crossroads Building
2 State Street
Rochester, New York 14614

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

Dear Mr. Lawrence:

I have received your letter of July 25 in which you requested an advisory opinion. Please accept my apologies for the delay in response.

By way of background, you represent The Weller Companies, which unsuccessfully requested from the State Liquor Authority (SLA) the "1985 SLA list of licenses by County" and "Recommendations for approval or disapproval of local ABC Boards". In 1985, Weller obtained the same type of list for an earlier period, which apparently was published. You indicated that "Weller does not solicit the listees, but presumes that the people who buy the publication may contact the listees". The list most recently requested was denied on the basis of section 89(2)(b)(iii), which permits an agency to deny on the ground that disclosure would constitute an unwarranted invasion of personal privacy when a list of names and addresses would be used for "commercial or fund-raising purposes".

It is your view, however, that various requirements of the Alcoholic Beverage Control Law (ABC Law) and regulations promulgated by the SLA essentially negate the authority to deny based upon provisions pertaining to the protection of personal privacy. For example, you cited section 100(7) of the ABC Law which requires that, after filing a new application for a license, the applicant must post a notice "in a conspicuous place at the

entrance to the proposes premises"; you also cited section 107 of the ABC Law, which requires that "Every person procuring a license hereunder must publish a notice thereof..."; similarly section 114 requires that a license be conspicuously displayed in the place of business of the licensee.

In this regard, I offer the following comments.

First, as you may be 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 section 87(2)(a) through (i) of the Law.

Second, the provision upon which the denial was premised, section 89(2)(b)(iii), in my view represents something of an aberration or exception relative to the general scheme of the Freedom of Information Law. With the exception of that provision, the purpose for which a request is made and the use of accessible records are irrelevant to rights of access [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 and Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. In the case of section 89(2)(b)(iii), rights of access may be conditioned upon the purpose for which a request is made. According to your letter, Weller does not engage in any direct contact with licensees; however, as I understand the situation, it prints information regarding licensees, and sells or distributes a publication containing the information. In turn, the recipients of the publication may contact licensees. While Weller's activities do not involve any direct contact or solicitation, from my perspective, it nonetheless seeks the list for a "commercial purpose".

Third, in my opinion, the Freedom of Information Law generally does not enable an agency to restrict access because an applicant seeks records for commercial purposes; often records are routinely made available even though they may be requested for commercial purposes (i.e., contracts, successful bids and related records). Further, I do not believe that the authority to deny pursuant to section 89(2)(b)(iii) pertains to all lists. This office has consistently advised that the exception pertains only to those lists that identify natural persons, rather than entities, for example.

If the list in question identified only entities, section 89(2)(b)(iii) would in my view be inapplicable. However, it is possible that it identifies both entities, such as commercial establishments, as well as natural persons. It is questionable in my view whether an entire list could be withheld if it identifies entities and natural persons. Concurrently, however, it may be difficult if not impossible in some cases for the agency to determine whether names appearing on lists identify persons or entities.

Of potential relevance are some of the related provisions of the ABC Law, such as those requiring the posting of notice and publication. I would conjecture that those requirements were imposed by the Legislature due to the public interest that may exist with respect to an activity that is regulated by government.

There are judicial decisions involving requests for lists of names and addresses, or their equivalent, where the courts upheld agency denials. However, I believe that the situations described in those cases might be distinguishable from those present here. In Scott, Sardano & Pomeranz v. Records Access Officer of the City of Syracuse [65 NY 2d 294, 491 NYS 2d 289 (1985)], a law firm requested accident reports for purposes of contacting accident victims by means of direct mail solicitation. While accident reports are generally available under both the Freedom of Information Law and section 66-a of the Public Officers Law, the court determined that the identifying details pertaining to the victims, their names and addresses, could be deleted. Another decision, Goodstein v. Shaw [463 NYS 2d 162 (1983)], dealt with a request by an attorney for complaints filed with the State Division of Human Rights during a particular time period. The request was granted, with the exception of the first names and addresses of complainants. The court determined that the names and addresses were sought for commercial purposes and, accordingly, could be withheld. From my perspective, the contents of the list in question are somewhat less "personal" than those described in the cases cited above. Both involved names of persons and their home addresses; both involved records relating to a "personal" event, i.e., a motor vehicle accident or a claim of discrimination. In this instance, the name on the list might identify an entity, rather than a person. Further, to the extent that the list does identify a natural person, it pertains to that person acting in his or her capacity as seller of alcoholic beverages. The address on the list, as I understand it, is not a home address, but rather the address of the commercial premises where alcoholic beverages may be purchased. Additionally, the posting and publication requirements would appear to be intended to enable the public to know the location where alcoholic beverages may be sold, and the identity of the licensee. While it is questionable that those requirements constitute a waiver of the protection of privacy as envisioned by section 89(2)(c)(ii) of the Freedom of Information Law as you suggest, it is also questionable in my view whether, given those requirements, an agency could justifiably withhold a list containing the equivalent of information that had previously been published in a newspaper and which is currently conspicuously posted in a commercial establishment. I recognize that an individual accident report, like an individual license is publicly available and that the Scott decision, supra, upheld a denial of a broad request for the names and addresses of accident victims. The distinctions in my

opinion involve the fact that the sale of alcoholic beverages is an activity regulated by the state that requires a license, an official approval indicating that specific qualifications have been met, coupled with the requirements of the ABC Law which are apparently intended to give the public the capacity to know, by means of posting and publication, that those requirements have been satisfied.

In short, to the extent that the list identifies licensees as entities rather than natural persons, I do not believe that the privacy provisions of the Freedom of Information Law would apply; to the extent that it does identify natural persons, the notice, posting and publication requirements imposed by the ABC Law likely would effectively negate the application of the provisions that might otherwise permit a denial.

The remaining issue concerns rights of access to recommendations for approval or disapproval of license applicants by local ABC boards. In brief, it is your view that such boards are subject to the requirements of the Open Meetings Law, that their minutes are available and that their recommendations constitute their final determinations, although not the final determinations, which are made by the SLA.

Section 43 of the ABC Law provides that the "Functions, powers and duties of local boards" include the following:

> "1. To recommend to the liquor authority the issuance or the refusal of licenses to sell alcoholic beverages at retail.
>
> 2. To recommend to the liquor authority the revocation of such licenses."

Section 30 of the ABC Law indicates that local boards consist of two members, except in New York City, where the board consists of four members.

Based upon the foregoing, a local ABC board is in my view a "public body" subject to the Open Meetings Law. Section 102(3) of that statutes 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 sub-committee or other similar body of such public body."

A local board is an entity consisting of two members or, in the case of New York City, four members; it is assumed that its powers can be carried out only by means of an affirmative vote of its members (a quorum); and it conducts public business and performs a governmental function for both the state and a public corporation, i.e., a county.

As a general matter, meetings of public bodies must be preceded by notice (see Open Meetings Law, section 104) and conducted open to the public (section 103), except to the extent that a topic may be considered during an executive session. The phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded [section 102(3)], and a procedure must be accomplished during an open meeting prior to entry into an executive session. That procedure is found in section 105(1), which 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..."

When read in conjunction with section 106 concerning minutes, which will be discussed later, I believe that a public body may generally vote during a proper executive session,unless the vote is to appropriate public monies. Whether a vote is taken during an open meeting or an executive session, minutes reflective of the action taken must be prepared as required by section 106.

Among the grounds for entry into an executive session, it appears that section 105(1)(f) may be particularly relevant to a local ABC board in relation to licensing. The cited provision permits a public body to enter into an executive session to discuss:

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

A local board might discuss the "financial or credit history of a particular person or corporation" in its review of an application for a license. To that extent, an executive session could in my view appropriately be withheld. However, the vote to recommend that a license be approved or disapproved likely must be conducted during an open meeting during which the general public may be present. If my assumptions are accurate, the recommendations transmitted by local boards to the SLA are the result of action taken at open meetings during which the public may be present. Further, if that is so, minutes or similar records indicating the nature of the recommendation should likely be available.

With respect to minutes, section 106(1) pertains to minutes of open meetings, section 106(2) concernings minutes of action taken during an executive session, and section 106(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."

Again, while minutes are available "in accordance with the provisions of the freedom of information law", which contains certain bases for withholding, again, minutes indicating action taken during an open meeting would in my view be available, even though they may indicate a "recommendation".

I agree that a recommendation transmitted from one agency to another may generally be withheld pursuant to section 87(2)(g) of the Freedom of Information Law. However, section 87(2)(g)(iii) requires that inter-agency or intra-agency materials reflective of "final agency policy or determinations" must be made available. In this instance, you contend that the action of the local board, although not the final and binding determination, which may be rendered only by the SLA, is the final agency determination of the local board. While there is controversy over what may be considered "final", there is precedent which in my view indicates that action taken by a local board may be accessible. For example, in Miracle Mile Associates v. Yudelson, it was found that intermediate decisions in a "multilevel administrative process" constitute final agency determinations [68 AD 2d 176, 182 (1979)]. In other contexts, what may be viewed as recommendations made by advisory bodies are available. At the local

government level, a planning board must hold open meetings, and its actions must be memorialized in minutes available to the public, even though its actions constitute recommendations transmitted to a governing body, a final decision-maker. As indicated earlier, the term "public body" includes committees and subcommittees, which generally have only the capacity to advise. Further, in Syracuse United Neighbors v. City of Syracuse [80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)], it was found that minutes of meetings of advisory task forces are available. In sum, due to the requirements of the Open Meetings Law and the judicial decisions cited above, determinations of local boards, although advisory to the SLA, are in my view likely available 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Gloria Cabiri

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4237
OML-AO-1315

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

August 25, 1986

Ms. Alice Waser
[redacted]

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

Dear Ms. Waser:

As you are aware, your letter that was apparently sent to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Freedom of Information Law.

In brief, having attended meetings of the Bohemia Fire District, you requested copies of minutes of meetings and offered to pay for photocopying and postage. However, you wrote that the Chairman of the District stated that he could not supply the minutes "because of law".

It is unclear on the basis of your letter whether the records pertain to meetings of a fire district's board of fire commissioners, or to the board of a volunteer fire company. In either case, I believe that minutes of meetings must be prepared and made available to public.

The Open Meetings Law applies to meetings of all public bodies. In this regard, 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."

If your inquiry pertains to a board of fire commissioners, its meetings are in my view clearly subject to the Open Meetings Law, for a fire district is a "political subdivision of the state" according to section 174(6) of the Town Law, and the board is its governing body. Further, I believe that each of the conditions necessary to a finding that the board of a volunteer fire company is a public body can also be met.

The board of a volunteer fire company is an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the conditions precedent can be met, a volunteer fire company is in my view a "public body" subject to the Open Meetings Law.

I would also like to point out that the status of volunteer fire companies had long been unclear. Such companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not such bodies conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, in a landmark decision, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland Newspapers v. Kimball, it is in my view clear that a volunteer fire company also falls within the definition of "public body" and is required to comply with the Open Meetings Law.

I would like to point out, too, that both the Open Meetings and Freedom of Information Laws are based upon presumptions of openness. In the case of the Open Meetings Law, all meetings must be conducted open to the public, except to the extent that an executive session may be held in accordance with section 105(1) of the Law. Similarly, under the Freedom of Information Law, all records of a volunteer fire company are available, except to the extent that they fall within one or more of the grounds for denial of access appearing in section 87(2) of the Law.

With respect to minutes, section 106(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks, and that minutes of action taken during an executive session must be prepared and made available in accordance with the Freedom of Information Law within one week.

I hope that I 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: Bohemia Fire District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1316

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

August 26, 1986

Hon. Paul J. Claffey
Mayor
Village of Potsdam
Civic Center
Potsdam, New York 13676

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

Dear Mayor Claffey:

I have received your letter of August 7 and appreciate your interest in complying with the Open Meetings Law.

You asked that I confirm a statement made at a workshop given in Watertown last month. Specifically, it is your understanding that I advised "that when a village board and lawyers for an adversary in litigation sit down together to work out a settlement, the Open Meetings Law requires that this be done in open session". I believe that you correctly recollect my statement, which was based upon two judicial determinations rendered by the Appellate Division.

As you are aware, section 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". In an interpretation of the intent of the quoted language, it has been held that the purpose of section 105(1)(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 Board, 83 AD 2d 612, 613 (1981)]. The same language was also used by the Appellate Division in Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)]. Based upon those decisions, a public body could not in my view justify an executive session to discuss pending litigation with its adversary.

It is noted that a discussion of the litigation between the Village attorney and the adversary or between members of the Board of Trustees constituting less than a quorum of the Board and the adversary would fall outside the requirements of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1317

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

August 26, 1986

Mr. Stephen P. Baboulis
News Director
WNYT-13
P.O. Box 4035
Albany, New York 12204

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

Dear Mr. Baboulis:

I have received your letter of August 8 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, both the Albany Common Council and the Albany County Legislature "ban recording devices from their sessions". You added that "they have particularly negative feelings about videotape recorders used in news coverage".

In this regard, I 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. There are no judicial determinations of which I am aware that pertain to the use of video recorders or similar equipment at meetings.

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, 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, unanimously 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, 113 AD 2d 924 (1985)]. 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" (id. at 925).

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, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

As indicated earlier, there are no decisions rendered in New York with which I am familiar concerning the use of video equipment at meetings of public bodies. However, I believe that the principles are the same as those described with respect to the use of tape recorders. If the equipment is large, if special lighting is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.

I hope that I 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: Albany County Legislature
Albany Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4254
OML-AO-1318

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

August 29, 1986

Mr. Renato J. Sanges
The Rainbow Alliance
P.O. Box 1253
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.

Dear Mr. Sanges:

I have received your letter of August 18, which pertains to the implementation of the Open Meetings and Freedom of Information Laws by officials of the City of Johnstown.

Your first area of inquiry concerns executive sessions held by the Common Council. For example, on July 21, the Mayor "requested an executive session between the Council and representative of a private business, to discuss the proposed purchase of another privately owned business in Johnstown". When questioned about the basis for entry into executive session, the Mayor apparently said "negotiations". On August 11, an executive session was held despite objections raised. After the session, "the Mayor told a reporter nothing important was discussed".

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that topics under consideration fall within the scope of one or more of the grounds for entry into executive session listed in section 105(1)(a) through (h).

Second, the Law requires that a public body accomplish certain procedural requirements, during an open meeting, before it may enter into an executive session. Specifically, the introductory language of 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..."

Third, with respect to a discussion of "negotiations", the only reference to that term in the grounds for entry into executive session appears in section 105(1)(e), which permits a public body to enter into an executive session to discuss collective bargaining negotiations under the Taylor Law, negotiations between a public employer and a public employee union.

Moreover, it has been advised, based upon judicial determinations, that a motion identifying the subject matter to be discussed as "negotiations", or, for example, "personnel" or "litigation", without more, is inadequate. Those descriptions do not enable the public, or even members of a public body, to know whether an intended executive session is appropriate [see Daily Gazette v. Town Board, Town of Cobleskill, 444 NYS 2d 44 (1981); 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].

In my view, a more detailed description of the reason for entry into executive session might serve to enhance public confidence in government and its compliance with law. By means of an analogy related to the situation described in your letter, it is clear that "negotiations", as that term is used in the Open Meetings Law, would not have constituted a proper basis for entry into an executive session. However, a different ground might have been applicable. 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 or a particular person or corporation..."

It is possible that the executive session of July 21 pertained, perhaps in part, to a discussion of the "financial or credit history" of a "particular corporation". To that extent, I believe that an executive session would have been proper. Assuming that was so, the motion to enter into executive session, to be adequate, might have referred to a discussion of "the financial history of a particular corporation."

To provide additional information regarding the adequacy of motions for entry into executive session, enclosed is a copy of the Doolittle decision, supra, the most expansive case involving that issue.

The remaining area of inquiry pertains to a request for copies of city maps under the Freedom of Information Law. According to your letter, the City Attorney, Robert Subik, verbally denied your request, stating that the City is not a "copying service" and that "he did not have time to send a written denial [of your] request."

It is noted initially that the Freedom of Information Law is applicable to all records of an agency, such as the City of Johnstown. Further, section 86(4) of the Law defines the term "record" expansively to include:

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

Due to the breadth of the language quoted above, which makes specific reference to maps, I believe that the records sought clearly fall within the scope of the Freedom of Information Law.

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

Under the circumstances, the maps would in my opinion be available, for none of the grounds for denial could appropriately be asserted.

In addition, while the City might not be a "copying service", the Freedom of Information Law requires that, upon payment of the appropriate fee, an agency must prepare copies of accessible records [see Freedom of Information Law, section 89(3)].

Lastly, I point out that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force and effect of law, impose certain procedural requirements upon agencies. Among them is a requirement that a denial be in writing and explain the reasons for the denial. Moreover, section 87(1) of the Freedom of Information Law requires the Common Council to adopt rules and regulations concerning the procedural aspects of the Law that are consistent with the Law and the Committee's regulations. Enclosed for your consideration are the Committee's regulations. Copies of the regulations and model regulations designed to enable agencies to easily adopt their own regulations will also be sent to the Mayor.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Mayor Donald Murphy
Robert Subik, City Attorney
R.J. Deluke, Schenectady Gazette
City Editor, The Leader Herald
Peter Henner, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1319

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

September 2, 1986

Mr. Martin Davis
[redacted]

Dear Mr. Davis:

I have received your recent letter and the news article attached to it, which reached this office on August 20.

The materials describe what you characterize as "clandestine meetings" held by the Hewlett-Woodmere Board of Education. You have asked that the Committee conduct "a complete investigation into all their secret actions going back some years".

In this regard, it is noted at the outset that the Committee on Open Government has neither the resources nor the legal authority to conduct an investigation. The Open Meetings Law authorizes the Committee to advise with respect to the Law, and accordingly, I offer the following general comments.

First, it is emphasized that the courts have interpreted the term "meeting" expansively. 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, 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)].

In the context of the news article, so-called budget work sessions or a gathering held by the Board and others to formulate the District's goals are, in my opinion, clearly "meetings" that fall within the requirements of the Open Meetings Law.

Second, every meeting, including work sessions and similar gatherings, must be preceded by notice given to the news media and to the public by means of posting in accordance with section 104 of the Law.

Third, 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 an executive session, a portion of an open meeting during which the public may be excluded, may be held pursuant to section 105(1) of the Law. Paragraphs (a) through (h) of the cited provision specify and limit the grounds for entry into an executive session.

If you have specific areas of inquiry concerning particular activities of the Board relating to the Open Meetings Law, I would be please to address them.

Enclosed for your consideration are copies of the Open Meetings Law and "Your Right to Know", which describes the Law in greater detail. In addition, copies of this letter will be sent to both the Superintendent and the President of the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Dr. Bert Nelson, Superintendent
Sheila Kislik, President, Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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EXECUTIVE DIRECTOR
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OML-AO-1320

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

September 4, 1986

Mr. Kevin M. Dailey
Supervisor
Town of Clifton Park
One Town Hall Plaza
Clifton Park, NY 12065

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

Dear Supervisor Dailey:

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

Specifically, according to your letter:

> "The Town of Clifton Park is in the process of planning a Community Center. We are deciding now on what approach to take regarding the method of construction. We have been interviewing Architects and Construction Managers which could be hired by the Town while we are constructing this Center. This person/persons will be a paid employee of the Town of Clifton Park for the period of construction and design.
>
> "These interviews have been closed to the press and the general public because they were personnel interviews and these individuals represented private companies' financial status. We also asked a few technical experts from our community to sit in on these interviews for the benefit of our Town Board who are not experts on building pools, ice rinks or senior centers."

Your question is whether the closed sessions that you described are consistent with the Open Meetings Law. In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings of a public body, such as the Town Board, are open to the public, except to the extent that discussions fall within the scope of one or more of the grounds for entry into executive session listed in section 105(1)(a) through (h) of the Law.

Second, of relevance 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, to the extent that the Board's deliberations focus on the "employment history of a particular person", matters "leading to the appointment" of a "particular person or corporation", or perhaps the "financial or credit history" of a particular corporation, I believe that an executive session could properly be held.

And third, with respect to the presence of persons other than members of the Board at executive sessions, section 105(2) of the 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."

Like any provision of law,I believe that the Open Meetings Law should be given a reasonable interpretation consistent with its intent. If, for example, the Board invites those with special knowledge or expertise to be shared during an executive session, I believe that it would be reasonable for those others to join the Board in an executive session. On the other hand, it has been advised in the past that an arbitrary invitation to attend an executive session to those without expertise or whose presence may be irrelevant to the discussion would be unreasonable and inconsistent with the Law.

Lastly, it is reemphasized that only to the extent that specific portions of the discussions fall within the scope of section 105(1)(f) would executive sessions be appropriate. Other aspects of the discussion (i.e., "what approach to take" and the like) appear to deal with matters of policy that should be considered during open meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1321

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

September 4, 1986

Ms. Marian Johnson
[redacted]

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

Dear Ms. Johnson:

As you are aware, I have received your letter of August 21 in which you requested advice concerning compliance with the Open Meetings Law by the Germantown School Board.

According to your letter and minutes of meetings that you enclosed, the Board attempted to enter into executive sessions or has held executive sessions to discuss issues characterized as "legal matters" or "personnel matters". In one instance, an executive session was apparently held without any description of the subject to be discussed. You also indicated that, following a brief meeting, "the members of the board remained in the school for about another 1 and 1/2 hours".

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. All meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted 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)].

With respect to your final comment, that the Board remained in the school for some time following a meeting, the purpose for their remaining in the school is unclear. If, for example, they remained for a purpose unrelated to District business, or to work individually, there would not in my opinion have been a violation of law. On the other hand, if the members remained for the purpose of discussing District business, as a body, that gathering in my view would have constituted a meeting subject to the Open Meetings Law that should have been open to the public, unless the subject matter rendered the gathering exempt from the Open Meetings Law [see section 108(3)].

Second, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 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..."

Third, with respect to the motions for entry into executive session that you described in your letter and which are identified in the minutes, I do not believe that the motions adequately described the topics to be discussed.

The ground for entry into executive session most closely associated with "legal matters" is section 105(1)(d), which permits a public body to hold an executive session to discuss "proposed, pending or current litigation". Here I point out that it has been held that the purpose of the "litigation" exception for executive session "is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (9183); also Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Board, 83 Ad 2d 612, 613, appeal dismissed, 54 NY 2d 957 (1981)]. The Court in Weatherwax, in its discussion of a claim that litigation might possibly ensue, added that:

> "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" (id. at 841).

Moreover, with respect to the nature of a motion to enter into executive session pursuant to section 105(1)(d), it has been determined 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 Cobleskill, 444 NYS 2d 44, 46 (1981)].

Similarly, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session, or "personnel matters", for example, without more, fails to comply with the Law. For instance, in a decision containing a discussion of minutes that referred to various bases for entry into executive session, it was found 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 section 100[1].

"With respect to 'personnel', Public Officers Law section 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, Sup. Ct., Chemung Cty., Oct. 20, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

In view of the foregoing, it has been advised that a motion to enter into executive session to discuss "personnel", or "personnel matters", without additional description, is inadequate. Where section 105(1)(f) may be asserted, I believe that motion for entry into an executive session should contain two components, inclusion of the term "particular", and reference to one or more of the topics appearing in that provision. For instance a motion to discuss "the employment history of a particular person" (without identifying the person) would be proper; a citation of "personnel" would not in my view be sufficient to comply with the statute.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4264
OML-AO-1322

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

September 11, 1986

Mr. Robert C. Johnston
[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. Johnston:

I have received your letter of August 24 and the materials attached to it.

Your inquiry concerns a denial of access to records relating to planned changes in the Village of West Carthage water system. The records sought were denied on the basis of section 87(2)(g) of the Freedom of Information Law. However, you indicated that the information sought has been provided to the State Health Department. In addition, it is your view that the information might have been withheld from you and your organization because of a "prior legal action" that you initiated after having examined an earlier proposal concerning the water system. You also referred to a statement by the Village Attorney, who indicated "that it was proper to hold a closed meeting for just that reason". More specifically, according to a news article that you enclosed, it is the Mayor's opinion that a meeting to discuss proposed water system renovations:

> "...can be held in executive session, he said, because of litigation instituted last fall by the Pleasant Lake Land and Cottage Owners Association, which opposes the project because it fears the proposed changes would substantially lower the lake level.
>
> "In an out-of-court accord, the village agreed to the association's request that a full environmental impact study be done before the project construction begins."

The Village Attorney was quoted in the article as stating that "We have a temporary order, but the lawsuit is still pending". The attorney suggested that the meeting could be closed because "any move we might make that the landowners don't like might put us back in court".

In the regard, I offer the following comments.

First, with respect to your request for records, as a general matter the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

It is emphasized that the introductory language of section 87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. Based upon the quoted language, I believe that the State Legislature envisioned situations in which a record or report might be both accessible and deniable in part. In my opinion, the language imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Second, under the circumstances, the records sought appear to consist of communications with village engineers and that, therefore, they could be characterized as "intra-agency" materials. Section 87(2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those portions of the inter-agency or intra-agency materials consisting of advice, opinion, recommendation and the like could in my view justifiably be withheld.

The disclosure of the information to the State Health Department is, in my opinion, likely irrelevant to your rights. It is assumed that the records in question were transmitted to the Department not in conjunction with a request made under the Freedom of Information Law, but rather because the Department officials need the records in the performance of their official duties.

Third, since you referred to a delay in response to your request, I point out that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force of Law, prescribe time limits for responding to request.

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)].

With regard to the authority to enter into an executive session to discuss the proposal, based upon the facts as I understand them, I disagree with the opinion of the Mayor and the Village Attorney. The news articles indicate that the lawsuit initiated some time ago resulted in "an out-of-court settlement". Further, the suit apparently dealt with the preparation of environmental impact study.

It appears that Village officials intend to rely upon section 105(1)(d) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In a situation similar to that described in the materials that you supplied, the Appellate Division unanimously held that the "litigation" exception for executive session could not be asserted. In Weatherwax v. Town of Stony Point, it was held 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 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)].

The materials do not indicate that the discussions will involve a discussion of "strategy" relative to litigation. Further, as specified by the court, the fear of litigation alone does not justify the holding of an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Donald Getman, Mayor
Lawrence D. Hasseler, Village Attorney

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1323

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 15, 1986

Mr. Morris Kumm
[redacted]

Dear Mr. Kumm:

I have received your letter of August 28 in which you take issue with an advisory opinion rendered on August 20.

In brief, you suggested that meetings of boards of United Senior Citizens Centers of Greater New York, Inc. might have been conducted in a manner inconsistent with the Open Meetings Law. I responded and advised that, in my opinion, the Open Meetings Law does not apply to those boards.

While I agree with your statements concerning the intent of the Open Meetings Law and share your sentiments relative to democratic principles, I do not believe that the Open Meetings Law applies to the boards in question.

Further, I have researched the matter and have found information concerning the creation of United Senior Centers of Greater New York. It was incorporated on April 6, 1972 as a not-for-profit corporation. My review of the certificate of incorporation and a statement of corporate purposes does not in my view indicate that the organization could be characterized as governmental or that it performs a governmental function.

As you requested, I am returning the materials attached to your letter of July 25.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-
OML-AO- 1324

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

September 15, 1986

Mr. Lawrence A. Hendrix
Superintendent of Schools
Putnam Central School District No. 1
Putnam Station, New York 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, except as otherwise indicated.

Dear Mr. Hendrix:

As you are aware, I have received your letter of August 29.

Your inquiry pertains to a series of events that led to the preparation and disclosure of a "Report on Corporal Punishment". The report includes names of students and teachers and has been forwarded to the Commissioner of Education. Your questions involve the application of Buckley Amendment to the report, whether the report should have been forwarded to the Education Department, which individuals who should be able to inspect the report, and whether the report "violate[s] any...state or federal law".

In this regard, I offer the following comments.

First, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. While this office has no jurisdiction regarding the Buckley Amendment, a federal law, it is often necessary to review that law in conjunction with the Freedom of Information Law, or the Open Meetings Law, in order to appropriately advise concerning those statutes. For more specific guidance relative to the Buckley Amendment, it is suggested that you review the regulations promulgated under that statute, a copy of which has been sent to you, or that you contact Ms. Pat Ballinger, FERPA Office, Room 3017, U.S. Department of Education, 400 Maryland Ave., S.W., Washington, D.C. 20202. Ms. Ballinger can be reached at (202)732-2058.

Second, the "Buckley Amendment" is the commonly used name for the Family Educational Rights and Privacy Act, which is a federal act (20 U.S.C. 1232g). In brief, the Buckley Amendment is applicable to educational agencies or institutions that participate in the funding programs administered by the U.S. Department of Education. As such, it applies to virtually all public educational institutions, as well as many private colleges and universities. With regard to records, as a general matter, "education records" identifiable to a particular student or students are considered confidential, unless the parents of the students consent to disclosure. Concurrently, the parents enjoy rights of access to education records pertaining to their children. I point out that the term "education records" is defined broadly in the federal regulations to mean:

> "those records which: (1) are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution" (regulations promulgated by U.S. Department of Education, section 99.3, Federal Register, Vol. 41, No. 118 --- Thursday, June 17, 1976).

As indicated earlier, education records identifiable to a particular student can be disclosed only after having received consent from the parents of the student. However, section 99.31 of the regulations describes certain situations in which prior parental consent is not required, including disclosure to authorized representatives of state educational authorities, "Subject to the conditions set forth in [section] 99.35" [section 99.31(a)(3)(iv)]. The "conditions" pertain to disclosures to federal and state officials for "federal program purposes". Specifically, section 99.35 states in relevant part that nothing in the Buckley Amendment or the regulations:

> "(a)...shall preclude authorized representatives of officials listed in section 99.31(a)(3) from having access to student and other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of or compliance with the Federal legal requirements which relate to these programs.

> (b) Except when the consent of the parent of a student or an eligible student has been obtained under section 99.30, or when the collection of personally identifiable information is specifically authorized by Federal law, any data collected by officials listed in section 99.31(a)(3) shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, or enforcement of or compliance with Federal legal requirements."

In addition, section 99.31(a)(5) states that prior consent is not needed in a case in which disclosure is made:

> "To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974".

I have no knowledge of whether the conditions described above may be present, or whether there is any specific reporting requirement. It is suggested that you might contact the State Education Department to determine whether a state statute requires that the report in question must be forwarded to the Department.

Third, during our conversation, you indicated that the Board of Education discussed issues relative to corporal punishment during open meetings, and that both teachers and students were identified during those open meetings.

For future reference, I point out that a public body, such as a board of education, may conduct closed or "executive sessions" to discuss certain topics. Of particular relevance is section 105(1)(f) of the Open Meetings Law (see attached), 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 particluar person or corporation..."

Therefore, if a discussion involves, for example, matters leading to the discipline of a particular teacher or student, I believe that an executive session may be held. Further, pursuant to section 105(2), the school board may authorize the parents of a student to join the Board in an executive session.

In addition, section 108 of the Open Meetings Law describes "exemptions". If a matter falls within the scope of an exemption, the Open Meetings Law does not apply. Section 108(3) exempts from the Open Meetings law "any matter made confidential by federal or state law." If, for instance, the Board is reviewing a student's records that are confidential under the Buckley Amendment, the discussion may be exempt from the Open Meetings Law, for it deals with a matter made confidential by federal 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1325

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

September 15, 1986

Ms. Cathy House
[redacted]

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

Dear Ms. House:

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

Your question is whether "a town board has the right to have a meeting to discuss the budget for 1987 to talk about the basics of this budget without the public...behind closed doors."

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, including town boards.

Second, as a general matter, the Open Meetings Law requires that meetings of public bodies be conducted in public, except to the extent that the subject matter of a discussion falls within the scope of one or more of the grounds for entry into an executive session listed in section 105(1)(a) through (h). As such, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, the Law specifies and limits the topics that may appropriately be considered during an executive session.

Third, from my perspective, a discussion of the "basics" of a budget must occur during an open meeting, for none of the grounds for entry into an executive session would be applicable.

Enclosed for your consideration are copies of the Open Meetings Law and "Your Right to Know", which describes the Law more fully.

I hope that I 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.

NEW YORK
STATE OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-
OML-AO-1326

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 122
(518) 474-2518, 279

September 15, 1986

Charles H. Maier, Supervisor
Town of Hamlin
[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 Supervisor Maier:

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

Those materials consist of a letter addressed to the Town Zoning Board of Appeals, a copy of which was sent to you, and a letter placed in your mailbox, that was not specifically addressed to you, by a member of the Town Board. It is apparently the Board member's contention that the correspondence addressed to the Zoning Board of Appeals should have been distributed to all the members of the Board.

In this regard, neither of the statutes within the Committee's jurisdiction, the Freedom of Information Law and the Open Meetings Law, deal specifically with the distribution of records. Certainly, if a request for a record is made under the Freedom of Information Law, the appropriate agency official must respond in accordance with the requirements of the Freedom of Information Law. However, I know of no provision of law that requires a town supervisor or similar official to routinely or automatically distribute copies of materials to all board members. Similarly, questions often arise concerning the disclosure of correspondence received by a municipality at meetings of its governing body. In short, the Open Meetings Law does not require that communications received by a municipality be read, disclosed or identified during meetings. While such a practice might exist in some units of government, I do not believe that there is any such requirement imposed by 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1327
OML-AO-1327

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

September 17, 1986

Mr. James Bacallis
[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. Bacallis:

As you are aware, I have received your note of September 10.

According to your letter, in electing its chairman, the Steuben County Legislature engages in "a series of secret ballots until a vote of ten affirmative votes is received. Then a formal resolution is entertained at which usually the vote is unanimous".

You have asked whether the secret ballot or series of secret ballots might violate either the Freedom of Information Law or the Open Meetings Law. In this regard, I offer the following comments.

First, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open meetings" requirement. Although the Freedom of Information Law pertains to existing records and generally does not require that a record be created or prepared [see attached, Freedom of Information Law, section 89(3)], an exception to the rule involves votes taken by public bodies. Specifically, relevant part, section 87(3) of the Freedom of Information Law has long required that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Stated differently, when a final vote is taken by an "agency", which is defined to include a municipal board [see section 86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

Second, in terms of the factual situation that you presented, it does not appear that the preliminary votes, i.e., those votes that do not result in a majority, must be recorded, for they are not "final". However, the vote resulting in an affirmative total of a majority of the membership of the County Legislature would, in my opinion, be required to be recorded and indicated how each member voted. Some have suggested that, in a series of secret ballots, there may be no way of recording the vote in the manner required by the Freedom of Information Law. A possible solution would involve each member marking his or her ballot, i.e., by means of a name or initials. While preliminary votes not resulting in a majority need not be recorded, the marked ballots resulting in a majority vote could be tabulated and identified by each voting member.

Third, in terms of the rationale of section 87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its elected representatives may have voted individually with respect to particular issues.

Further, although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of section 87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law:

> "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 listing 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."

I hope that I 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-A00-1328

162 WASHINGTON AVENUE ALBANY, NEW YORK 12231

September 23, 1986

Mr. Henry McGrath
Mc Enterprise Productions
P.O. Box 222
Rensselaer, NY 12144

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

Dear Mr. McGrath:

I have received your letter of September 12, as well as the materials attached to it.

According to your letter, you are the director of a not-for-profit organization that sponsors events relating to the performing arts. In May, you applied to the Town of East Greenbush to conduct the "Freedom Bash '86", a music festival featuring a variety of artists. Your request was initially approved. However, five days following the approval, you indicated that "the Town Supervisor called a meeting with the board to discuss Public Works personnel matters". As such, you wrote that the issue was discussed and determined during "a closed Executive meeting". The determination involved a revocation of the approval to hold the event at a town park. You also suggested that the Town Board may have been led to believe that the concert would be a "mini-Woodstock", and that "600 to 1000 people" would attend. However, although you could not be sure how many would attend, it was apparently your belief that a much smaller gathering would occur.

In this regard, I offer the following comments.

First, every meeting of a public body, including a special or emergency meeting, must be preceded by notice given to the public and the news media. Since it is not clear whether the appropriate notice was given, I point out that, in the case of a meeting scheduled at least a week in advance, notice must be given to the news media (at least two) and to the public by means of posting in one or more designated public locations not less than seventy-two hours prior to the meeting [see Open Meetings

Law, section 104(1)]. In the case of a meeting scheduled less than a week in advance, notice must be given to the news media and the public by means of posting "to the extent practicable" at a reasonable time before the meeting [section 104(2)].

Second, as a general matter, all meetings of public bodies must be conducted open to the public, except to the extent that a discussion falls within the scope of one or more of the grounds for entry into executive session appearing in section 105(1)(a) through (h) of the Open Meetings Law. Stated differently, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, the Law specifies and limits the subjects that may properly be discussed during an executive session.

Third, prior to entry into an executive session, a procedure prescribed in the Open Meetings Law must be accomplished, during an open meeting, by a public body. Specifically, the cited provision states in relevant part that:

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

Having reviewed the materials, it is unclear whether the procedure described above was followed.

Fourth, the so-called "personnel" exception for entry into executive session, section 105(1)(f), 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..."

Based upon the information you provided, the provision quoted above could not, in my opinion, have been asserted to justify the holding of an executive session. The size of the event, the use of Public Works employees generally or issues regarding liability would not likely have pertained to any "particular" person. Therefore, I do not believe that the personnel exception or any of the other grounds for entry into executive session could have appropriately been asserted.

Lastly, it has been held that a motion for entry into executive session that describes the issue as "personnel matters" is inadequate [Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981]. A motion to enter into an executive session under section 105(1)(f) should in my view contain two components in order to enable both the public and members of a public body to know that there is a proper basis for holding an executive session. Such motions should indicate that the discussion focuses upon a "particular" person or corporation, although that person need not be named. Further, reference should be made to one of the topics listed in section 105(1)(f). For instance, a proper motion might pertain to "the employment history of a particular person"; a motion to discuss "personnel matters", without more, would be insufficient to comply with the Law.

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

I hope that I 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: Michael Van Voris, Town Supervisor
James Werking, East Greenbush Town Board
Ruth K. Thompson, Asst. Director
Tony Toczylowski, Times-Union
Heidi Gralla, Chatham Courier
Mary DiAmbrosio, Times-Union

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1329

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

September 25, 1986

Ms. Hazel Shader
[redacted]

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

Dear Ms. Shader:

I have received your letter of September 19 in which you requested an advisory opinion.

Your question involves the circumstances in which a school board may vote during an executive session. In this regard, I offer the following comments.

First, 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)].

Second, since I am not familiar with each of the provisions of the Education Law and other statutes that relate to the functions of a school board, I cannot specify each situation in which a school board may vote during an executive session. However, the following situations are, in my opinion, most common. One involves a so-called 3020-a proceeding in which a board must vote in executive session to determine whether charges should be filed with respect to a tenured employee. The other

generally pertains to situations involving particular students. As you may be aware, certain federal Acts prohibit the disclosure of information identifiable to students without the consent of the parents [see e.g., the Family Education Rights and Privacy Act, 20 U.S.C. 1232g]. Therefore, if, for instance, disciplinary action is taken concerning a particular student, I believe that a vote may be taken behind closed doors. Similarly, in situations in which the vote may identify a handicapped student, I believe that, due to requirements of federal law, a vote should occur in private. While there may be other situations in which a vote may be taken in an executive session of which I am not aware, those described above are in my opinion the situations that arise most frequently in which a board of education may vote during a closed 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

COMMITTEE ON OPEN GOVERNMENT

OML-AO-1330

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

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PRISCILLA A. WOOTEN

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 30, 1986

Mr. Monroe Yale Mann

[redacted]

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

Dear Mr. Mann:

I have received your letter of September 16 in which you requested an advisory opinion concerning the Open Meeting Law.

According to your letter, the Mayor of the Village of Port Chester and four trustees "met and took action to prepare a statement as to action that has been set by these five public officials." You added that, based upon a newspaper article you attached to your letter,

> "they set up a five point information campaign program wherein they agreed to meet with service clubs, etc.; they will establish a citizens advisory group to report to the Board of Trustees; they solicit the opinions to residents through a questionaire; they propose to draft a brochure; and they have agreed to display a full scale conceptual plan of a redevelopment project, and in addition, the Mayor stated that the Board will hold several public hearings on the development. These plans require the expenditure of Village funds in order to hold meetings, draft brochures, display conceptual plans, etc."

It is your view that the "campaign program" was authorized or adopted in violation of the Open Meeting Law, for "no public meeting was ever called at which this action was taken." Further, you indicated that neither the public nor two Village trustees

that you represent knew of any meeting during which the program was devised. Rather, those two trustees "first learned about all of this by reading the newspapers." The news articles indicate that the program was formulated by a "bipartisan majority of the Board of Trustees." Moreover, the components of the five point program indicate that "village staff" and the Board of Trustees will be involved in and responsible for carrying out each aspect of the program. As such, the program was presented to the public as an endeavor of Village government.

Based upon the foregoing, I offer the following comments.

First, if indeed a majority of the Village Board of Trustees convened to formulate, discuss and adopt the program, I would agree with your contention such a convening constituted a "meeting" subject to the requirements of the Open Meeting Law. As you pointed out in your letter, the Court of Appeals, the state's highest court, in landmark decision found that any gathering of a public body held for the purpose of conducting public business is "meeting" subject to the Open Meeting Law, whether or not there is an intent to take action and regardless of the manner in which the gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. It is noted, too, that the Court of Appeals affirmed the Appellate Division's broad interpretation of the term "meeting", which was found to include so-called work sessions, informal gatherings, agenda sessions and the like. Based upon the facts that you provided, the formulation of the program and the program itself concern acts involving Village government and matters within its jurisdiction. Therefore, again, I believe that any gathering of a majority of the Board would have constituted a "meeting" that fell within the scope of the Open Meeting Law.

Second, assuming that one or more meetings were held, I point out that the Open Meeting Law requires that notice of the time and place of all meetings be given. In the case of a meeting scheduled at least a week in advance, section 104(1) requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to the meeting. In the case of a meeting 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 earlier, to the extent practicable, at a reasonable time prior to the meeting [section 104(2)].

Third, although the Open Meeting Law permits a public body to conduct executive sessions, it is noted that the phrase "executive session" is defined in section 102(3) of the Law to mean a portion of an open meeting during which the public may be excluded. Consequently, an executive session is not separate and distinct from an open meeting, but rather is a portion of an

open meeting. Further, section 105(1) of the Law prescribes a procedure that must be accomplished by a public body, during an open meeting, before an executive session may be held. Specifically, the cited provision states in relevant part that:

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

Therefore, a public body cannot enter into 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 topics that my appropriately be considered during an executive session. From my perspective, if one or more meetings had been held, the discussions should have occurred open to the public, for none of the grounds for entry into executive session would have been applicable.

In your letter, you also cited the decision rendered in Sciolino v. Ryan, 81 AD 2d 475 (1981). Although that decision, which deals with political caucuses, was effectively reversed by means of legislation enacted in 1985, I do not believe that it could be claimed that a political caucus, which would be exempt from the Open Meeting Law, was held. The news articles clearly indicate that the program was conceived and adopted by members of both political parties who serve on the Board of Trustees.

Lastly, viewing the situation from a somewhat different vantage point, it is questionable in my opinion whether the Board may vote or otherwise take action, even if such a vote represents a majority of the Board, without first informing the remaining two members that a meeting would be held. Here, I direct your attention to section 41 of the General Construction Law, which, since 1909, has imposed certain requirements concerning a quorum upon public bodies. The cited provision 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 or officers disqualified from acting."

I believe that the provision quoted above permits a public body to perform and exercise its duties only at a meeting conducted by a quorum of the body, a majority of its total membership, and only by means of an affirmative vote of a majority of its total membership. While those conditions may have been present at a gathering held by the "bipartisan majority", an additional condition, in my opinion, is that "reasonable notice" of a meeting must be given to all of the members. Stated differently, under section 41 of the General Construction, a public body may carry out its powers and duties only at a meeting held upon reasonable notice to all the members. If that is so, the validity of action taken at a gathering that was not preceded by reasonable notice given to all the members would, in my view, be questionable. Absent such a requirement, the members of a public body constituting a majority, whether partisan, bi-partisan or non-partisan, might effectively preclude minority members from participating in the body's deliberative process, thereby negating the capacity of those members to represent those who elected them.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Peter Iasillo, Mayor
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1331

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

October 1, 1986

Ms. Lucille Johnson
[redacted]

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

Dear Ms. Johnson:

I have received your letter of September 22 in which you requested an advisory opinion concerning the Open Meeting Law.

According to your letter, on the morning of August 27, a meeting was held by three of the five members of the Connetquot Central School District. Also in attendance were certain school district officials, as well as Mr. Gerald Kramer, a developer, and his attorney. The meeting was apparently called "after a request to [your] Superintendent that [your] Board of Education review a development proposal in [your] district". You indicated that notice of the time and place of the meeting was not given and that the "public was not given the opportunity to observe [the] Board of Education deliberations on this matter". The result of the meeting was a letter sent on the same date by the Superintendent to the Chairman of the Town Planning Board. That letter states in part that "After reviewing the various proposals of Mr. Kramer, it is the consensus of the Board of Education and Superintendent that we are in favor of approving a modified zoning to Mr. Kramer in order to permit him to build 320 houses on this property".

When the Board of Education was questioned about the gathering, the President of the Board "said it was an 'unofficial meeting'".

In this regard, I offer the following comments.

First and perhaps most importantly, in a landmark decision rendered in 1978 by the Court of Appeals, the state's highest court, it was held that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action and irrespective of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. It is noted that the court of Appeals in so holding affirmed an expansive decision rendered by the Appellate Division, Second Department, which specifically determined that so-called "work sessions", "agenda sessions", and "conferences" held by a public body are "meetings" subject to the Open Meeting Law. In view of judicial interpretations of the Law and the language of the Law itself, the gathering of August 27 as described in your letter was, in my opinion, a "meeting" that fell within the requirements of the Open Meeting Law. Further, the letter sent by the Superintendent to the Planning Board indicates that the School Board, as a body, met, deliberated and reached a consensus. From my perspective, the contents of the letter support the conclusion that the gathering in question should have been conducted in accordance with the Open Meeting Law.

Second, assuming that the gathering was indeed a "meeting", I point out that section 104 of the Open Meeting Law requires that notice of the time and place of every meeting be given. More specifically, in the case of a meeting scheduled at least a week in advance, section 104(1) requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than 72 hours prior to the meeting. When a meeting is scheduled less than a week in advance, section 104(2) requires that notice be given to the news media and to the public by means of posting in the same manner as described earlier, to the extent practicable, at a reasonable time prior to the meeting.

Lastly, as a general matter, the Open Meeting Law is based on a presumption of openness. All meetings must be conducted open to the public, except to the extent that a discussion falls within the scope of one or more grounds for entry into an executive session. Paragraphs (a) through (h) of section 105 (1) of the Open Meeting Law specify and limit the grounds for entry into an executive session.

Enclosed for your review are copies of the Open Meeting Law and "Your Right to Know" which describes the Law in greater detail. The same materials and a copy of this opinion will be sent to the Superintendent and the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

enc.
cc: John S. Maloney, Superintendent
Board of Education

STATE
DEP
COMMITTEE ON

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EXECUTIVE DIRECTOR
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FOIL-AO-
OML-AO- 1332

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

October 6, 1986

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 September 26 in which you raised several issues.

First, you alluded again to the possibility of a requirement that a form be used when requesting records under the Freedom of Information Law. To reiterate, there is nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government that refers to the use of a form. Section 89(3) of the Law indicates that an agency may require that a request be made in writing and requires that the request "reasonably describe" the records sought. As such, it has been advised that any written request that reasonably describes the records sought should suffice. It has also been advised that, while an agency may prepare a request form for purposes of administrative convenience, a failure to use a form prescribed by an agency cannot validly serve to delay a response to a request or to deny a request.

Second, in an unrelated area, you wrote that the Town Board of the Town of East Hampton indicated that "if [you] wanted to discuss a complaint about police conduct with the Town Board it would be done in executive session under the personnel section of the exemptions". In this regard, the so-called personnel exemption, section 105(1)(f) of the Open Meetings Law, permits a public body to enter into executive session to discuss:

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

Based upon the language quoted above, if a complaint pertains to a "particular" public officer, for example, I believe that an executive session could appropriately be held. On the other hand, if a complaint deals with the conduct of the police department generally, it is unlikely, in my view, that section 105(1)(f) would apply.

Third, you asked whether "anything [has] yet developed on Notices of Claim". I do not recall that you raised that subject as an issue. In brief, although notices of claim pertain to "legal matters", it has been advised that they are generally available when they come into the possession of an agency.

Lastly, you questioned the amount of time within which an agency must respond to an appeal. Section 89(4)(a) of the Freedom of Information Law states in relevant part that the person or body designated to determine an appeal "shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial or provide access to the record sought".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Theodore Sklar, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO
OML-AO ~ 1333

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

October 7, 1986

Mr. Dana F. Higgins
Rowland, Bellinger & Comstock, Inc.
211 W. Court Street
P.O. Box 231
Rome, New York 13440

The staff of the Committee on 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. Higgins:

I have received your letter of September 19 in which you inquire as to whether the "New York Automobile Insurance Plan (the 'Assigned Risk' plan)" is subject to the provisions of the Open Meetings Law or the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records maintained by "agencies". The term "agency" is defined in the Law [section 86(3)] as:

> "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."

Second, the Open Meetings Law pertains to meetings of public bodies. The term "public body" is defined in the Law [section 102(2)] as:

> "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."

Third, section 5301(a) of the Insurance Law mandates the creation of the assigned risk plan. It provides as follows:

> "All insurers licensed to write motor vehicle insurance in this state shall subscribe to and participate in the reasonable plan or plans, approved, or which may be approved, by the superintendent after consultation with such insurers, for equitable apportionment among such insurers, for equitable apportionment among such insurers of applicants for such insurance who are in good faith entitled to procure it through ordinary methods."

Section 5302(a) of the Insurance Law relates to the creation of the committee to administer the plan. It states:

> "In addition to the members of the committee elected by the subscribers to administer the plan, the superintendent shall appoint annually two additional members who shall be duly licensed insurance agents or brokers representative of broad segments of the public obtaining insurance through the plan."

Fourth, as I understand it, the insurers required to participate in "the plan" are non-governmental entities. They are businesses which function as an integral part of the private sector.

From my perspective, it appears that neither "the plan" nor the committee designated to administer "the plan" are within the scope of the term "agency" as defined under the Freedom of Information Law. Although the insurers are required by statute to take part in "the plan", they do not, in my view, constitute a "governmental entity" or "perform a governmental or proprietary function" by virtue of that fact. Thus, in my opinion, neither "the plan" nor the committee are likely subject to the Freedom of Information Law.

Similarly, it does not appear that "the plan" or the committee designated to administer "the plan" "conduct public business" or "perform a governmental function". As such, it is not likely that the plan or the committee are subject to the Open Meetings Law.

Finally, I contacted Counsel's Office for the Insurance Department in regard to this issue. The Deputy General Counsel concurred fully with the opinion that neither "the plan" nor the committee are subject to the Freedom of Information Law or the Open Meetings Law. He did indicate, however, that the insurers participating in "the plan" are required by law to file certain records with the Insurance Department. Since the department is an "agency", in my view, its records are subject to the Freedom of Information Law. Thus, you may make a request under the Freedom of Information Law for those records you seek which are maintained by the Insurance Department. You should direct your request to: New York State Department of Insurance, Office of General Counsel, Agency Building 1, Empire State Plaza, Albany, New York 12257, Attention: Robert A. Ginnelly, Records Access Officer.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

cc: Paul Altruda, Deputy General Counsel

STATE OF NEW YORK
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1334

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 7, 1986

Mr. Russell Olwell
[redacted]

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

Dear Mr. Olwell:

I have received your letter of September 19, which reached this office on September 30.

You indicated that you live in the Sachem School District and that you attend meetings of the Board of Education. According to your letter, "The meetings are scheduled for 8 pm, but the board members arrive before 7:30 to discuss public business in a back room". At 8 p.m., "they emerge and vote on the items on the agenda without discussion or explanation". You added that, "When they run out of items on the agenda, they call the 'meeting' into Executive Session". Further, when you asked a question concerning the procedure for entry into executive session, you indicated that "the Board President replied that they only go into executive session to discuss personnel matters".

Your question is whether "the meeting before the meeting is a violation" of the Open Meetings Law. In this regard, I offer the following comments.

First, it is emphasized that the definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I would like to point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "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" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal", stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the clear direction given by the courts, I believe that a "pre-meeting" gathering held to discuss public business is itself a "meeting" subject to the requirements of 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(1) of the Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 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 section 104(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is reiterated that notice must be provided prior to all meetings, regardless of whether the meetings are considered formal or otherwise. In the context of your letter, if the members intend to meet at 7:30, for example, I believe that notice must be given to that effect.

Third, with respect to other comments that you made, it is noted that the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, 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..."

In view of the foregoing, it is clear in my view that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting during which the public may be excluded. It is also clear that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss a subject listed in the Open Meetings Law as appropriate for discussion behind closed doors.

Lastly, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session, or "personnel matters", for example, without more, fails to comply with the Law. For instance, in a decision containing a discussion of minutes that referred to various bases for entry into executive session, it was found 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 section 100[1].

"With respect to 'personnel', Public Officers Law section 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, Sup. Ct.,

Chemung Cty., Oct. 20, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983).

In view of the foregoing, it has been advised that a motion to enter into executive session to discuss "personnel", or "personnel matters", without additional description, is inadequate. Where section 105(1)(f) may be asserted, I believe that motion for entry into an executive session should contain two components, inclusion of the term "particular", and reference to one or more of the topics appearing in that provision. For instance a motion to discuss "the employment history of a particular person" (without identifying the person) would be proper; a citation of "personnel" would not in my view be sufficient to comply with the statute.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be sent to the Sachem 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: Sachem School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1335

162 WASHINGTON AVE., ALBANY, NEW YORK, 12231
(518) 474-2518, 279

October 20, 1986

Ms. Ruth Silverman
Marbletown Residents Association, Inc.
Box 353
High Falls, New York 12440

<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 and attachments.</u>

Dear Ms. Silverman :

I have received your letter of October 1, as well as the attached newspaper article, in which you requested assistance under the Open Meetings Law in your capacity as secretary of the Marbletown Residents Association, Inc. (the association).

Specifically, members of the association believe that the officials of the Town of Ulster have been holding closed meetings in violation of the Open Meetings Law. According to the referenced article from the September 28 issue of the <u>Sunday Freeman</u>, the current budget for the Town of Ulster was developed by the Town Board during executive sessions held in violation of the Open Meetings Law. Further, the article indicates that Town Supervisor, Charles G. Rider, has advised the Board that private budget meetings will be called to discuss next year's budget, including personnel related matters, budget proposals for the highway and police departments and the general budget. In this regard, I offer the following comments.

First, the Open Meetings Law pertains to 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, a town board such as the Ulster Town Board is clearly a "public body" and as such is subject to the Open Meetings Law.

Second, in a landmark decision rendered in 1978 by the Court of Appeals, 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 Meeting 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 45NY2d 947 (1978)]. In my view, gatherings of a quorum of the members of a town board for the purpose of discussing budgetary matters are clearly meetings subject to the Open Meetings Law.

Third, section 103 of the Open Meetings Law states that

> "Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred of this article."

Thus, I believe that gatherings attended by a quorum of the town board for the purpose of discussing the town budget should be held open to the public except to the extent that any of the grounds for executive session are applicable.

Fourth, section 105 of the Law sets forth the procedural requirements for entering into an executive session and specifically enumerates the purposes for which an executive session may be conducted. The statute indicates that 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 and the motion must be carried by a majority vote of the total membership of the public body. Further, section 105 specifies and limits the topics that may be considered during an executive session.

It is noted that according to the newspaper article the Open Meetings Law permits closed meetings only for personnel and legal matters, however, there are actually eight grounds for conducting an executive session set forth in section 105(1)(a) through (h) as follows:

"a. matters which will imperil the public safety if disclosed;
b. any matter which may disclose the identity of a law enforcement agent or informer;
c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
d. discussion regarding proposed, pending, or current litigation;
e. collective negotiations pursuant to article fourteen of the civil service law;
f. 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;
g. the preparation, grading or administration of examinations; and
h. 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."

Fifth, unless the procedure for entry into an executive session is followed, and unless the subject matter to be discussed falls within the scope of one or more of the grounds for entry into an executive session, I do not believe that a public body may properly convene an executive session.

In my view, it does not appear likely that discussions of budgetary matters such as those described in the newspaper article would fall under any of the grounds for entry into an executive session. Although the article states that one of the topics for discussion in the proposed closed meetings is spending items for personnel, a general discussion of moneys allotted for personnel salaries and general personnel related matters would not, in my view, qualify for discussion during an executive session. Under section 105(1)(f), an executive session may be convened to discuss specific types of "personnel-related" matters. However, the topics provided for in section 105(1)(f) clearly do not, in my opinion, include budgetary matters, matters of policy, as opposed to situations involving a "particular person". In sum, I believe it is improbable that the Town Board could properly go into executive session to discuss budgetary matters.

Sixth, for your use and information, I am enclosing a copy of "Your Right to Know", a pamphlet which describes the Freedom of Information Law and the Open Meeting Law.

Finally, in an effort to enhance compliance with the Law, I am sending a copy of this letter and the pamphlet to Mr. Charles G. Rider, Town Supervisor of the town of Ulster. It is my hope that he will share this information with the other town board members.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc

cc: Hon. Charles G. Rider, Town Supervisor of Ulster

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-
OML-AO-1336

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 1223
(518) 474-2518, 27

October 21, 1986

Mr. Joseph DiBenedetto
Cole & Dietz
175 Water Street
New York, NY 10038-4924

The staff of the Committee 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. DiBenedetto:

I have received your letter of September 30 and attachments in which you requested an advisory opinion from this office.

According to your letter, Mr. Jay Boyle, a client of Cole & Dietz, Attorneys at Law, made a request to the Town of Smithtown under the Freedom of Information Law for certain records. The records requested include the minutes or tapes of executive sessions of the Town Board held in connection with Town Board meetings of August 26, September 2 and September 9. Further, you indicate that Sandra Berman, Town Attorney for the Town of Smithtown, denied the request on the ground that "existing case law in the State of New York...has excluded minutes of an executive session from disclosure under the Freedom of Information Law". In this regard, I offer the following comments.

First, I direct your attention to section 106 of the Open Meetings Law concerning minutes. The cited provision states:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Second, section 106(3) requires that minutes of an executive session be made available to the public within one week from the date of the executive session in accordance with the Freedom of Information Law. I would point out, too, that the summary of any final determination required to be included in the minutes "need not include any matter, which is not required to be made public by the Freedom of Information Law" [see section 106(2)]. Stated differently, even though a public body might take final action during an executive session, information that would be deniable under the Freedom of Information Law need not be made available as part of the minutes of the executive session. Further, if no action is taken during an executive session, minutes in my opinion need not be prepared.

Third, in brief, the Freedom of Information Law requires that all records be made available, except to the extent that records or portions of records fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. As a consequence, there may be situations in which some aspects of minutes of an executive session might justifiably be deleted, if those deletions represent information that falls within one or more of the grounds for denial. Since you have not provided any facts concerning the contents of the requested minutes, I cannot comment as to whether or to what extent any of the grounds for denial might apply to them.

Fourth, I spoke with Sandra Berman about the denial of your request. Specifically, I questioned the "existing case law" which she contends provides for denial of access to minutes of executive session, generally. Ms. Berman advised me that the case to which she referred is Matter of Gabriel v. Turner, 50 AD

2d 889, 377 NYS 2d 527 (1975). The case was decided prior to certain major amendments to the Freedom of Information Law which became effective in January, 1978 and which greatly broadened the availability of records under the Law. Additionally, the case was decided prior to the enactment of the Open Meetings Law, including its requirements regarding minutes of executive sessions. Thus, in light of the changes in the law, the case cited clearly does not, in my view, retain any precedential value relative to this matter. In sum, it is my opinion that minutes of executive sessions are available under the Freedom of Information Law except to the extent that the minutes, or portions of them, fall under any of the grounds for denial in section 87(2)(a) through (i).

Lastly, Ms. Berman indicated that there are no tape recordings of the executive sessions in question.

In an effort to enhance compliance with the Law, a copy of this advisory opinion is being sent to the Smithtown Town Attorney's Office.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

cc: Sandra Berman, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1337

162 WASHINGTON AVENUE ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

October 21, 1986

Ms. Pat Woytowich
[redacted]

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

I have received your letter of October 2, which pertains to compliance with the Open Meetings Law by the Board of Education of the Richfield Springs Central School District.

According to your letter, the Board of Education often enters into executive sessions for "vague reasons" and returns to public sessions to vote with little public discussion. Some of the issues discussed during executive sessions apparently involved such matters as a class field trip, tax warrants, a grant study, ice cream and milk bids, among other issues.

In this regard, I offer the the following comments.

First, it is emphasized that the definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I would like to point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "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" (60 AD 2d 409, 415).

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 Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 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 section 104(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is reiterated that notice must be provided prior to all meetings, regardless of whether the meetings are considered formal or otherwise. In the context of your letter, if the members intend to meet at 7:30, for example, I believe that notice must be given to that effect.

Third, it is noted that the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, 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..."

In view of the foregoing, it is clear in my view that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting during which the public may be excluded. It is also clear that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss a subject listed in the Open Meetings Law as appropriate for discussion behind closed doors.

Most of the issues that you described in your letter should, in my opinion, have been discussed in public, for none of the grounds for entry into an executive session would have applied.

Lastly, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session, without more, fails to comply with the Law. For instance, in a decision containing a discussion of minutes that referred to various bases for entry into executive session, it was found 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 section 100[1].

> "With respect to 'personnel', Public Officers Law section 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, Sup. Ct., Chemung Cty., Oct. 20, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

In view of the foregoing, it has been advised that a motion to enter into executive session to discuss "personnel", or "personnel matters", without additional description, is inadequate. Where section 105(1)(f) may be asserted, I believe that motion for entry into an executive session should contain two components, inclusion of the term "particular", and reference to one or more of the topics appearing in that provision. For instance a motion to discuss "the employment history of a particular person" (without identifying the person) would be proper; a citation of "personnel" would not in my view be sufficient to comply with the statute.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Richfield Springs Central School District Board of Education
Mr. Bell, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1338

162 WASHINGTON AVENUE ALBANY, NEW YORK 12231
(518) 474-2518, 279-

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 22, 1986

Mr. Mark L. Behan
Managing Editor
Lawrence and Cooper Streets
P.O. Box 2023
Glens Falls, NY 12801-0109

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

Dear Mr. Behan:

I have received your letter of October 6 in which you requested an advisory opinion under the Open Meetings Law.

Attached to your letter are several news articles describing executive sessions or gatherings held outside of public view by members of the Glens Falls Common Council. You referred specifically to an article concerning a gathering held on October 4 which involved negotiations with the Glens Falls Tigers baseball team. The article indicates that the Code of the City of Glens Falls provides that a quorum of the Council is a majority of its membership, and that the Mayor is considered a member of the Common Council. Although three Councilmen and the Mayor attended, no notice of the gathering was given, and it was contended that the Open Meetings Law did not apply because the Councilmen attended as "observers". The article also indicates that I advised that the gathering was held in violation of the Open Meetings Law, and that the Mayor, in response said "If we violated the law, we violated the law...But we did it (held the meeting), and we got results."

Other news articles allude to executive sessions that might have involved matters of "pending litigation" or "personnel matters".

In this regard, I offer the following comments.

First, it is emphasized that the definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I would like to point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "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" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal", stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule'

> (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if the Mayor and three other members of the Council met to engage in negotiations, in their capacities as Council members, it would appear that a quorum convened to conduct public business. If that was so, the gathering, in my opinion, would have constituted a "meeting" subject to 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(1) of the Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 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 section 104(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is reiterated that notice must be provided prior to all meetings, regardless of whether the meetings are considered formal or otherwise.

Third, it is noted that the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, 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..."

In view of the foregoing, it is clear in my view that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting during which the public may be excluded. It is also clear that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss a subject listed in the Open Meetings Law as appropriate for discussion behind closed doors.

Further, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session, or "personnel matters" or "pending litigation", for example, without more, fails to comply with the Law. For instance, in a decision containing a discussion of minutes that referred to various bases for entry into executive session, it was found 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 section 100[1].
>
> "With respect to 'personnel', Public Officers Law section 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, Sup. Ct., Chemung Cty., Oct. 20, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

In view of the foregoing, it has been advised that a motion to enter into executive session to discuss "personnel", or "personnel matters", without additional description, is inadequate. Where section 105(1)(f) may be asserted, I believe that motion for entry into an executive session should contain two components, inclusion of the term "particular", and reference to one or more of the topics appearing in that provision. For instance, a motion to discuss "the employment history of a particular person" (without identifying the person) would be proper; a citation of "personnel" would not in my view be sufficient to comply with the statute.

With respect to "litigation", section 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 that the purpose of the "litigation" exception for executive session "is to enable a public body to discuss pending litigation privately, without hearing its strategy to its adversary through mandatory public meetings" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (9183); also Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Board, 83 Ad 2d 612, 613, appeal dismissed, 54 NY 2d 957 (1981)].

Moreover, with respect to the nature of a motion to enter into executive session pursuant to section 105(1)(d), it has been determined 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 Cobleskill, 444 NYS 2d 44, 46 (1981)].

Lastly, I point out that the "personnel" exception, section 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 any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

It is unclear on the basis of the articles the extent to which the discussions might have focused on a "particular person" in conjunction with the issues described in the provision quoted above.

Further, I point out that not all "negotiations" may be discussed or considered during executive sessions. The provision that deals specifically with negotiations, section 105(1)(e), permits a public body to enter into an executive session regarding "collective negotiations pursuant to article fourteen of the civil service law", which is commonly known as the "Taylor Law", and which deals with the relationship between a public employer (i.e., a city) and a public employee union.

As you requested, copies of this opinion will be sent to Mayor O'Keefe, City Attorney Newell, Councilman McCarthy and the City Clerk.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Hon. Francis X. O'Keefe, Mayor
Hon. Robert McCarthy, Councilman
Ronald Newell, City Attorney
City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1339

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

November 3, 1986

Mrs. Fran Hohenberger, President
Parent Teacher Co-Ordinating Council
Connetquot Central School District
of Islip
780 Ocean Avenue
Bohemia, NY 11716

The staff of the Committee on 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. Bohenberger:

I have received your letter of October 13 in which you requested information regarding the Open Meetings Law in your capacity as president of the Parent Teacher Co-Ordinating Council.

Specifically, you are seeking guidance concerning "the responsibilities of (your) Board of Education in holding private and/or open meetings". In this regard, I offer the following comments.

First, the Open Meetings Law, section 103(a), states that:

> "Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred of this article."

Second, section 102(2) defines "public body" as:

> "...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."

According to section 41 of the General Construction Law a "quorum" means a simple majority of the total membership of the public body. A board of education is clearly, in my view, a "public body" and, as such, is subject to the Open Meetings Law whenever a quorum of the board is present for the purpose of discussing public business.

Third, section 102(1) defines "meeting" as " the official convening of a public body for the purpose of conducting public business".

In Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh (60 AD2d 409), the Appellate Division rendered its unanimous, landmark decision, later unanimously affirmed by the Court of Appeals [45 NY2d 947 (1978)] which interpreted the term "meeting" broadly. In its discussion, the Appellate Division stated:

> "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 records ...There would be no need for this law if this was all the Legislature intended... It is the entire decision making process that the Legislature intended to affect by the enactment of this Statute" (60 AD2d 409, 414-415).

The court went on to state:

> "In further support of the fact that the Open Meetings Law was intended to apply to all discussions of a public body of matters pending before it, we need only look to the provisions made for executive sessions...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" (id. at 417).

In my view, the decisions of the Appellate Division and the Court of Appeals indicate that whenever a quorum of a public body convenes to discuss public business, the gathering 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 the gathering is characterized (i.e. workshops, work sessions, etc.).

Fourth, section 105 of the Law sets forth the procedural requirements for entering into an executive session and specifically enumerates the purposes for which an executive session may be conducted. The statute indicates that 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, and the motion must be carried by a majority vote of the total membership of the public body. Further, section 105 specifies and limits the topics that may be considered during an executive session [subdivisions (a) through (h) of section 105(1)].

I note that it has been advised that a general reference to one or more of the subjects of section 105(1) in a motion to enter into executive session is not a sufficiently specific indication of the topic or topics to be discussed in an executive session. Some additional degree of specificity is, in my view, required. For instance, if the actual subject matter for discussion at the proposed executive session is the possible hiring of a teacher in the local high school, a recitation of paragraph (f) of section 105 (1) would, in my opinion, be insufficient. A statement in the motion that the subject matter for discussion is a matter leading to the employment of a particular person, or the employment history of a particular person (without identifying that person) would likely proper.

Fifth, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meeting 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 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 7AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157 aff'd 58 NY 626 (1982)].

Sixth, the Open Meetings Law also contains additional provisions which apply to meetings held by a public body such as a board of education, including notice requirements and additional requirements regarding minutes. For your further information, I am enclosing two copies of the Open Meetings Law and "Your Right to Know", a pamphlet which describes 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

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-
OML-AO-1340

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

November 5, 1986

Mrs. Sharon F. Waagner
[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. Waagner:

I have received your letter of October 23, as well as a news article attached to it, which describe a series of difficulties in obtaining information from the Town of Long Lake.

The first two paragraphs of the article state that:

> "Town Supervisor Morrison J. Hosley, Jr. recently refused to reveal projected costs to the public at a hearing on the proposed 1987 Long Lake budget.
>
> "In an apparent disregard for the New York State Open Meetings Law, Hosley claimed he was not allowed to give out preliminary figures. No figures were presented either verbally or in printed form."

Later in the article, it was written that:

> "Prior to this meeting, it was learned the two councilman were opposing the supervisor's salary increase. Bissell explained that a meeting had taken place where Hosley proposed the increase and received the support of Bird and Gagnier.

> "Because the press had not been aware of this meeting, Hosley was contacted for comment. He would only say it was a committee meeting and that he received what he requested. Bissell and Emerson, at that time, said it was likely that copies of the proposed budget would be made available at the public hearing."

In this regard, I offer the following comments.

First, although the Freedom of Information and Open Meetings Laws are generally relevant to rights of access to records of the Town and meetings of the Town Board, it appears that other provisions of law may be relevant to issues surrounding the adoption of the budget. Specifically, enclosed are copies of sections 105 through 109 of the Town Law. In brief, those statutes set forth the requirements concerning the preparation, form, and content of a town budget. They also provide direction concerning public disclosure of materials prior to the adoption of a budget by a town board. With respect to the difficulties that you encountered, section 108 requires that a town board shall hold a public hearing on the preliminary budget and directs that:

> "The notice of hearing shall state the time when and the place where the public hearing will be held, the purpose thereof and that a copy of the preliminary budget is available at the office of the town clerk where it may be inspected by any interested person during office hours. Such notice shall also specify the proposed salaries of each member of the town board, an elected town clerk and an elected town superintendent of highways."

Therefore, although the article indicated that the Town Supervisor "said he was not allowed to release any figures until the budget was approved", I believe that he was not only allowed to release them, but that the figures would be available under both the Town Law and the Freedom of Information Law.

Second, I point out that, in terms of the Freedom of Information Law, the "figures" could be characterized as "intra-agency material" [see Freedom of Information Law, section 87(2)(g)]. However, intra-agency materials consisting of "statistical or factual tabulations or data" are accessible [see section 87(2)(g)(i)]. Further, it has been held that numbers prepared in the budget process, even though they may be estimates

that are not reflective of "objective reality" constitute statistical tabulations that are available under the Freedom of Information Law [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

Third, it appears that a meeting was held to discuss issues involving the budget in private, and that the justification for holding the meeting without public notice was that it was a "committee meeting". It also appears that a majority of the Town Board, or perhaps its entire membership, attended the meeting.

Here I point out that the Open Meetings Law is applicable to meetings of public bodies, and that 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, a town board, a governing body, is clearly subject to the Open Meetings Law. In addition, since the definition also refers to a committee or subcommittee of a public body, a committee of the Town Board would, in my opinion, also constitute a "public body" required to comply with the Open Meetings Law.

Section 104 of the Law requires that notice of the time and place of every meeting to be held by a public body, including a committee, must be given prior to a meeting. Further, the courts have interpreted the term "meeting" expansively. 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 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 a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As such, if a majority of the Town Board or committee of a town board seeks to convene to conduct public business, such a gathering in my view is a meeting that falls within the requirements of the Open Meetings Law that must be preceded by notice given in accordance with section 104 of the Law.

As you requested, copies of this opinion will be sent individually to members of the Town Board. In addition, enclosed are a dozen copies of "Your Right to Know", which you may distribute as you see fit to do so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Hon. Morrison J. Hosley, Jr.
Hon. Thomas Bissell
Hon. James Emerson
Hon. Richard Bird
Hon. Venita Gagnier

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AC-1341

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

November 7, 1986

Mr. Charles Barrett
[redacted]

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

Dear Mr. Barrett:

I have received your letter of October 20 and the news articles attached to it.

You wrote and the articles indicate that the Allegany County Legislature has held executive sessions to discuss "budget matters". The articles pertain to discussions of the budget relative to different issues. One apparently involved an executive session held to discuss the impact on the County budget of federal legislation that would reduce funds available to municipalities. The other executive session was held to discuss salaries of County employees.

For the reasons described in the following paragraphs, one of the executive sessions was, in my view, improperly held; the other, depending upon the nature of the discussion, appears to have been appropriate. In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. All meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted 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)]. It is

noted that the decision dealt with so-called "work sessions" held solely for the purpose of discussion and found that work sessions and similar gatherings are "meetings" that fall within the scope of the Open Meetings Law.

Second, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 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..."

As such, a motion to enter into an executive session must be made during an open meeting. Further, the motion must describe the topic to be considered and be carried by a majority of the total membership of a public body.

Third, in conjunction with the contents of the news articles, most issues involving the preparation of a budget must, in my opinion, be discussed in public, for none of the grounds for entry into an executive session would be applicable. For instance, a discussion of the impact of federal legislation upon a municipal budget likely involves matters of policy relative to the expenditure or allocation of public moneys. I do not believe that any of the grounds for entry into an executive session could be cited to discuss those kinds of considerations.

With respect to the discussion of salaries of County employees, section 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..."

While issues relative to a budget might have an impact upon personnel, those issues often relate to personnel by department or as a group, for example, or the manner in which public moneys may be expended. If 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 v. City of Middletown, the Common Council of the City of Middletown, Sup. Ct., Orange Cty., December 6, 1978; Orange County Publications 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., October 26, 1983.

Further, in conjunction with a consideration of salaries of particular employees, if the discussion involved the salary that should be accorded to a position, rather than the person who holds the position, I do not believe that an executive session would be proper. For example, in a discussion of the salary for the position of sheriff, if comparisons were made with the salaries of sheriffs in counties of similar size, the focus would be on the position, not the performance of the person in that position. Similarly, if the discussion involved an across the board increase for non-union employees, it would have dealt with a group of employees, not any "particular person". In such a case, I do not believe that an executive session could be justified. On the other hand, if the discussion focused upon a "particular person" and how well or poorly that person was performing his or her duties, an executive session could, in my opinion, have been held to that extent pursuant to section 105(1)(f).

Enclosed for your consideration are copies of the Open Meetings Law and an explanatory pamphlet that must 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
Enc.
cc: Chairman, Allegany County Legislature

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1342

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

November 10, 1986

Mr. Hugo V. De Ciutiis
[redacted]

The staff of the Committee on Open Government is authorized to issue to 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 October 24 in which you suggested that this office "reprimand" the Board of Education of the Westbury School District concerning activities that occurred at a recent meeting of the Board.

According to your letter, the Board has long had a policy of setting aside a "public to be heard" session during its meetings. At the meeting in question, the Board President, Mr. Sumner P. Spivack, set aside one hour for the public to speak. When the public began to criticize the Board's proposed procedure for selecting a new superintendent, although "less than a third of the allotted time had passed", you indicated that "Mr. Spivack, without polling fellow trustees, not only refused to allow further speakers to be heard, but literally walked out - taking his trustees with him." You characterized the incident as "a blatant and rude defiance of the open meetings law".

In this regard, I offer the following comments.

It is emphasized at the outset that the Open Meetings Law gives the public the right to attend and listen to the discussions and deliberations of public bodies. However, the Law is silent with respect to the issue of public participation. Consequently, it has been advised that the Open Meetings Law does not confer a right on the part of the public to speak or otherwise participate at open meetings of public bodies. Therefore, if a public body does not want the public to speak, there is no requirement, in my view, that it must permit public participation. However, it has also been advised that, if a public body determines to permit public participation, it may do so based upon reasonable rules that treat members of the public equally.

Therefore, if there was a violation, I do not believe that it would have involved the Open Meetings Law, but rather the Board's compliance with its own policy or rules.

From my perspective, the only issue arising under the Open Meetings Law pertained to the President's action, without benefit of a motion or vote by the Board, to stop public participation and leave the meeting. However, that issue might be addressed in a statement of the Board's policy or its rules. As such, without additional knowledge of the Board's policy or rules, it is questionable whether, in a technical sense, the facts as you described them, pertain to compliance with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Sumner P. Spivack, President, Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-
OML-AO-1343

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

November 10, 1986

Ms. Sandra Fonda-Reccio
Mr. Robert Galinsky
The Rainbow Alliance
P.O. Box 1253
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.

Dear Ms. Fonda-Reccio and Mr. Galinsky:

I have received your letter of October 28, as well as the materials attached to it. You have raised a series of issues pertaining to the Freedom of Information and Open Meetings Laws.

The first pertains to fees for copies. According to the materials, the City of Johnstown has charged five dollars per copy in response to your requests for particular maps. In this regard, as you are aware, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy, up to nine by fourteen inches, or the actual cost of reproducing any other record, unless a different fee is prescribed by statute. As such, if the maps in question are not larger than nine by fourteen inches, I believe that you may be charged a fee of up to twenty-five cents per photocopy. If the maps are larger or cannot be photocopied by means of conventional methods, the City may base its fees upon the actual cost of reproduction. The regulations promulgated by the Committee, which have the force and effect of law, state that fees for copies of records in excess of nine by fourteen inches or which cannot be photocopied "shall not exceed the actual reproduction cost which is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries" [21 NYCRR section 1401.8(c)(3)]. Therefore, unless the actual cost of reproducing the maps is indeed five dollars, it appears that you should have been charged a lesser fee. This is not to suggest that the fee cannot exceed twenty-five cents per photocopy, but rather that, if the maps are larger than nine by fourteen inches, the City may charge based upon its actual cost of reproduction.

In a related vein, in your letter of September 12 addressed to the Common Council in which the issue of fees was raised, you indicated that the City Engineer "has surveying/engineering maps for his private business copied on the machine in the City Engineer's office". You requested copies of receipts indicating the fee that he paid for copies of maps "made for his private business". From my perspective, assuming that such receipts exist, I believe that they are available, for none of the grounds for denial appearing in the Freedom of Information Law could in my view justifiably be asserted.

In addition, it appears that you received no response to that request. Here I point out 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)].

You also alluded to a "work session" of the Common Council and minutes of meetings. Although apparently you or a representative of the Alliance spoke at a particular meeting, no reference to your comments is included in the minutes. In this regard, the following points are offered.

First, the Open Meetings Law, based upon case law, is applicable to so-called "work sessions" to the same extent as "formal" meetings. In a landmark decision rendered by the Court of Appeals in 1978, it was held that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action and irrespective of the manner in which such a gathering might be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. It is noted that the decision dealt specifically with "work sessions" held solely for the purposes of discussion and without an intent to take action. Therefore, a "work session" is in my opinion a "meeting" subject to the requirements of the Open Meetings Law, including any requirements that might be applicable relative to the preparation of minutes.

Second, it is noted that the Open Meetings Law contains what might be considered as minimum requirements concerning the contents of minutes. Section 106(1), which pertains to 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."

Based upon the language quoted above, it is clear in my opinion that minutes need not consist of a verbatim account of what might have been said at a meeting. Further, the minutes need not necessarily include reference to comments made during a course of a meeting.

I point out, too, that section 106(2) indicates that minutes of executive sessions are required to be prepared only when action is taken during an executive session. If a public body engages only in a discussion during an executive session, but takes no action, there is no requirement that minutes be prepared.

Lastly, the materials attached to your letter indicate that the Mayor of the City of Johnstown directed a request to the Alliance under the Freedom of Information Law. I agree with your response in which you suggested that the Freedom of Information

Law is not applicable to the Rainbow Alliance. The Freedom of Information Law applies to records of an "agency", a term defined in section 86(3) to mean:

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

As such, as a general matter, the Freedom of Information Law pertains to records maintained by entities of state and local government; it does not generally apply to records of a citizens group, such as the Rainbow Alliance.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor Donald Murphy
Robert Subik, Esq.
Peter Henner, Esq.
The Schenectady Gazette
The Leader Herald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1344

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

November 10, 1986

Mr. Kenneth W. Kahl
Councilman
Town of Annsville
9845 Coal Hill Road
Taberg, New York 13471

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

Dear Mr. Kahl:

It was a pleasure to meet you on October 20. I have received your letter of that date, which for reasons unknown, did not reach this office until October 28.

You described a series of meetings held by the Annsville Town Board, several of which were held without public notice. For example, a "reorganizational meeting" during which a variety of actions occurred was apparently held without notice; a meeting scheduled for 8 p.m. was rescheduled without public notice; joint meetings conducted by the Annsville Town Board with another town board were held without notice; a work session was "announced" but no notice was given. In addition, executive sessions have been held without the presence of the Town Clerk. You added that it appears that the Town Supervisor "considers an announcement during a regularly scheduled Town Board Meeting, or other meetings of a quorum of the Town Board, as sufficient formal notification to citizens, of a special unscheduled meeting".

You have asked for a clarification of these issues and, in this regard, I offer the following comments.

First, it is important to note that the Open Meetings Law applies to all meetings of a public body, and 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, affirmed an Appellate Division decision 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 a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978(]. I point out that the decision specifically referred to so-called "work sessions", "organizational" meetings and similar gatherings. In addition, it has been held that joint meetings attended by a quorum of two or more public bodies are "meetings" subject to the Open Meetings Law [see Oneonta Star Division of Ottoway Newspapers, Inc. v. Board of Trustees of Oneonta School District, 66 AD 2d 51].

Second, every meeting must be preceded by notice given in accordance with section 104 of the Open Meetings Law. It is emphasized that an announcement at a meeting of an upcoming meeting is inadequate. Section 104 provides 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."

Stated differently, 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 public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene the Board quickly, the notice requirements can be met by telephoning the local news media and by posting in one or more designated locations.

Third, with respect to the presence or absence of the Town Clerk for the purpose of taking minutes, section 106 of the Open Meetings Law pertains to minutes and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear that minutes need not consist of a verbatim transcript of the entire discussion at a meeting, but rather only "a record or summary" of "motions, proposals, resolutions and any other matter formally voted upon..." Therefore, if a public body merely discusses public business at a "work session", but does not engage in the making of "motions, proposals, resolutions" or voting, presumably the minutes need not reflect the nature of the discussion. Further, minutes of executive sessions are required to be prepared only when action is taken during an executive session. If the Board discusses an issue during an executive session, but takes no action, there is no requirement that minutes of the executive session be prepared.

One problem as I see it involves the interpretation of the Open Meetings Law in conjunction with section 30 of the Town Law, which in subdivision (1) states in relevant part that the town clerk:

> "Shall 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, it might not be reasonable to construe section 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, the drafters of section 30 could not likely have envisioned the existence of an extensive Open Meetings Law analogous to the statute now in effect. On the contrary, I believe that section 30 was likely intended to require the presence of a clerk to take minutes in situations in which motions and resolutions are introduced and in which votes are taken. If that is not the case with respect to work sessions and similar gatherings, it is in my view unnecessary that a town clerk be present to take minutes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Annsville

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1345

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

November 11, 1986

Mr. Wayne R. Robbins
Letchworth Central Teachers
Association
Letchworth Central School
Gainesville, New York 14066

The staff of the Committee 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. Robbins:

I have received your letter of October 17, with attachments, in which you requested the advice of this office.

According to your letter, the Letchworth Central School Board of Education placed an advertisement in local circulars listing coaching vacancies and the salaries for each position. Due to "a general uproar in the school and the community" the Board sent letters to faculty, staff and the community stating that the decision to advertise was made "unanimously by the Board" at its September 8 meeting. You have enclosed copies of the letter and the minutes of that meeting. As you point out, it does not appear that the minutes contain any reference to such a decision. You pose a number of questions related to the issue. In this regard I offer the following comments.

It is noted at the outset that the Committee on Open Government is authorized to render advisory opinions under the Open Meetings Law and the Freedom of Information Law. Several of the questions you ask are outside the scope of authority and expertise of this office.

You ask first what constitutes a "vote" in a meeting. The Open Meetings Law does not directly address the issue. However, the Second College Edition of Webster's New World Dictionary of the American Language offers the following definition for the word vote: "a decision by a group on a proposal, resolution,

bill, etc. or a choice between candidates for office, expressed by written ballot, voice, show of hands, etc." From my perspective, the definition likely describes what is intended by the word "vote" as used in the Open Meetings Law.

As to whether "unanimous agreement" is possible without a show of hands or the voicing of ayes or nays, in my opinion, common sense dictates that the only way to determine the position of each member of a body on an issue or the body as a whole is by taking a count, whether by "written ballot, voice, show of hands..." or some other similar method. Further, I believe that action taken or relied upon by a board generally indicates that a "vote", an expression of agreement by the majority, was taken.

Your next question is whether "unanimous agreement" has to appear in the minutes of the meeting. The issue is, I believe, whether the "unanimous agreement" of the Board of Education to place the advertisement of coaching vacancies in local publications constituted a "vote" for purposes of the Open Meetings Law. As you may know, section 106(1) and (2) of the Open Meetings Law requires that minutes be taken regarding any matter voted upon as follows:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a records 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."

In a related question you ask whether the placing of the advertisement is an expenditure of public monies requiring a vote.

As indicated above, it is my impression that the "unanimous agreement" described by the board likely was a vote within the meaning of that term under the Open Meetings Law. Assuming that there was a vote, section 106 requires that the vote, an indication of action taken, be recorded in the minutes.

Second, you ask whether, since the minutes do not refer to the decision, you can assume that the discussion leading to the "unanimous agreement" took place during executive session.

This office has consistently advised that under the Open Meetings Law, minutes are required to contain reference, at a minimum, to those activities (i.e., motion, proposals, resolutions and action taken) specified in section 106(1) and (2). Since matters voted upon in open session or in executive session are required to be reported, and since the details of a discussion are not required to be recorded in minutes, it does not appear that your assumption is necessarily accurate.

Third, you state that you have not been able to obtain documents specifically designated as "Minutes of the Executive Session". You ask: "Are we to assume that votes and decisions recorded in the regular minutes immediately following the return to the open meeting are the minutes of the executive session? If not, are specific minutes of the executive session to be kept and be available to the general public?"

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). It is noted that under section 106(3) of the Open Meetings Law minutes of both open meetings and executive sessions are available in accordance with the Freedom of Information Law. 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 (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 7AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2s 157 aff'd 58 NY 626 (1982)]. Therefore, if a school board cannot vote during an executive session, minutes of an executive session need not be prepared.

Fourth, you ask "Is it correct to assume that the law was broken under Article 7, Section 105(f), because the Board chose to discuss matters in Executive Session which led to multiple appointments rather than the appointment of a particular individual?" In my view, the Law does not prohibit a public body from discussing more than one appointment during an executive session as long as a notion for entry into an executive session so states. For instance, if the actual subject matter for discussion at the proposed executive session is the possible hiring of a full-time cleaner, a senior auto repairman and a bus driver, a recitation of paragraph (f) of section 105(1) or a statement

that the topic is "personnel matters" is, in my view, which is based on judicial decisions insufficient. A statement in the motion that the topics for discussion are matters leading to the employment of three particular persons or the employment history of three particular individuals (without identifying the individuals) would likely be proper [see Matter of Doolitle v. Board of Education, Sup. Ct., Chemung County, July 21, 1981; Daily Gazette v. Town Board, Town of Cobleskill, 444 NYS 2d 44 (1981)].

Fifth, you ask whether there are any grounds for "pursuing legal action in this matter". Section 107 of the Open Meetings Law states that an aggrieved person may commence an article 78 proceeding against a public body for a violation of the Open Meetings Law.

For your further information, I am enclosing copies of the Open Meetings Law and "Your Right to Know", a pamphlet which describes 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc

enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1346

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

November 25, 1986

Mr. Arthur L. Mills, Sr.
[redacted]

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

Dear Mr. Mills:

I have received your letter, which is dated October 9, but which did not reach this office until October 31. Please accept my apologies for the delay in response.

Your inquiry focuses upon the Board of Trustees of the Village of Sylvan Beach. Specifically, you wrote that:

> "It is a known fact that the Sylvan Beach Board, including the Mayor, meet several times a week, either at the Village Hall or at local restaurants. Whether decisions are made on municipal government is questionable, but we do know that they have meetings."

In addition, attached to your letter is a news article describing a series of events that led to the hiring of the Mayor's son for a Village position. You wrote that you know of other applicants who "were overlooked but were seemingly qualified".

In this regard, I offer the following comments.

First, as you may be aware, the Open Meetings Law pertains to "meetings" of public bodies. It is important to note that the courts have interpreted the term "meeting" expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the

manner in which a gathering may be characterized [see Orange County Publications, 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 a decision rendered by the Appellate which dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding the court stated:

> "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" (60 AD 2d 409, 415).

With respect to chance meetings, it was noted:

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'" (id. at 416).

In view of the foregoing, if members of a public body meet by chance or for a social gathering, for example, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business. However, if, by design, the members of a public body seek to meet to discuss public business, formally or otherwise, at the Village Hall or in a restaurant, I believe that the gathering of a quorum would trigger the application of the Open Meetings Law, for such gatherings would, in my opinion, constitute "meetings" subject to the Law that must be preceded by notice.

With respect to the legality of the appointment of the Mayor's son, I have neither the expertise nor the jurisdiction to provide advice. It is suggested, however, that you might contact the Office of Municipal Service at the State Department of Civil Service, Civil Service Building, State Campus, Albany, NY 12239. Perhaps a representative of that office could provide appropriate advice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Board of Trustees, Village of Sylvan Beach

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1347

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

December 1, 1986

Ms. Margaret Schumacher
[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. Schumacher:

Your letter of October 28 addressed to the Division of Legal Services has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Open Meetings Law.

As a member of a town board, you requested advice on whether a member of the public has the right to tape record town board meetings and whether there are any "regulations" regarding the tape recording of meetings. In this regard, I offer the following comments.

I point out initially the Open Meetings Law does not specifically address the issue of tape recording meetings. However, there is relevant case law on the question.

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 use 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. 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 Appellate Division, Second Department, affirmed a decision of the Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings 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, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While the board of education has supplied this court with a battery of reasons supporting its positions, its resolution prohibiting the use of tape recorders at its public meetings was far too restrictive, particularly when viewed in light of the legislative scheme embodied in the Open Meetings Law (Public Officers Law art. 7) which

> was enacted and designed to enable members of the public to 'listen to the deliberations and decisions that go into the making of public policy'" (id. at 925).

In view of the recent judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record open meetings of public bodies.

Second, you ask about the legality of tape recording a meeting without prior notice to the public body conducting the meeting. I am not aware of any legal requirement that such notice be given. Thus, in my view, a member of the public may tape record an open meeting without notifying the public body of his/her actions.

Third, you ask whether there are any "regulations" regarding the tape recording of meetings. Again, I am not aware of any statutory authority or regulations regarding the tape recording of meetings, generally. However, the judicial decisions referred to earlier provide direction. From my perspective, the discussions by the courts in both Ystueta and Mitchell, supra, clearly indicate that the use of unobtrusive means is likely the decisive factor as to whether tape recording is permissible in a given situation. As the court stated in Mitchell, "...the unsupervised recording of public comment by portable, hand-held tape recorders is not obtrusive, and will not distract from the true deliberative process of the body" (id.).

Finally, I am enclosing copies of the decision rendered in Mitchell, the Open Meetings Law and "Your Right to Know", a pamphlet which describes the Law (pages 11-15).

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1348

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

December 11, 1986

Ms. Sandra Kissam
[redacted]

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

Dear Ms. Kissam:

I have received your letter of November 3 and the materials attached to it. Please accept my apologies for the delay in response.

Your inquiry concerns action taken by the Newburgh Town Board concerning a delegation of authority to a "subcommittee" of the Town Planning Board. Specifically, the minutes of a meeting held by the Town Board on October 6 state in part that:

> "Motion by Councilman DeCrosta, seconded by Councilman Coyne to empower the Chairman, Vice-Chairman and one other member designated by the Planning Board to review and approve or disapprove minor sub divisions of four lots or less as well as lot line changes. Councilman Kunkel amended motion to include a trial period of six months for this proposal at which time it will be reviewed by the Town Board to determine feasibility of continuance of this procedure. Vote on amended motion was unanimous in favor."

When you questioned the action, the Town Supervisor, according to your letter, indicated that meetings of the newly created subcommittee would not be open to the public. Further, at a later meeting, the Town Attorney offered several reasons for suggesting that the subcommittee is not subject to the Open Meetings Law.

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and the phrase "public body" is defined by section 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."

Clearly, in my opinion, both the Town Board and the Planning Board are "public bodies" that fall within the requirements of the Open Meetings Law. Further, the definition quoted above represents an amended version of the original provision. I point out that the definition refers to entities that "conduct" public business, rather than those that "transact" public business, which was the term used in the original statute enacted in 1976 and amended in 1979. In addition, the original definition of "public body" made no reference to a committee, subcommittee or similar body. In my view, the subcommittee in question, which was designated by the Town Board and which is a component entity of the Planning Board is a "public body" that is subject to the requirements of the Open Meetings Law in all respects.

A review of each aspect of the definition of "public body" leads to the same conclusion. It is an "entity" consisting of at least two members (the minutes indicate that it has three). I believe that it is subject to a quorum requirement pursuant to section 41 of the General Construction Law. That provision states, in brief, that any group of three or more persons or public officers who are designated to carry out a public duty collectively, as a body, may do so only by means of a quorum, an affirmative vote of a majority of its total membership. If the subcommittee consists of three members, its quorum would be two. Further, the subcommittee was designated to conduct public business and perform a governmental function for Planning Board and the Town, which is a public corporation.

While the Town Attorney apparently suggested that the subcommittee is not a public body because it merely makes recommendations, I do not believe that factor would necessarily remove the subcommittee from the requirements of the Open Meetings Law. Moreover, the statement in the minutes authorizing the creation of the subcommittee indicates that the subcommittee has the power to "review and approve or disapprove minor sub divisions...as well as lot line changes.

Second, I am not an expert relative to the Town Law or planning boards. However, it is suggested that you might question the authority to delegate authority to a "subcommittee" in the manner described in the Town Board's action.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Town Board, Town of Newburgh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1349

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

December 24, 1986

Mr. Tim O'Brien
Education Reporter
The Post Journal
P.O. Box 190
Jamestown, NY 14702-0190

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

Dear Mr. O'Brien:

I have received your letter in which you requested an advisory opinion under the Open Meetings Law. Please accept my apologies for the delay in response.

Your inquiry concerns an executive session held by the Jamestown City School District Board of Education. According to your letter, the Board called an executive session "to discuss contract negotiations and personnel". Following the meeting, a discussion with the Director of Pupil Personnel, Dr. Edward Becker, in your view indicated that the executive session dealt with "staffing needs". You added that persons in attendance at the meeting expressed concern "that some 20 students were not receiving proper therapy", and that the Board "discussed possible solutions to the problem" during the executive session. Further, the Board apparently directed Dr. Becker "to continue pursuing such solutions as working with area hospitals, private speech therapists or hiring a certified occupational therapist's assistant".

You have questioned the propriety of the executive session and, in this regard, I offer the following comments.

First, as you may be aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of a public body must be conducted open to the public, except to the extent that a discussion may justifiably be held

during an executive session pursuant to section 105(1) of the Law. Further, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

Second, assuming that the executive session in question involved a discussion of staffing needs as described in your letter, it does not appear that an executive session could properly have been held.

The ground for entry into executive session involving "contract negotiations", section 105(1)(e), pertains to "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law, which is commonly known as the "Taylor Law", deals with the relationship between public employers and public employee organizations. As such, an executive session held under section 105(1)(e) involves a discussion of collective bargaining negotiations between the District and a union, i.e., a teachers' association. On the basis of the facts presented in your letter, an executive session could not, in my opinion, have been held on the basis of "contract negotiations", for that does not appear to have been the subject considered.

The other ground for entry into executive session cited by the Board, the so-called "personnel" exception, permits a public body to close its doors under section 105(1)(f) 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 a discussion focuses upon a "particular person" or persons in conjunction with one or more of the topics contained within the provision. Therefore, if, for example, the discussion involved the kinds of possible solutions described in your letter, the issue would not have involved a "particular person", but rather staffing needs in a program area. If my interpretation of the facts is accurate, I do not believe that an executive session could properly have been held under the "personnel" exception.

The only way that section 105(1)(f) could, under the circumstances, have been justified, in my view, would have involved a discussion dealing with the needs of students whose identities would be divulged. In such a case, the issue might have dealt with the "medical...history of a particular person".

If, however, the issue under discussion pertained to staffing needs, without reference to the needs of particular students, once again, I believe that the discussion should have occurred in public.

Lastly, for future reference, the characterization of the subjects in a motion for entry into an executive session as "contract negotiations" or "personnel" is, according to case law, inadequate. Prior to entry into an executive session, a motion to do so must be made and carried in accordance with the procedure described in section 105(1) of the Open Meetings Law. That provision states in relevant part that:

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

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 section 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].

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 section 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 section 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 section 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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4387
OML-AO-1350

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

December 29, 1986

Mr. Peter A. Stark
[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. Stark:

I have received your letter of November 29. Please accept my apologies for the delay in response.

Your inquiry, as well as your suggestions, were apparently precipitated by a request directed to the Bedford School District. Although the request was made in writing, you were informed that a request was required to be submitted on a form prescribed by the School District. It appears, too, that School District officials believe that they are prohibited from disclosing records unless a formal request is made. As such, you suggested that the Freedom of Information Law should be amended to preclude a public body, such as a school board, from adopting policies or rules more restrictive than the Freedom of Information Law.

In this regard, I offer the following comments.

First, as a general matter, a public body cannot, in my view, unilaterally adopt rules or procedures more restrictive than a statute enacted by the State Legislature, such as the Freedom of Information Law.

Second, by way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Freedom of Information Law. The Committee has done so, and I have enclosed a copy of its regulations (21 NYCRR Part 1401). In turn, section 87(1) of the Law requires that the governing body of a public corporation, in this instance, the Board of Education, adopt rules and regulations consistent with the Freedom of Information Law and the Committee's regulations.

In terms of direction, section 1401.1(d) of the Committee's regulations states that:

> "Any conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of records."

Further, section 1401.5 of the regulations provides in part that:

> "(a) An agency may require that a request be made in writing or may make records available upon oral request.
>
> (b) An agency shall respond to any request reasonably describing the record or records sought within five business days of receipt of the request."

Therefore, the regulations indicate that, while an agency may require that a request be made in writing, it may, nonetheless, respond to a request made orally.

It is also noted that nothing in the Freedom of Information Law or the Committee's regulations refers to a particular form that must be used for the purpose of requesting records. The only statement in the Law regarding the issue involves an agency's authority to require that a request be made in writing and that the request "reasonably describe" the record sought [see attached, Freedom of Information Law, section 89(3)]. Based upon the foregoing, it has consistently been advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for a denial of a request or delay in response to a request. It has concurrently been advised that any written request that reasonably describes the records sought should suffice. In my view, a requirement that a specific form be used can cause unnecessary delays.

It appears that your question concerning the use of a form may have initially arisen when you could not review records discussed or used by the Board at a meeting. It is noted that the situation has arisen often and is the subject of a recommendation offered to the Governor and the Legislature in the Committee's recent annual report. In brief, the Committee recommended that, with certain exceptions, records to be discussed at open meetings must be made available to the public prior to or at the time of the meeting.

You also suggested that section 107 of the Open Meetings Law insofar as it pertains to the award of attorney's fees should be amended in order that government cannot be awarded attorney's fees. While I might agree, I know of no judicial decision brought under the Open Meetings Law in which a public body was awarded attorney's fees payable by a member of the public. However, there are several decisions in which members of the public were awarded attorney's fees payable by a public body.

In addition, the Committee has recommended that the enforceability of the Open Meetings Law be enhanced. The recommendation, if enacted, would give a court greater discretion to invalidate action taken by a public body when the Law has been violated; it would also permit a court to fine members of a public body, individually and without the possibility of indemnification, when the court determines that the Law was flagrantly violated, or where a pattern of violations has been found.

Enclosed for your consideration is a copy of the 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

cc: Board of Education
Mary Lou Meese, Executive Assistant
to the Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4386
OML-AO-1351

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

December 29, 1986

Hon. John L. Alfano
Member of the City Council
Alfano & Alfano, P.C.
550 Mamaroneck Ave.
Harrison, NY 10528

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

Dear Mr. Alfano:

I have received your letter of November 24, which reached this office on December 1. Please accept my apologies for the delay in response.

According to your letter, the City of Rye, which you serve as a member of the City Council, has an "Administrative Pay Plan which establishes pay ranges for various grades of non-union employees of the city government, both management and confidential". You wrote that, for the last several years, the Plan has been discussed in executive session pursuant to section 105(1)(f) of the Open Meetings Law, "since the job titles in each grade make it obvious whose salary is being discussed".

Your questions involve the propriety of conducting such discussions during executive sessions, and "whether all data supporting the Administrative Pay Plan is subject to disclosure under the Freedom of Information Law..."

In this regard, I offer the following comments.

As you are aware, 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."

In my opinion, so-called "personnel" exception for entry into executive session is intended largely to enable a public body to protect the privacy of a "particular person" when a discussion involves one or more of the topics listed in that provision. In the context of your question, the specific nature of a discussion would determine whether or not an executive session could be held. If the discussion involves the salary that should be accorded a position, I do not believe that an executive session could be held. For example, if the issue pertains to the salary of the police chief, and the discussion involves the salaries given to police chiefs in municipalities of a size similar to the City of Rye, clearly the discussion would pertain to the position and the salary that the position merits. Even though there may be but one person in a position, the issue would concern an issue of policy regarding the position, irrespective of who might hold that position. In that situation, there would be no considerations of privacy and, consequently, the discussion in my view should occur during an open meeting. On the other hand, if the issue involves how well or poorly a particular employee carries out his or her duties, there would be privacy considerations, for the issue would focus upon an individual. To that extent, I believe that an executive session could appropriately be held.

With respect to the "supporting data" relative to the Plan, I direct your attention to the Freedom of Information Law. As a general matter, the Freedom of Information Law is based on 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.

It appears that one of the grounds for denial would be particularly relevant. Due to its structure, it would likely grant access to portions of the data or perhaps permit a denial of other aspects of the data. Specifically, section 87(2)(g) provides 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 policy or determinations must be made available. Concurrently, those portions of inter-agency or intra-agency materials reflective of advice, opinion, recommendation and the like could in my view be withheld.

Under the circumstances described, supporting data prepared by the City could be characterized as "intra-agency materials". Public rights of access would be dependent upon the specific contents of the records. For instance, if the data includes information reflective of the salaries or benefits of public employees, those materials would consist of "statistical or factual tabulations or data" accessible under section 87(2)(g)(i). Conversely, if the data includes a subjective evaluation of a particular employee which is essentially an opinion concerning that person's performance, I believe that such a document could be withheld.

In short, with respect to both of the issues that you raised, the answers would be dependent upon the specific nature of a discussion or the specific contents of records in relation to the Open Meetings Law and the Freedom of Information Law respectively.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1352

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

December 30, 1986

Mr. David McKay Wilson
Westchester Rockland Newspapers
Corporate Park II
One Gannett Drive
White Plains, NY 10604

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

Dear Mr. Wilson:

I have received your letter of December 3 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter and the news article attached to it, the Board of the White Plains Urban Renewal Agency on November 10 discussed the possibility of revoking an agreement to sell a parcel of real property to a particular developer. Based upon a tape recording of the meeting, part of which is transcribed in your letter, the Board of the Agency entered into an executive session to discuss the issue because there was "potential for a lawsuit". There was no motion made or carried prior to entry into an executive session. In addition, the news article indicates that the developer "had not threatened to sue the city".

In this regard, I offer the following comments.

First, a motion for entry into an executive session must indicate the topic or topics to be discussed. As stated in section 105(1) of the Law, which in part describes the procedure for entry into executive session:

> "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 reiterated that a motion to enter into an executive session must include, in general terms, reference to the subject to be considered behind closed doors.

Second, the provisions in the Open Meetings Law concerning "litigation" are found in 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:

> "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 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 be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the language quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Further, since "possible" or "potential" litigation could be the result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a "potential" for litigation.

Lastly, with regard to the sufficiency of a motion to discuss "litigation" or "possible litigation", it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an

> executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Urban Renewal Agency
Hon. Alfred DelVecchio, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1353

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

December 30, 1986

Mr. Stanley J. Teich, President
Conference of Ramapo Villages
Village of New Hempstead
Village Hall
8 Old Schoolhouse Road
New City, NY 10956

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

Dear Mayor Teich:

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

Your inquiry pertains to the applicability of the Open Meetings Law. Specifically, according to your letter:

> "The Village Boards of the ten Town of Ramapo Villages have formed an organization which is called the Conference of Ramapo Villages. By resolution of each Board, the Mayor of each Village, or his designated representative, attend meetings of the Conference. Meetings are held monthly at New Hempstead Village Hall."

Your question is:

> "In view of the fact that no quorum of any Village Board is present and no action taken has any legal force or effect, are meetings of the Conference required to be open to the public and to the press?"

In this regard, I offer the following comments.

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 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.

While a village board of trustees clearly is a public body subject to the requirements of the Open Meetings Law, an association of government representatives, such as the organization that you described, likely is not subject to the Law.

Assuming that the Conference represents a forum during which common issues or problems may be discussed or shared, but in which no quorum of any particular public body is present, I do not believe that the Open Meetings Law would apply. It is assumed that the activities of the Conference are in no way binding upon participant villages and that the Conference does not in any way conduct public business collectively, as a body, for any particular village. If that is so, and if the Conference is merely a vehicle for exchanging ideas, I do not believe that it is a public body, or that the Open Meetings Law applies to its meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1354

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

December 30, 1986

Ms. Gaynelle Gutierrez
County of Essex
Office of Real Property Tax Services
Elizabethtown, New York 12932

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

Dear Ms. Gutierrez:

As you are aware, I have received your letter of December 5. Please accept my apologies for the delay in response.

According to your letter, the Chairman of the Essex County Board of Supervisors has appointed a ten member committee, which you chair, to review County employee positions. The composition of the committee includes three members of the Board of Supervisors, two department heads and five "Civil Service Employees".

By way of background, you wrote that:

> "In order to review them individually, each employee was asked to submit a Job Evaluation Questionnaire; at the end of each of these questionnaires was space for comments to be made by direct supervisors and a space for the Department Head to make comments; each statement was also signed."

You added that the "committee's discussion will focus on individuals and their job history and performance to some extent".

It is the desire of the committee to conduct executive sessions to discuss the questionnaires. Your question is whether you must "allow anyone, including a member of the Board of Supervisors, who is not a member of this committee, to attend these executive sessions".

In this regard, I offer the following comments.

First, I believe that the committee in question is a public body subject to the Open Meetings Law. 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."

The committee consists of at least two members. I believe that it must conduct its business by means of a quorum pursuant to section 41 of the General Construction Law, which imposes a quorum requirement or any entity consisting of three or more public officers or persons charged with a public duty to be performed or exercised by them collectively as a body. Further, based upon the facts that you provided, it is clear, in my view, that the Committee conducts public business and performs a governmental function for a a public corporation, in this instance, Essex County.

Second, as a general matter, a public body must conduct its meetings open to the public, except to the extent that an executive session may properly be convened in conjunction with section 105(1) of the Open Meetings Law.

Relevant under the circumstances 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..."

Assuming the committee's discussion involves the employment history of a "particular person", or perhaps a review of the performance of "particular" employees, I believe that section 105(1)(f) could be asserted to conduct an executive session.

With respect to those who may attend executive sessions, section 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 provision quoted above, I believe that only the members of the committee, the public body holding the meeting, have the right to attend an executive session held by the committee. Members of the Board of Supervisors who do not serve on the committee would not, in my opinion, have the right to attend an executive session of the committee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1355

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

December 30, 1986

Ms. Cindy Morrison
ERA C. Morrison Realty, Inc.
179 Montcalm Street
Ticonderoga, NY 12883-0045

The staff of the Committee on Open Government is authorized to issue to 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 November 28. Please accept my apologies for the delay in response.

Your inquiry concerns the propriety of a resolution adopted by the Board of Trustees of the Village of Ticonderoga which limits the public's right to speak at meetings. You expressed concern that the resolution may violate the constitutional right of freedom of speech.

In this regard, I offer the following comments.

First, although the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of a public body, the Law is silent with respect to public participation at meetings. Therefore, I do not believe that a public body is required by the Open Meetings Law to permit the public to speak or otherwise participate at meetings. Conversely, if a public body determines to permit the public to speak, it may due so based upon reasonable rules. Therefore, the question is whether the resolution adopted by the Board represents a reasonable exercise of its authority.

Second, that issue, as well as the issue you raised concerning constitutional rights, are beyond the scope of the jurisdiction or expertise of this office. However, enclosed is a copy of a judicial decision that pertains in part to the issue.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Board of Trustees