STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1450

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

January 13, 1988

Ms. Dorothy Smith
Associate in Library Services
NYS Education Department
New York State Library
Division of Library Development
Albany, New York 12230

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. Smith:

I have received your letter of December 18, which, for reasons unknown, did not reach this office until December 28. Please accept my apologies for the delay in response.

Your question is "whether the meetings of an ad hoc committee appointed by the boards of trustees of the Smithtown Public Library, the Commack Public Library and the Suffolk Cooperative Library System must be open to the public". By way of background, you wrote that:

> "The State Librarian has asked the three boards to name representatives to a joint committee to propose a solution to a service problem that currently exists between the Smithtown and Commack Libraries. The committee's role will be advisory. It will not be able to take any action, only to make recommendations to the three boards of trustees. The meetings of those boards are open and consequently any discussion of or action on the committee's recommendations will be in open sessions. The questions at issue are locally very sensitive and there have been threats of litigation if a satisfactory solution is not found, but no actions have been initiated to date."

In this regard, I offer the following comments.

First, the Open Meetings Law, Article 7 of the Public Officers 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."

Further, section 260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library...shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

In view of the foregoing, it is clear in my opinion that not only would the elected board of trustees of a public library constitute a "public body", but also that a board of a cooperative library system is a public body. As such, each of the entities responsible for appointments to the ad hoc committee is a "public body" subject to the Open Meetings Law.

Second, as indicated earlier, the definition of "public body" includes not only governing bodies, such as the three boards of trustees, but also committees, subcommittees and similar bodies of those boards. Since the joint committee in question would be the creation of those three boards, I believe that it would also constitute a public body subject to the Open Meetings Law.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also

involved a situation in which a governing body, 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 those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body" to its current form. Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies".

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more persons designated or created to serve as a body by a public body, or in this instance, by more than one public body, would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Further, I believe that the same conclusion can be reached by viewing the definition of "public body" in terms of its components.

The committee is an "entity" that would consist of "two or more members". Further, although the action of the governing bodies that created the committee might 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 is being established to advise public bodies. 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, supra; 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 is required to 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 public corporations, such as a town and a school district. 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.

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 to discuss one or more of the topics of discussion described in section 105(1) of the Law.

Every meeting of a public body, including the committee, must be convened open to the public. However, as you may be aware, the Open Meetings Law permits a public body to conduct closed or "executive" sessions to discuss certain topics. Those topics are specified in paragraphs (a) through (h) of section 105(1) of the Law.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1451

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

January 13, 1988

Ms. Susan L. Garlock
The Citizen
25 Dill Street
Auburn, NY 13021

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. Garlock:

I have received your letter of December 23, as well as the materials attached to it.

Among the materials are "sample pages from agendas" of meetings held by the Board of Education of the Auburn Enlarged City School District. As you indicated in your letter, executive sessions are scheduled at the beginning of each meeting, "though no reason is given and they are planned without a vote having been taken".

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

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

Second, 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..."

Therefore, an executive session may be held only after having followed the procedure described above.

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

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

vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981].

Third, 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 subjects that may be considered during an executive session. Further, as indicated earlier, a motion to enter into an executive session must identify in general terms the "area or areas of the subject or subjects to be considered".

In sum, I believe that the Board's practice of scheduling executive sessions prior to its meetings is inconsistent with the Open Meetings Law. Moreover, on the basis of the facts stated in your letter, the Board has apparently failed to follow the procedure required to be accomplished before it enters into executive sessions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4916
OML-AO-1452

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

January 13, 1988

Mr. James Switzer
[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. Switzer:

I have received your letter of December 24 and congratulate you on your election to the Ontario Town Board. You have raised a series of questions concerning the Freedom of Information Law and the Open Meetings Law. I will deal initially with the issues pertaining to the Open Meetings Law.

According to your letter:

> "The town board advertised by legal notice its annual budget hearing. The same meeting was posted by the town clerk on her bulletin board as a 'special meeting-budget hearing.' At the conclusion of the budget hearing, the town board took action...to conduct some additional business such as awarding bids for purchase of pipe for a water line. The town attorney, who had left the meeting, later ruled that action other than budget review was null & void given absence of notice of the special meeting to the news media and instructed the town board to approve the bids again to make the action valid."

You asked whether it is true:

> "...that no other business can be transacted at such a meeting if media notice is not given? Is it true that when a majority of a public body convenes a 'meeting' technically exists at which any action can be taken as if the board were in regular session?"

In this regard, it is noted that there may be a distinction between a meeting and a hearing. The term "meeting" as it appears in the Open Meetings Law is defined to mean "the official convening of a public body for the purpose of conducting public business" [see section 102(1)]. As such, a meeting involves a situation in which a quorum of a public body seeks to conduct business or deliberate as a body. I believe that the term "hearing" generally refers to situations in which members of the public are given an opportunity to express their views, as in the case of a public hearing, or to a situation in which a person or entity seeks testimony from witnesses or interested parties, or investigates in a quasi-judicial manner. Often a hearing must be preceded by the publication of a legal notice. Notice of meetings need not be preceded by publication of a legal notice [see Open Meetings Law, section 104(3)]. However, notice of the time and place of every meeting must be given to the news media, and to the public by means of posting in one or more designated, conspicuous public locations.

In the situation that you described, it appears that notice was posted with respect to both a "special meeting" and a hearing. If notice was not given to the news media, it would also appear that the Board did not fully comply with the notice requirements imposed by section 104 of the Open Meetings Law. I point out that, in the event of a lawsuit brought under the Open Meetings Law, a court may, in its discretion and upon good cause shown, invalidate action taken in violation of the Law [see section 107(1)]. However, the same provision states that:

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

Therefore, from my perspective, action taken at the meeting in question would have remained valid, unless and until a court held to the contrary.

Further, as a general matter, the term "meeting" has been construed expansively to include any gathering of a quorum of a public body for the purpose of conducting public business. The leading decision on the matter dealt specifically with the status

of "work sessions" and similar gatherings, and held that those gatherings constitute "meetings", 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, too, that the Open Meetings Law does not distinguish among official or regular meetings as opposed to "work sessions" or "special meetings". The Town Law, section 62(2), refers to "special meetings". It is unclear whether that provision is relevant to the facts that you presented. In short, it is my view that, unless its own rules of procedure provide to the contrary, a public body may take action at any meeting, regardless of how the meeting is denominated.

Whether the gathering is considered a meeting, a work session or a special meeting, I believe that it is a "meeting" subject to the requirements of the Open Meetings Law. As such, the requirements that minutes be prepared would be dependent upon the activities that occur at a meeting. For example, section 106(1) of the Open Meetings Law, 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."

Consequently, if, for example, motions are made at work sessions (including motions to enter into executive sessions), minutes must be prepared.

You also described a situation in which three members of the town board, and yourself as a member-elect, met with a state auditor to conduct a preliminary review of his audit report. You added that: "He stated that the session was confidential pending release of the audit".

I disagree. Similar inquiries have arisen on many occasions in which municipal officials have met with representatives of the Department of Audit and Control. While municipal boards that met with representatives of Audit and Control have in some instances expressed no objection to conducting open meetings, representatives of Audit and Control have essentially refused to conduct business with municipal officials if the meetings were to be open.

In my opinion, the gathering that you described constituted a "meeting" as defined by the Open Meetings Law. As indicated earlier, the definition of "meeting" is broad and has been interpreted expansively by the courts. In Orange County Publications, supra, the Court of Appeals, the state's highest court, found that the definition encompasses virtually any situation in which a quorum of a public body convenes for the purpose of conducting public business. If as you indicated, the gathering in question was attended by a quorum of the Town Board, I believe that it was subject to the Open Meetings Law in all respects, notwithstanding the objections that might have been expressed by officials of Audit and Control.

The remaining questions deal with the Freedom of Information Law. Specifically, in response to a request for a copy of:

> "the annual independent auditor's report & management letter, the town attorney ruled that the management letter was not accessible under FOIL because it is an 'interagency, advisory document' which, if revealed, would abridge the privacy of the auditor as an advisor to the town board."

The Town Attorney might have been correct several months ago. However, due to a recent amendment to the Freedom of Information Law, I believe that the management letter is accessible. By way of background, it has been held that consultant reports should be treated as if they were prepared by the staff of an agency and that, therefore, they constitute "intra-agency materials" subject to section 87(2)(g) of the Freedom of Information Law [see Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)]. In brief, intra-agency materials consisting of advice, opinion, or recommendation may be withheld. However, a new provision, section 87(2)(g)(iv), was recently added to the Law. That provision requires that, among other items, inter-agency or intra-agency materials consisting of "external audits, including but not limited to audits performed by the comptroller and the federal government" must be made available.

Lastly, you wrote that the Town Attorney recommended and the Town Board agreed "to form a 3-person committee (town clerk, town attorney, town supervisory) to review all requests for copies of records". The Town Attorney cited a "'ruling of the attorney general' as the basis for this committee." You also indicated that the Town Board is the "appeal body for denials".

First, I do not believe that the Attorney General issues "rulings" in the area in question. Rather, like this office, I believe that the Attorney General may render an opinion. Second, most often, when questions concerning the Freedom of Information Law are directed to the Attorney General, he forwards those questions to the Committee. I am unaware of any "ruling" or opinion that has been rendered regarding the issue that you described. Third, if there is such an opinion, I believe that it is inconsistent with the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR), which govern the procedural aspects of the Law and have the force and effect of law.

Section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law. In turn, section 87(1) requires the governing body of a public corporation, such as the Town Board, to adopt its own procedural regulations in conformity with the Law and consistent with the Committee's regulations.

In relevant part, section 1401.2 of the regulations promulgated by the Committee states that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list;
>
> (2) Assist the requester in identifying requested records, if necessary;

(3) Upon locating the records, take one of the following actions:

(i) Make records available for inspection; or

(ii) Deny access to the records in whole or in part and explain in writing the reasons therefor..."

Usually, a town clerk is the records access officer, for the clerk, according to section 30 of the Town Law, is the legal custodian of all town records. Further, although there may be more than one records access officer, each such records access officer is generally responsible for records maintained by separate units within an agency. For instance, within an agency, one records access officer might have the duty to respond to requests for records within his own unit, while others in separate units have similar responsibilities with respect to records of their units.

Further, a person cannot serve as both records access officer and appeals officer. Section 1401.7(b) of the Committee's regulations states in part that "The records access officer shall not be the appeals officer."

In addition to the dozen copies of "Your Right to Know" that you requested, I have also enclosed copies of the Committee's regulations and model regulations. The model regulations can enable the Town Board to readily adopt the appropriate procedures.

I hope that I 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-4917
OML-AO-1453

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

January 13, 1988

Mr. G. Edward Quackenbush
Secretary
Arvin Hart Fire Co., Inc.
Stillwater Fire District
Box 288
Stillwater, NY 12170

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. Quackenbush:

I have received your letter of December 21 in which you requested an advisory opinion concerning the application of the Open Meetings Law.

According to your letter:

> "The Arvin Hart Fire Company is an incorporated fire department which receives no funding from the Town or Village government for its operation. The Company operates solely on monies raised thru volunteer fund-raising activities. The company elects its own officers and has its own set of by-laws for the operation of the fire company. Fire equipment, buildings, land and the responsibilities thereof fall under the jurisdiction of five (5) elected Fire Commissioners which is the Stillwater Fire District. This is totally separate from the Arvin Hart Fire Company. The company only operates the fire district's equipment and its officers must answer for such equipment to the fire commissioners of the fire district."

Your question is whether the meetings of the Fire Company must be open to the public. In this regard, I offer the following comments.

First, the Open Meetings Law applies to meetings of all public bodies, and 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."

Second, I 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 likely that a volunteer fire company also falls within the definition of "public body" and is required to comply with the Open Meetings Law.

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 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.

Enclosed are copies of the Open Meetings Law, the Freedom of Information Law and an explanatory pamphlet dealing with both laws that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4930
OML-AO-1454

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

January 22, 1988

Mr. Edward A. Grause
Chairman
Town of Hempstead Democratic
Committee
94 Newbridge Road
East Meadow, NY 11554

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. Grause:

I have received your letter of January 2. Please accept my apologies for the delay in response.

As requested, enclosed are 2 copies of the Committee's annual report, which, in its discussion of the issue of political caucuses, contains an endorsement of legislation proposed by the Governor on the subject.

You wrote that you are:

> "deeply concerned by the implication to be drawn from the fact that seldom, if ever, do the members of the Hempstead Town Board engage in public discussion of items voted on by said board. It would appear to me that either the members of the board discuss items out of view of the public or are just too busy to even engage in dialogue on matters requiring their consideration."

In addition, you indicated that "it is the policy of the board to close the meeting before the public voices its views on non-calendar items". It is your view that remarks by the public

"should be part of the formal business session and be on the record". You also asked what can be done to oblige the Board to respond to questions raised at meetings or by means of written communications.

In this regard, I offer the following comments.

First, with respect to the extent to which the Board discusses the items upon which it votes, the Open Meetings Law requires that meetings of public bodies be conducted in public, unless there is a basis for entry into an executive session [see Open Meetings Law, section 105(1)(a) through (h)]. Further, the term "meeting" has been construed expansively to include any gathering of a quorum of a public body for the purposes of conducting public business, even if there is no intent to take action and irrespective of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Nevertheless, as you are aware, a 1985 amendment to the Open Meetings Law exempts political caucuses from the scope of the Law. Section 108 of the Law states that the Open Meetings Law does not apply to:

> "2(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...".

In view of the foregoing, the members of the Board who are members of the same political party may conduct a closed political caucus outside the requirements of the Open Meetings Law. As indicated

in the annual report, the Committee and the Governor have sought to narrow the exemption in order to ensure that public business is conducted in public, particularly when a public body has a lop-sided majority of members of one political party.

Second, the Open Meetings Law is silent with respect to public participation at meetings. Therefore, in my view, if a public body does not want to permit members of the public to speak or otherwise participate at meetings, it is not required to do so. On the other hand, there is nothing in the Open Meetings Law that limits the authority of a public body to permit public participation at its meetings. Consequently, a public body may permit public participation, presumably in accordance with reasonable rules that treat members of the public equally.

Third, with respect to the preparation of a record containing comments made during a meeting, it is noted that the Open Meetings Law contains what might be viewed 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."

As such, it is clear that minutes need not consist of a verbatim account of statements made during a meeting. Further, minutes are not required to include reference to each such statements.

Lastly, with respect to responses to written inquiries and questions, I direct your attention to the Freedom of Information Law. That statute pertains to all records of an agency and 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, however, that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that, as a general rule, an agency need not create or prepare a record in response to a request. As such, the Freedom of Information Law does not require agency officials to answer questions when their answers would involve the preparation of new records. Further, although agency officials may and often do answer questions, I am unaware of any law that requires them to do so.

Rather than raising questions, it is suggested that requests be made for records. As you are aware, "Your Right to Know", which describes both the Freedom of Information Law and the Open Meetings Law, contains a sample letter of request that may be useful to you and others.

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: Town Board, Town of Hempstead
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1455

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

January 29, 1988

Ms. Carolyn Short
City Clerk
City of Kingston
Kingston, NY 12401

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. Short:

I have received your letter of January 13, as well as the materials attached to it. You have requested a "ruling" concerning an issue arising under the Open Meetings Law.

By way of background, the President of the City of Kingston Common Council "recently appointed various aldermen as liaisons to the city boards of commissioners -- Public Works, Police, Fire, Recreation, Civil Service, etc.". He also asked that the commissions "extend to the liaisons the right to attend executive sessions". However, the City's Corporation Counsel, S. James Matthews, has advised that it would be inappropriate to permit the liaisons to attend executive sessions conducted by city commissions. Specifically, Mr. Matthews wrote that:

> "There is no provision in the Open Meetings Law that can be constructed as providing for the liaison to be in attendance at executive sessions of the boards or commissions. In fact, allowing such attendance might very well be seized upon [as] a reason for having all of the matters discussed at such a meeting made public on the basis that at least one non-member was allowed to attend. In short, the liaisons should be prohibited from attending executive sessions."

Your question is:

> "which public body has the right to make this determination -- the board holding the executive session, or the Common Council which has designated the liaison?"

In this regard, I offer the following comments.

First, as indicated above, the staff of the Committee on Open Government is authorized to render advisory opinions. Neither the Committee nor its staff is empowered to issue "rulings" or compel compliance with the Open Meetings Law. As such, my remarks should be viewed as advisory only.

Second, the Open Meetings Law is applicable to meetings of public bodies, and 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."

Therefore, the Common Council is a public body, and the commissions to which the liaisons have been appointed are also public bodies. The Common Council and the commissions are separate and distinct, and the liaisons are not members of the commissions.

Third, 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 a commission, for example, which would be the public body conducting a meeting, have the right to attend executive sessions held by the commission. Moreover, a liaison, a person who is not a member of the commission, would not, in my opinion, have the right to attend an executive session of such a commission. Nevertheless, section 105(2) authorizes a commission to permit the attendance of others, such as a liaison.

With respect to Mr. Matthews' opinion, while I agree that liaisons do not have the right to attend commissions' executive sessions, the Open Meetings Law does not prohibit the commissions from permitting attendance at executive sessions by the liaisons. In short, I believe that the commissions may but need not permit the liaisons to attend their executive sessions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: S. James Matthews, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1456

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

February 2, 1988

Mr. Jon A. Kelley
[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. Kelley:

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

Specifically, you asked "whether a Town Zoning Board of Appeals has the right to deliberate and vote in executive session on matters brought before them." You also questioned the validity of actions taken by a zoning board of appeals during an executive session.

In this regard, I offer the following comments.

By way of background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards 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. As such, those deliberations could be conducted in private. 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. 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 may be 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 of 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.

Assuming that there is no basis for entry into an executive session, a zoning board of appeals must vote in public. In fact, even prior to the amendment in 1983, it was held that, following quasi-judicial deliberations, a zoning board of appeals was required to vote in public, for the act of voting was found to be non-judicial [see Orange County Publication v. City of Newburgh, 60 AD 2d 409, 418 (1978)].

Lastly, I believe that action taken by a public body remains valid unless and until a court renders a contrary determination. Nevertheless, I point out that a court has the authority to nullify action taken during an executive session inappropriately held. Section 107(1) of the Open Meetings Law 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. 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."

Therefore, if a zoning board of appeals votes behind closed doors when the vote should have been taken in public, a court may, in its discretion, nullify its action (see Park Newspapers v. City of Ogdensburg, Supreme Court, St. Lawrence County, April 26, 1984).

Enclosed 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.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4960
FOIL-AO-1457

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

February 9, 1988

Supervisor J. Albert Wright
Town of Waddington
Box 249
Waddington, NY 13694

<u>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.</u>

Dear Supervisor Wright:

As you are aware, I have received your letter of January 22 in which you raised questions concerning the Open Meetings and Freedom of Information Laws.

According to your letter, the Town has used a tape recorder to record meetings of the Town Board, and members of the public have been permitted to use tape recorders at meetings. Most recently, citizens used a video recorder at a meeting, and some members of the public objected to its use. Further, when certain citizens were unable to attend a meeting, they asked for a copy of the town's tape recorder, which apparently "caused a disruption of activity" in the Clerk's office.

You have asked whether the Town Board can adopt a resolution to prohibit the use of tape and video recorders, and whether you could deny the use of the Town's recorder to make a copy of a tape of a meeting. In addition, you included a copy of a page from <u>McKinney's</u> Town Law, which cites a 1968 opinion of the Attorney General in which it was advised that a town board could prohibit the use of tape recorders at its meetings.

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 <u>Davidson v. Common Council of the City of White Plains</u>, 244 NYS 2d 385, which was decided in 1963. In short, the court in <u>Davidson</u> 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."

More 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 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.

I point out, too, that the 1968 opinion of the Attorney General to which you referred was superseded by a later opinion rendered on May 13, 1980. In response to the question of whether a town board may preclude the use of tape recorders at its meetings, the Attorney General reversed earlier opinions on the subject and advised that:

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

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.

With regard to the public's right to obtain copies of tape recordings of meetings, I direct your attention to the Freedom of Information Law.

First, the Freedom of Information Law is applicable to records of an agency, such as a town. Further, section 86(4) of the Law defines the term "record" 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."

As such, a tape recording of an open meeting kept by a town is, in my view, clearly a record subject to rights of access. Moreover, the Court of Appeals, the state's highest court, has

construed the definition literally and as broadly as its specific language indicates [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980) and Washington Post v. Insurance Department, 61 NY 2d 557 (1984)].

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 of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. Under the circumstances, a tape recording of an open meeting is, in my opinion, available, for none of the grounds for denial would be applicable. It is noted, too, that it has been determined judicially that a tape recording of an open meeting is accessible under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Sup. Ct., Nassau Cty., October 3, 1983]. Further, with respect to fees, based upon section 87(1)(b)(iii) of the Freedom of Information Law, the fee for a copy of tape recording would be the "actual cost of reproduction", excluding personnel costs or other fixed costs of the agency (i.e., heat, light, etc.).

I hope that 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-1458

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

February 16, 1988

Mr. Stephen L. Epstein
Zoning Committee Chairperson
Nottingham Association, Inc.
1481 E. 26 Street
Brooklyn, NY 11210

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. Epstein:

I have received your letter of February 8, as well as the materials attached to it.

Enclosed, as you requested, are seventy-five copies of "Your Right to Know".

Once again, your inquiry concerns meetings of Community Board 14 in Brooklyn. The latest issue of interpretation pertains to section 4.050 of the New York City Planning Commission's Uniform Land Use Review Procedure (ULURP). That provision states that:

> "The public may attend all executive sessions or meetings of a community board at which an application which has been scheduled in the Comprehensive City Planning Calendar for a community board public hearing is to be considered and acted upon in a preliminary or final manner. A community board may close an executive session or meeting to the public by a three-fourths vote of the appointed members present, provided that no final action shall be taken at such meeting."

From my perspective, part of the problem might involve the phrase "executive session". Section 4.050 seems to indicate that "meetings" and "executive sessions" may be synonymous. It is noted, however, that 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, as you are aware, section 105(1) of the Open Meetings Law specifies and limits the topics that may appropriately be considered during executive sessions.

With respect to the requirement in section 4.050 that closed sessions may be held upon a three-fourths vote of the appointed members present, I point out there may be an inconsistency with the Open Meetings Law. Section 105(1) of the Open Meetings Law permits a public body to enter into an executive session, where appropriate, "Upon a majority vote of its total membership". The phrase "total membership", in my opinion,, is intended to mean the whole number of members, notwithstanding vacancies or absences.

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

> "1. Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article.
>
> 2. Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby.
>
> 3. Notwithstanding any provision of this article to the contrary, a public body may adopt provisions less restrictive with respect to public access than this article."

Therefore, a rule, for example, that permits greater public access than the Open Meetings Law remains effective. However, a rule that would permit less public access to the public to meetings would be void to the extent that it is inconsistent with the Open Meetings Law.

You asked what your Association might do if the Board "defies" the Open Meetings Law. Short of the initiation of a lawsuit, all that I can suggest is you seek to persuade, to employ pressure by means of public opinion, and perhaps to contact the officials responsible for designating the members of the Board.

Lastly, you asked whether a representative of this office could address the Association. In this regard, I often speak before government, news media and public interest groups. Nevertheless, the staff is small, and it may be difficult to find transportation from Brooklyn to Albany following an evening meeting. In addition, budgetary constraints would preclude the staff from making such a presentation until April at the earliest.

As a possible alternative, the Department of State has produced a videotape of a presentation that deals with the Open Meetings and Freedom of Information Laws. The tape is available for purchase or rental by contacting Ms. Regina Daly of the Department's Office of Local Government Services. She can be reached by phone at (518)474-6748.

I hope that 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: Helen D. Henkin, Chair
William Valletta, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1459

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

February 16, 1988

Mr. Isidore Gerber
[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. Gerber:

I have received your letter of January 25, as well as the materials attached to it.

According to your letter and the materials, the Board of Trustees of the Village of Liberty held a "work session meeting" that you attended and during which you and the members of the Board discussed a variety of issues. Following the meeting, you requested minutes of the meeting. In response to the request, Deborah H. Tanous, the Clerk/Treasurer, indicated that minutes were not taken "as only a discussion was held and no action occurred". You then appealed to the Mayor, Robert H. Sherwood, who indicated that the Board holds regularly scheduled "work-session meetings", which are "designed for discussion and review of various topics and subjects by the Village Board and are open to the public". The Mayor stressed that "NO action is ever taken at work session meetings" (emphasis by the Mayor) and that, therefore, minutes are not taken.

You have asked whether, in my view, the Village "must have some sort of minutes" for the meeting in question and others like it. You also suggested that there should have been an agenda.

In this regard, I offer the following comments.

First, it is emphasized that the courts have broadly construed the term "meeting". In a landmark decision rendered in 1978, the Court of Appeals unanimously affirmed a decision of the Appellate Division, Second Department, and held that the term "meeting" encompasses any gathering in which a quorum of a public body convenes to discuss public business, whether or not there is

an intent to take action and regardless of the manner in which a gathering may be characterized [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The decision of the Appellate Division made specific reference to so-called "work sessions", "agenda sessions", "conferences", "organizational meetings" and the like during which public business is discussed but in which no binding action is taken.

As such, in my view, the "work sessions" that you described are subject to the Open Meetings Law, and the Board has the same obligation to prepare minutes relative to work sessions as it has with respect to "regular" or "official" meetings.

Second, section 106 of the Open Meetings Law contains what might be considered minimum requirements concerning the contents of minutes. That provision does not require that a verbatim transcript of a discussion held at a meeting be prepared. However, it does require that certain kinds of information be included in minutes.

Section 106(1) pertains to minutes of open meetings and states that:

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

Based upon the language quoted above, if there are no motions, proposals, resolutions and the like introduced or adopted at the gatherings in question, I do not believe that minutes must be prepared.

Section 106(2) concerns minutes of executive sessions and states that:

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

In my opinion, the language quoted above indicates that if a public body enter into an executive session but merely engages in a discussion and takes no action, minutes of the executive session need not be prepared. On the other hand, if action is taken during an executive session, minutes must be prepared as described in section 106(2).

Third, I point out that section 105(1) requires that a motion be made during an open meeting prior to entry into an executive session. If such a motion is made during a "work-session meeting", I believe that reference to the motion would have to appear in minutes as required by section 106(1).

Fourth, section 106(3) specifies the time limits within which minutes must be prepared and made available, stating that:

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

Consequently, if activities occur at the meetings in question that would require the creation of minutes, the minutes must be prepared and made available within two weeks of such meetings. If action is taken in an executive session that is held during a work session, minutes must in my view be prepared and made available in accordance with the Freedom of Information Law within one week of the executive session.

Lastly, there is nothing in the Open Meetings Law or any other statute of which I am aware that deals with agendas. In short, although many public bodies prepare agendas, I do not believe that there is any legal obligation to prepare an agenda or to follow an agenda that is 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: Hon. Robert H. Sherwood, Mayor
Hon. Deborah H. Tanous, Clerk/Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1460

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

February 22, 1988

Ms. Cheryl Hartl
Reporter
WEBR News Radio 970
23 North Street
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 Ms. Hartl:

I have received your letter of January 27 in which you raised a series of questions concerning the Open Meetings Law. Your questions have apparently arisen in conjunction with your coverage of meetings of the "Board of Commissioners" of the Niagara Frontier Transportation Authority.

It is noted at the outset that the Open Meetings Law is applicable to meetings of public bodies and that section 102(2) of the Law defines the phrase "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."

Based upon the foregoing, the governing body of a public authority, a public corporation, is a "public body" required to comply with the Open Meetings Law. As such, the Board of the Niagara Frontier Transportation Authority is, in my view, a public body subject to the Open Meetings Law.

Your first question involves motions made by the Board to enter into executive sessions. The motions have been "brief" and indicate that the subjects would involve "personnel or litigation".

In this regard, I offer the following comments.

First, 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:

> "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 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 "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 bearing its strategy to its adversary through mandatory public meetings" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983); 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 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

> 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 next question involves the circumstances in which the public or the new media should be given a "written report of items discussed in an executive session.

Section 106 of the Open Meetings Laws states in part that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

Consequently, when a motion to enter into an executive session is made, that motion must be included in minutes of the meeting. Further, if a vote is taken during an executive session, minutes must be prepared pursuant to section 106(2). If, however, a matter is discussed during an executive session, but no action is taken, there is no requirement that minutes of the executive session be prepared. In that kind of situation, no "written report" or minutes would be required to deal with the executive session, except the minutes insofar as they include reference to a motion to conduct an executive session.

Lastly, you asked "how far in advance must the NFTA notify the media of a meeting of the Board of Commissioners", and whether there are "any circumstances under which the Board can meet and not notify the media?"

Unless a public body meets solely to discuss a matter exempt from the Open Meetings Law (see attached Open Meetings Law, section 108), notice of the time and place must be given prior to all meetings, whether they are regularly scheduled or otherwise. Specifically, section 104(1) pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media and to the public by means of posting not less than seventy-two hours prior to such meetings. Section 104(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public in the same manner as described in section 104(1), "to the extent practicable" at a reasonable time prior to such meetings. As such, if a meeting must be convened quickly, a public body should, in my view, inform the news media of the time and place of the meeting by phone, and post notice.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Directors, Niagara Frontier
Transportation Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1461

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

February 25, 1988

Ms. Betty R. Perry
[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. Perry:

I have received your letter of February 2. You have asked that I review the "Procedural Policies" adopted by the Planning Board of the Town of Somerset, a copy which is attached to your letter.

In this regard, I offer the following comments.

Item 3 indicates that a quorum shall consist of four members. Since the statement of policy does not include reference to the number of members on the Planning Board, I point out that section 41 of the General Construction Law has long provided that a quorum consists of a majority of the "whole number" of members of a board. Further, the phrase "whole number" is construed to mean the total number "were there no vacancies and were none of the persons or officers disqualified from acting."

Item 4 states that "Sound recording of any Planning Board meeting or portion thereof is not permitted". It is noted initially that the Open Meetings Law does not specifically address the issue of tape recording meetings. However, judicial decisions indicate that any person may use a portable tape recorder at an open meeting.

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 judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record open meetings of public bodies.

Item 5 states that "Discussions relating to applications for Special Use Permits shall be held in executive session, open only to Planning Board members".

Here I point out that the Open Meetings Law prescribes a procedure that must be accomplished 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..."

Therefore, I do not believe that, as a matter of policy, the Planning Board may schedule executive sessions in advance or conduct executive sessions without following the procedure described above. Moreover, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered in an executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, its meetings must be conducted open to the public, unless and until a topic arises that may properly be discussed during an executive session.

To attempt to enhance compliance with the Open Meetings Law, copies of the Law and this opinion will be sent to the Planning Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board, Town of Somerset

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1462

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

February 29, 1988

Ms. Nancy Nurre
[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. Nurre:

I have received your letter of February 9, in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, "the Board of Trustees of the Village of Fishkill recently held a workshop meeting which was closed to the public." You have asked whether the Open Meetings Law "would allow a public body to announce a workshop meeting as an executive session without taking the procedural vote in open session." Further, assuming that a vote is taken to enter into an executive session, you also asked "how specific must the motion be to enter into discussions involving, say for example, 'legal matters'."

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 Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. That decision specifically rejected a contention that so-called "work

sessions" and similar gatherings are outside the scope of the Open Meetings Law. As a consequence, since a "workshop" or "work session" is a meeting subject to the Open Meetings Law, a public body is required to comply with the requirements of the Law, irrespective of its characterization as a "workshop", for example.

Second, the vehicle for closing a meeting involves the convening of an executive session. 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:

> "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 of 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 be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

With respect to the provision involving 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 (1983); 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)].

Further, 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)].

Therefore, a motion to discuss "legal matters" without more would not, in my opinion, which is based upon the judicial interpretation of the Open Meetings Law, meet the requirements 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

cc: Board of Trustees, Village of Fishkill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1463

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

February 29, 1988

Ms. Rosemary McConologue
Trustee
Wappingers Central School District
90 Remsen Avenue
Wappingers Falls, NY 12590

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. McConologue:

I have received your letter of February 10, as well as the materials attached to it.

In your capacity as a member of the Board of Education of the Wappingers Central School District, you wrote that, prior to the start of this year, you believed that the Board strictly adhered to the requirements of the Open Meetings Law. Nevertheless, of late, you have questioned the propriety of certain executive sessions conducted by the Board.

Most recently, you wrote that:

> "A public workshop on the budget was adjourned with the following motion: Moved that we adjourn to executive session to discuss personnel and negotiations. The motion passed unanimously. The following discussions took place in executive session:
>
> 1. Eight-period versus nine-period day - senior high schools (handout enclosed)
>
> 2. A legal matter pertaining to land acquisition (I saw no problem with this agenda item.)

3. Voter registration (see enclosed handout)

4. P.M. School - Revenue implications (see enclosed handout)

5. 1988/89 housing of students (see enclosed handout)".

You have requested a "ruling" concerning the meeting described above. In this regard, I offer the following comments.

First, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Open Meetings Law. The Committee cannot enforce the Open Meetings Law or render a binding "ruling" or determination.

Second, as to the substance of your inquiry, having reviewed the materials attached to your letter, with the possible exception of item 2 concerning land acquisition, it appears that the topics considered during the executive session should have been discussed in public during an open meeting.

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)]. As such, a "budget workshop" conducted by the Board is, in my view, clearly a meeting subject to the requirements of the Open Meetings Law.

Further, 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..."

The focal point of your inquiry concerns the sufficiency of motions to enter into executive sessions and the nature of the discussions that transpired during the executive session.

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 analogous 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 that might relate to personnel indirectly or as a group.

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 <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 conducted 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 issues described in the materials that you forwarded could not, in my opinion, have been appropriately discussed under the "personnel" ground for entry into executive session.

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 re-

> lated 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; please note that the Open Meetings Law was renumbered after Doolittle was decided].

With respect to "negotiations", the only ground for entry into executive session that mentions that term is section 105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, section 105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union. It does not appear that section 105(1)(e) could properly have been asserted to discuss the issues described in the materials.

In terms of a motion to enter into an executive session held pursuant to section 105(1)(e), 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, supra].

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

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

In short, based upon the Open Meetings Law and its judicial interpretation, the motion for entry into executive session was inadequate. Further, with one possible exception, it appears that the topics discussed in executive session should have been discussed in public.

Lastly, you asked "what avenues [you] can pursue if this practice continues". Here I point out that a copy of this opinion will be sent to the Board in the hope that it will be persuasive and educational, and that it will enhance compliance with the Law in the future. As a general matter, I believe that the best guarantee of compliance involves an effort to become familiar with the Open Meetings Law. Through that knowledge, it is likely, in my opinion, that the Board will adhere to the requirements of the Law. Should those kinds of efforts fail, you or any "aggrieved person" could initiate a lawsuit to seek to compel compliance with the Law.

Enclosed is a copy of the Open Meetings Law, as well as a dozen brochures that describe its provisions. Perhaps distribution of the materials will serve to enhance compliance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Board of Education, Wappingers Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 4985
OML-AO - 1464

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

March 1, 1988

Mr. David Quackenbush
President
Minisink Hook & Ladder Co.
15 1/2 Sayer Street
Goshen, NY 10924

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. Quackenbush:

I have received your letter of February 5, as well as the materials attached to it. Please note that your correspondence did not reach this office until February 16.

The correspondence involves a series of difficulties that you and the fire company you serve have encountered with the Board of Commissioners of the Goshen Fire District. In brief, a long-standing member of your company was the subject of a conviction and was suspended. The company later voted to reinstate him as a member. The Board of Fire Commissioners, however, disapproved the reinstatement. You have raised a series of questions concerning executive sessions held by the Board, minutes of its meetings and other records, and the status of a form that must be completed by applicants for membership in the Goshen Fire District. The form seeks authority to enable the District "to make inquiry of [the applicant's] present and past employers, and/or any public or private agency regarding [the applicant's] character, integrity and reputation".

In this regard, I offer the following comments.

First, I believe that the Board of Fire Commissioners is a "public body" subject to the Open Meetings Law and that a fire district is an "agency" subject to the Freedom of Information Law.

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."

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction law, section 66(1), the Board of Commissioners of the District in my view clearly contains all of the components necessary to a finding that it is a public body. Further, the definition of "public body" specifically refers to a committee of a public body. Therefore, if, for example, the Board of Fire Commissioners designated a committee, the committee would, in my view, constitute a public body subject to the Open Meetings Law.

The Freedom of Information Law is applicable to records of an "agency", a term defined in section 86(3) of the Law to include:

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

Again, since a fire district is a public corporation, I believe that it is an agency required to comply with the Freedom of Information Law.

Second, with regard to your specific questions, there is no requirement that minutes of meetings be publicly read. Although a public body must prepare minutes, it is not obliged to read them aloud at a meeting.

Further, in terms of the contents of minutes, section 106 of the Open Meetings Law requires that:

> "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."

As such, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. Minutes of open meetings need not consist of a verbatim account of every comment made at a meeting. However, they must include reference to all motions, proposals, resolutions, action taken, and the vote. It is noted, too, that minutes of executive sessions must be prepared only when action is taken during an executive session. Minutes of an executive session need not be prepared if, for example, a public body discusses an issue but takes no action.

With respect to requests for records of a fire district, the Freedom of Information Law permits an agency to require that requests be made in writing. Further, as a general matter, an agency may charge up to twenty-five cents per photocopy for records. No fee may be assessed for the inspection of records. There is no requirement in the Freedom of Information Law that requests be made by certified mail or that fees for copies be paid by certified check. It is also noted that the Freedom of Information Law does not refer to any particular form that must be completed when requesting records. In short, it has consistently been advised that any written request that reasonably describes the records sought should be sufficient.

The materials attached to your letter indicate that the Board has conducted executive sessions concerning the issue of reinstatement. Here I point out that section 105(1) of the Open Meetings Law specifies and limits the topics that may appropri-

ately be discussed in an executive session. Moreover, the Law requires that a public body accomplish a procedure, during an open meeting, before it may enter into an executive session. Specifically, the introductory language of section 105(1) provides that:

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

One of the grounds for entry into executive session, section 105(1)(f), is likely relevant to the issue of reinstatement. 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."

Lastly, with regard to the application form, it is noted that the text of the authorization raises a series of issues, most of which do not relate to the Freedom of Information Law. Further, it is possible that other state and federal enactments may be relevant.

In terms of the Freedom of Information Law, there is nothing in the Law that pertains to the collection of personal information by an agency. As such, the Freedom of Information Law does not prohibit an agency from seeking personal information.

Viewing the matter from a different perspective, some of the information that might be requested by the District might involve records kept by agencies subject to the Freedom of Information Law. As you may be aware, the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy" [see Public Officers Law, section 87(2)(b)]. However, the Law also states that, unless a different ground for denial may be asserted, "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...when the person to whom a record pertains consents in writing to

disclosure" [section 89(2)(c)(ii)]. Consequently, the authorization, if signed, would likely permit other agencies to disclose to the District some records pertaining to an applicant.

The authorization in my opinion might nonetheless in many circumstances be of questionable utility. For instance, in the case of agency records subject to the Freedom of Information Law, the "waiver" would be of significance only when the individual to whom the record pertains has a right to the record. Stated differently, if the subject of the record has no right to the record, there is no right to be conferred. Further, the individual may have no right of access in certain cases.

The authorization likely pertains to records kept by entities other than governmental entities. In those situations, the non-governmental entities could likely disclose, but they would not be obliged to do so.

The breadth of the terms of the authorization also raises questions concerning areas beyond my expertise, such as the Human Rights Law regarding discrimination, as well as federal laws. A related issue is whether an applicant must sign the authorization as a condition for application. Whether signing the form is mandatory or optional may also relate to civil rights law provisions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Board of Commissioners, Goshen Fire District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4988
OML-AO-1465

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

March 2, 1988

Ms. Wilma Ryan
Town Clerk
324 Champlain Avenue
Ticonderoga, NY 12883

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

Dear Ms. Ryan:

I have received your letter of February 18, as well as the correspondence attached to it.

The correspondence consists of an anonymous letter in which the writer suggested that:

> "nobody is required to sign a Freedom in Information form for information, public information that can be given orally. A Freedom in Information form is required only when you request a document, public document."

The correspondent, as I interpret his comments, also suggested that if he wants public information that does not exist in the form of a record, the information can be "given orally". In addition, he referred to notice of meetings and indicated that he does "not have to sit glued to [his] radio all day...to find out when they are being held".

You requested "guidelines" concerning the issues raised in the letter.

First, it is emphasized that the title of the Freedom of Information Law may be misleading, for that statute is a vehicle that enables the public to request and, in most instances, obtain existing records. It is not a vehicle that gives members of the public the right to cross-examine public officials or that requires public officials to answer questions

or to provide "information" that does not exist in the form of a record or records. This is not to suggest that public officials are precluded from providing information orally or from answering questions, particularly those of a routine nature. Nevertheless, the Freedom of Information Law pertains to requests for agency records.

Second, although agency officials may respond to oral requests for records, section 89(3) of the Freedom of Information Law indicates that an agency may requires that a request be made in writing. It is noted that there is nothing in the Law concerning the use of a particular form. As such, it has consistently been advised that any request made in writing that reasonably describes the record sought should be sufficient.

Third, the Freedom of Information Law does not distinguish among applicants for records. As a general rule, if records are accessible under the Freedom of Information Law, they should be made equally available to any person, regardless of status or interest [see e.g., Farbman & Sons v. New York City, 62 NY 2d 75 (1984); Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Therefore, in a technical sense, an applicant for records is likely not required to sign a request or indicate his identity, so long as sufficient information is given (such as a post office box number, address or name of an organization) to respond to the request. I point out, too, that agency officials may but need not respond immediately to requests. Section 89(3) of the Law requires that an agency respond within five business days of a receipt of a request.

Lastly, with respect to notice of meetings, I direct your attention to the Open Meetings Law, which requires that notice of the time and place of meetings of public bodies be given prior to all meetings. Specifically, section 104(1) pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and posted in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. If 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 described earlier, "to the extent practicable", at a reasonable time prior to the meeting. Again, if a person contacts your office and asks when the next Town Board meeting will be, certainly that kind of information can and, in my view, should be given orally. Nevertheless, the specific requirements concerning notice of meetings are described in section 104 of the Open Meetings Law.

Enclosed are copies of the Freedom of Information Law, the Open Meetings Law, the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the

Freedom of Information Law, model regulations that enable a municipality to adopt appropriate regulations similar to those adopted by the Committee, and an explanatory pamphlet that deals with both 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:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1466

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

March 2, 1988

Mr. James Flannigan
Executive Director
NYS Association for Retarded
Children, Inc.
Rensselaer County Chapter
415 River Street
Troy, New York 12180

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

Dear Mr. Flannigan:

I have received your letter of February 4, with an attachment, in which you requested an advisory opinion concerning the Open Meetings Law.

According to the materials and our recent telephone conversations, the Rensselaer County Chapter of the New York State Association for Retarded Children, Inc. (ARC) submitted a plan to the Brunswick Town Planning Board for construction of a Day Treatment facility for handicapped persons. The plan was approved with several stipulations, including submission of a draft environmental impact statement (EIS) to the Board, as lead agency for purposes of the State Environmental Quality Review process. The Board reviewed the draft EIS submitted by the ARC, and determined that certain additional issues should be addressed. In accordance with the Board's requirements, an amended EIS was prepared and submitted. The project was placed on the agenda for the Board's January 21 meeting. You indicate that at that meeting "the Planning Board Chairman instead heard every other item on the Agenda, as well as several items which were not on the Agenda" and then adjourned the meeting due to the late hour without hearing the ARC's application. You were subsequently advised by Mr. Thomas Simkins, the Planning Board Chairman, that your case was not heard because you brought a stenographer to the meeting and the presence of the stenographer "might restrain (the Board members') free discussion of the project". Mr.

Simkins indicated that the ARC project would be discussed at the upcoming Planning Board workshop session on January 28 so long as the stenographer did not attend. Mr. Simkins later advised an ARC consultant that the project would not be discussed in the presence of ARC representatives. On January 28, the Planning Board met at Mr. Simkins' home, discussed the ARC project and voted to reject the amended EIS You indicate that because of Mr. Simkins' statements, no ARC representatives attended the meeting.

In this regard, I offer the following comments.

First, I point out that while the Open Meetings Law does not address the issue of the public's right to "record" the content of an open meeting, there are several judicial decisions that deal with the issue as it relates to the use of tape recorders.

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 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 it was not persuaded by the school Board's contention that:

> "...since recordings can be edited, altered, or used out of context, the Board was justified in forbidding their use altogether. Clearly if the Board were to prohibit the use of pen, pencil and paper, because of the potential for misquotations, such a restriction would be unreasonable and arguably violative of the 1st Amendment. A contemporaneous recording of a public meeting is undoubtedly a more reliable, accurate and efficient means of memorializing what is said at the proceeding. Once the information and comments are conveyed to the public, it should be of no consequence that they may subsequently be repeated by means of

> replay, to those who were unable to attend. Furthermore, although the Open Meetings Law provides that a public body shall take minutes at all open meetings, and that such minutes shall be made available to the public (see, Public Officers Law section 106), the imposition of such a duty cannot fairly be construed as precluding all other methods or recordation.
>
> "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 judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record or use other methods of "recordation" to memorialize 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.

Second, the courts have held that a convening of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which the gathering is characterized, is 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)]. As such, the January 28 "workshop session" you described was, in my view, a "meeting" subject to the Law.

Third, every meeting of a public body must be preceded by notice of the time and place of the meeting. Specifically, section 104 of the Open Meetings Law states in part that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall 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."

You indicate that, as far as you are aware, the required notice to the public was not given with respect to the January 28 meeting.

Fourth, section 103(a) of the Law states that "Every meeting of a public body shall be open to the general public" except to the extent that an executive session may be properly convened as a portion of an open meeting from which the public may be excluded.

With respect to the January 28 meeting, the Board's failure to give notice of the meeting, the holding of the meeting at the private residence of the Board chairman, and the statements made by Mr. Simkins to ARC representatives, in my view indicate that the meeting was not "open to the general public". Further, while the Law does not specifically describe the locations where meetings may be held, I believe that a public body should hold its meetings in locations or facilities that would reasonably enable interested members of the public to attend. To bolster that contention, I refer to the Legislative Declaration, 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."

Thus, in my view, it is questionable whether the home of a Board member is a proper site for a meeting, particularly when there is no clear indication that the public is invited to attend.

Fifth, you indicate that "the Planning Board conducted its business in what would appear to be an Executive Session without indicating the reason for going into an Executive Session" and you expressed the view that entry into an executive session in order to exclude the stenographer and representatives of the ARC does not appear to be a proper basis under the Open Meetings Law.

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. Therefore, an executive session is not separate and distinct from an open meeting; on the contrary, it is a portion of an open meeting. I point out, too, that a public body is required to accomplish a procedure during an open meeting before it may enter an executive session. 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..."

Based upon the facts presented, it appears that the Planning Board conducted a closed or "executive session" without having first convened an open meeting and without following the procedures required by section 105(1).

Further, as suggested in section 105(1), a public body cannot enter into an executive session to discuss the subject of its choice. Paragraphs (a) through (h) of section 105(1) specify and limits the topics that may be discussed during an executive session. Unless and until one of those topics arises, a public body in my opinion is required to conduct its business open to the public. Further, a discussion of the ARC's amended EIS, would not in my view have constituted a subject that could have properly been discussed during a closed meeting. Rather, I believe that that issue should have been discussed in full view of the public.

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

> "[A]ny aggrieved person shall have standing to enforce the provisions of this article against a public

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

Based on judicial decisions, it appears that the remedy of invalidating an action taken by a public body is available when the court finds that the public body voted during an improperly closed session or meeting [see Dombroski v. Board of Ed., West Genesee School District, 462 NYS 2d 146 (1983); Woll v. Erie County Legislature, 83 AD 2d 792 (1981)].

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc

cc: Brunswick Town Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1467

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

March 2, 1988

Supervisor Mijo Vonic
Town of Kingsbury
Kingsbury Town Hall
210 Main Street
Hudson Falls, NY 12839

<u>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.</u>

Dear Supervisor Vonic:

As you are aware, I have received your letter of February 12.

According to your letter, you intend:

> "to call upon 6 or 7 citizens within our Town to serve on the 'Citizen's Informative Council' (non-statutory, without by-laws, independent from any governmental body), a group with the goal of providing their opinions to [you] of the pressing issues within various parts of our Town. The group may meet about 4 times during the year and not necessarily in Town Hall. [Your] participation in the group will be strictly as a citizen with the purpose of being more informed about the Town's needs and goals."

Your question is whether such a council would be subject to the Open Meetings Law.

In this regard, I offer the following comments.

First, if indeed the Council in question is designated by you, the Supervisor, as a citizen, to advise you, it is unlikely, in my view, that it would be subject to the Open Meetings Law. Resolution of the issue appears to be dependent, in part, upon the authority of a town supervisor to appoint a committee on behalf of a town. Section 63 of the Town Law states:

> "The supervisor, when present, shall preside at the meetings of the town board. In the absence of the supervisor, the other members shall designate one of their members to act as temporary chairman. A majority of the board shall constitute a quorum for the transaction of business, but a lesser number may adjourn. The vote upon every question shall be taken by ayes and noes, and the names of the members present and their votes shall be entered in the minutes. Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board. The board may determine the rules of its procedure, and the supervisor may, from time to time, appoint one or more committees, consisting of members of the board, to aid and assist the board in the performance of its duties."

While you, as Supervisor, may appoint members of the Town Board to serve as a committee, which, in my opinion, would be subject to the Open Meetings Law, it does not appear that you would be authorized to designate an "official" committee consisting of others. Stated differently, a committee consisting of members of the Town Board would carry out its duties for the Town; a committee or council consisting of others apparently carries out its duties for the supervisor, individually, rather than for the Town as a whole.

Second, in a related vein, the Open Meetings Law is applicable to 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 funtion for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Again, a committee of a body, i.e. the Town Board, would, in my view, constitute a public body subject to the Law, for it would conduct public business and perform a governmental function for a public corporation, a town. Nevertheless, if a council or committee is designated by and advises only the supervisor, it does not appear that it would constitute a public body.

Lastly, if indeed the Council advises the Town Board, and if the Town Board, as a body, effectively recognized the Council as an advisor to the Board as a whole, it is possible that the it could be determined to be a public body subject to the Open Meetings Law. Nevertheless, I know of no judicial determination that deals specifically with analogous facts.

I hope that 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-1468

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

March 3, 1988

Mr. Jon R. Montan
Planner III
St. Lawrence County Environmental
Management Council
Courthouse
Canton, New York 13617

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. Montan:

I have received your letter of February 16 in which you requested a "determination" concerning the status of the St. Lawrence County Environmental Management Council.

Attached to your letter is a copy of a resolution passed in 1971 in which the County Board of Supervisors created and established the "St. Lawrence County Environmental Management Council" (the Council). Section 3 of the resolution states in part that:

> "The Council shall consist of the members appointed by the Board of Supervisors as provided in this section. In addition to the members of the environment and ex-officio members as provided herein, the Board of Supervisors shall appoint not less than 20 nor more than 29 members..."

As such, the Council has a fluctuating membership.

Section 5 describes the powers and duties of the Council, section 6 requires the submission of an annual report to the Board of Supervisors and section 8 states in part that:

> "This resolution shall be deemed an exercise of the powers of the county to preserve and improve the quality of the natural and man-made environment on behalf of the present and future citizens therof."

You have asked whether the Council is a "public body", what its quorum requirement might be and whether its committees are subject to the Open Meetings Law.

In this regard, I offer the following comments.

First, in my view, the legislative history of the Open Meetings Law indicates that the Council is a "public body" subject to the Law. By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject involved a situation in which a governing body, 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 those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in section 102(2) to include:

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more persons designated or created to serve as a body by the Board of Supervisors, or any public body, would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Further, I believe that the same conclusion can be reached with respect to the Council by viewing the definition of "public body" in terms of its components.

The Council is an "entity" that consists of "two or more members". Further, although the resolution that created the Council might not refer to any quorum requirement, I believe that section 41 of the General Construction Law would permit the Council 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 Council are "persons charged with [a] public duty to be performed or exercised by them jointly". The Council was established to advise the Board of Supervisors, develop programs, offer recommendations and perform its powers and duties cooperatively with county and municipal agencies. 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, supra; 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 Council must exercise its duty pursuant to the quorum requirements set forth in section 41 of the General Construction Law.

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

Second, based on the same background and rationale, a committee of the Council consisting of two or more members would also constitute a public body.

Lastly, although I am unaware of any judicial decision dealing with a body whose membership might fluctuate in terms of the number of its members, a quorum would, in my opinion, consist of a majority of the Council's total membership at any particular time, notwithstanding absences, for instance. Similarly, a quorum of a committee of the Council would consist a majority of the committee's total membership.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1469

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

March 4, 1988

Ms. Dorothy L. Ciraolo
Town Clerk
Town of Niagara
7105 Lockport Road
Niagara Falls, NY 14305

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. Ciraolo:

I have received your letter of February 19. I thank you for your kind words and regret that you were unable to attend the final session of the Association of Towns Annual meeting.

Attached to your letter is a memorandum sent to you as Town Clerk and to members of the Niagara Town Board by James A. Sacco, the Town Supervisor. The memorandum sets for the rules, as determined by the Supervisor, regarding the conduct of Town Board meetings. You highlighted one aspect of the memorandum in particular which sets forth that:

> "All questions from the public sector will be addressed to the Supervisor or Chairperson. A forum or a debate will not be allowed at any meeting of the Town Board."

You also asked what the proper procedure might be with respect to the consideration of a resolution. You described the Board's past procedure, which worked well, and the new procedure, which "has caused nothing but confusion."

In this regard, I offer the following comments.

It is noted at the outset that the Open Meetings Law provides general guidance concerning the procedural conduct of meetings. However, there is nothing in the Open Meetings Law or any other statute of which I am aware that deals with the specific procedure for dealing with resolutions.

Nevertheless, according to the Town Law, I do not believe that the Supervisor may unilaterally dictate the Board's procedure. Section 63 of the Town Law states that:

> "The supervisor, when present, shall preside at the meetings of the town board. In the absence of the supervisor, the other members shall designate one of their members to act as temporary chairman. A majority of the board shall constitute a quorum for the transaction of business, but a lesser number may adjourn. The vote upon every question shall be taken by ayes and noes, and the names of the members present and their votes shall be entered in the minutes. Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board. The board may determine the rules of its procedure, and the supervisor may, from time to time, appoint one or more committees, consisting of members of the board, to aid and assist the board in the performance of its duties."

Based upon the foregoing, I believe that the Town Board, not the Supervisor, "may determine the rules of its procedure." Further, the adoption of rules of procedure must, in my view, occur by means of an "affirmative vote of a majority of all the members of the town board."

Lastly, I point out that the Open Meetings Law is silent with respect to public participation. Therefore, if the Town Board does not want the public to speak or otherwise participate at its meetings, it need not permit those activities. However, the Board may choose to permit the public to speak. If the Board opts to permit public participation, I believe that it should do so based upon reasonable rules that treat members of the public equally.

I hope that I 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-1470

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

March 7, 1988

Mr. Henry C. Young
[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. Young:

I have received your letter of February 17, as well as the materials attached to it.

You have raised a series of questions concerning the implementation of the Open Meetings Law by the Town Board of the Town of Conquest. Other questions involving the Town's authority were raised concerning issues that do not pertain to the Open Meetings Law. Here I point out that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. As such, certain questions posed in your letter are outside the scope of our jurisdiction or expertise. Therefore, the following comments pertain only to those issues that deal with the Open Meetings Law.

The first area of inquiry concerns notice of an "organizational meeting". You asked whether "other business matters can be conducted when notice does not inform public". In this regard, the Open Meetings Law requires that notice of the time and place of meetings be given; it does not require that notice include the subject matter of meetings. Therefore, unless the Board, by means of its own policy or rules of procedure, for example, is required to discuss only certain matters designated in its notice, it would not in my opinion be precluded from discussing issues not included in the notice.

Second, you wrote that an informal meeting was held "before Town Board was officially opened". You asked whether that is permissible under the Open Meetings Law. The courts have construed the term "meeting" broadly to include any gathering of a quorum for the purpose of conducting public business, even if there is no intent to take action and irrespective 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)]. In that decision, it was specifically held that "work sessions" and similar "informal" gatherings are "meetings" subject to the Open Meetings Law. As such, if the Board intended to hold an "informal meeting" prior to its scheduled "official" meeting, the informal meeting would have been subject to the Law, and the notice should have been given concerning the time and place of that meeting.

Your third, fourth and fifth questions do not deal directly with the Open Meetings Law.

Lastly, you asked that I compare the minutes of a meeting with a newspaper report of the meeting. In this regard, section 106(1) of the Open Meetings Law provides guidance concerning the contents of minutes of an open meeting. The cited provision states that:

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

While a newspaper may publish a verbatim account of minutes of a meeting, it is not required to do so. Stated differently, a newspaper may report on any aspect of a meeting it considers to be important or newsworthy, and its account of a meeting need not be reflective of every activity occurring at a meeting or duplicate the contents of the Town Board's minutes.

Enclosed for your consideration are copies of the Open Meetings Law and "Your Right to Know", which describes the Law in detail.

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

Sincerely,

Robert J. Freeman
Executive Director

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1471

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

March 10, 1988

Mr. David Zinman
Newsday
Long Island, NY 11747

<u>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, unless otherwise indicated.</u>

Dear Mr. Zinman:

As you are aware, I have received a copy of your letter addressed to Peter Slocum, Director of Public Affairs for the State Health Department.

In your letter, you requested that meetings of the State Cardiac Advisory Committee (hereafter "the Committee") be conducted in accordance with the Open Meetings Law. You wrote that "the committee's decisions are tantamount to state policy because they determine how health care is regulated in open-heart programs." Moreover, you stressed that "Over the years, the committee's decisions have been universally accepted by the State Health Commissioner" and that "the committee's actions have great impact on the public..."

You also referred to a request for minutes of a meeting of the Committee held in October, which, as of the date of your letter, had not yet been prepared.

Your question involves the status of the Committee under the Open Meetings Law. In this regard, I offer the following comments.

By way of background and in conjunction with your suggestion, I obtained a copy of the 1986 Report of Cardiac Diagnostic and Surgical Centers, which was prepared by the Executive Secretary of the Committee. The introductory portion of the report states that:

> "The State Cardiac Advisory Committee was established by the Commissioner of Health in 1955 at the advent of open heart surgery. Its current composition consists of seventeen cardiologists and cardiac surgeons. The Committee may consider any matter relating to cardiac centers. However, it has three basic responsibilities:
>
> 1. Setting professional standards for cardiac diagnostic and surgical centers.
>
> 2. Carrying out a program of approval and review of existing and prospective new cardiac centers through periodic inspections of approved and proposed cardiac diagnostic and surgical centers.
>
> 3. Collecting and analyzing cardiac statistics."

The report also indicates that:

> "Previous reports published by the Department have proven to be a valuable aid to those involved in the evaluation and planning of health services in acute care facilities. The data contained in this current volume represents a major source of information on cardiac utilization in the State and for the community."

The basis for the creation of the Committee, according to the report, is section 2803 of the Public Health Law, which confers broad powers and duties upon the Commissioner of Health regarding health care in the state. Further, the regulations promulgated by the Commissioner refer to the Committee. 10 NYCRR section 405.5 (f)(9) states that "The State Cardiac Advisory Committee shall, at the request of the commissioner, consider any matter relating to cardiac diagnostic centers and shall advise the commissioner thereon." Section 405.5(f)(10) of the regulations, entitled "Approval and review", states in part that:

> "Site visits to existing and prospective new centers by members of the State Cardiac Advisory Committee, or other designees of the commissioner, shall be made as indicated, as an adjunct to initial approval, and/or for maintaining approval."

In view of the foregoing, I believe that the Committee is subject to the requirements of the Open Meetings Law.

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

It is noted that the language quoted above differs from the original definition of "public body" as it appeared in the Open Meetings Law when the Law became effective in 1977.

At that time, questions arose regarding the status of committees, advisory bodies and similar entities which may have had the capacity only to advise, and no authority to take final action. The problem arose in several instances because the definitions of "meeting" and "public body" referred to entities that "transact" public business. Although the Committee on Open Government (then the Committee on Public Access to Records) consistently advised that the term "transact" should be accorded its ordinary dictionary definition, i.e., to carry on business [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], it was contended by many that the term "transact" referred only to those entities having the capacity to take final action.

To clarify the Law and to indicate that committees, subcommittees and other advisory bodies should be subject to the requirements of the Open Meetings Law, the definition of "public body" was amended in 1979 to its current language and to include entities that "conduct" public business.

Based upon the facts that you provided, as well as the contents of the Committee's report and the regulations cited earlier, I believe that the Committee is a public body, for each of the conditions found within the definition of "public body" above can, in my view, be met.

The Committee is an "entity" consisting of at least two members. Again, the Committee's report indicates that it consists of seventeen members. Further, although the regulations might 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". It was apparently established to advise the Commissioner and to carry out certain duties regarding cardiac diagnostic and surgical centers. Although characterized as "advisory", the report and the regulations suggest that the Committee in reality makes policy and carries out specific functions. As indicated earlier, the Committee has certain "responsibilities", including "setting professional standards for cardiac diagnostic and surgical centers", implementing a "program of approval and review" of new and existing centers, and collecting and analyzing statistics. The approval and review function is referenced in state regulations "as an adjunct to initial approval, and/or for maintaining approval."

Those functions, in my opinion, indicate that the Committee conducts public business and performs a governmental function for the state and for an agency of state government, the State Health Department.

Based upon the preceding analysis, I believe that the Committee is a public body, for it bears each of the characteristics in the definition of "public body".

In good faith, I point out that there are conflicting judicial opinions concerning the status of entities designated by an executive. In Syracuse United Neighbors [80 AD 2d 894, appeal dismissed, 55 NY 2d 995 (1982)], it was held that advisory committees designated by a mayor are public bodies subject to the Open Meetings Law. In New York Public Interest Research Group v. Governor's Advisory Commission [507 NYS 2d 798 (1986)], it was held that an advisory body designated by means of an executive order was not a public body. Nevertheless, based upon the contents of the Committee's report, the regulations and an assumption that your contention is accurate, that the Committee makes policy and that its decisions "have been universally accepted by the State Health Commissioner", I believe that the status of the Committee is analogous to that of the bodies described in Syracuse United Neighbors.

In that decision, the Court stated that:

> "While neither of the committees here usurp the powers of other municipal departments and their recommendations may be characterized as advisory only, in that they did not bind the common council or other city departments it is clear that their recommendations have been adopted and carried out without exception. To hold that they are not public bodies within the meaning of the Open Meetings Law would be to exalt form over substance. Both committees perform vital governmental functions affecting the municipality and its citizenry and their recommendation receive the automatic approval of the common council. To keep their deliberations and decisions secret from the public would be violative of the letter and spirit of the legislative declaration in section 95 of the Public Officers Law" (id. at 985).

Due to the apparent similarity between the Committee in question and those considered in Syracuse United Neighbors, once again, it is my view that the Committee is a public body required to comply with the Open Meetings Law.

Since you referred to your inability to obtain minutes of a meeting held by the Committee, and based on an assumption that the Committee is subject to the Open Meetings Law, I point out that the Law contains provisions concerning the contents of minutes and the times within which they must be prepared. Specifically, section 106 of the Open Meetings Law provides 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."

Therefore, minutes of open meetings of public bodies must be prepared and made available within two weeks. Minutes reflective of action taken during executive sessions must be prepared and made available to the extent required by 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: David Axelrod, Commissioner
Peter Slocum, Director of Public Affairs
Delton Courtney, Executive Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5012
OML-AO-1472

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

March 14, 1988

Ms. Jayne E. Lynch
[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. Lynch:

I have received your letter of March 2, which deals with problems that you have encountered as a new member of the Greenfield Town Board concerning access to minutes and other Town records.

According to your letter, since the beginning of this year, Town Board meetings have been taped by the Clerk. However, you have been unable to obtain minutes from the Clerk "until a day or so before [your] next regular meeting." Although you requested that the minutes be prepared in a timely manner, the Clerk has refused, stating that she "is very busy...too much confusion in the town hall...etc." You also suggested that, in some instances, the minutes have been erroneous. For example, you referred to a situation in which abstentions were recorded as "ayes". Further, when requesting local laws "which are on file" in order to familiarize yourself with their contents, your requested was "refused".

You have requested a "ruling" concerning these matters.

In this regard, it is noted at the outset that the Committee does not have the authority to issue a "ruling" or to compel compliance with the Open Meetings Law or the Freedom of Information Law. Nevertheless, both of those statutes require the Committee to advise with respect to those statutes, and it is my hope that advisory opinions serve to educate and persuade. As such, 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 vote to approve them. If 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.

Since you indicated that meetings are tape recorded, I direct your attention to the Freedom of Information Law. Section 86(4) of that statute defines the term "record" 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."

As such, a tape recording of a meeting kept by a town is, in my view, clearly a record subject to rights of access. Moreover, the Court of Appeals, the state's highest court, has construed the definition literally and as broadly as its specific language indicates [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980) and Washington Post v. Insurance Department, 61 NY 2d 557 (1984)].

Further, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. Under the circumstances, a tape recording of an open meeting is, in my opinion, available, for none of the grounds for denial would be applicable. Moreover, it has been determined judicially that a tape recording of an open meeting is accessible under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Sup. Ct., Nassau Cty., October 3, 1983].

With regard to the recording of abstentions, section 41 of the General Construction Law has long provided guidance concerning quorum requirements and voting by public bodies. That provision states in part that "not less than a majority of the whole number may perform and exercise" the "power, authority or duty" conferred upon a public body. Therefore, I believe that a majority of the total membership of a public body must cast an affirmative vote as a condition precedent to the adoption of any measure.

It is noted, too, that section 41 of the General Construction Law has been interpreted by the courts on various occasions regarding abstentions. In short, it has consistently been found that an abstention cannot be counted as an affirmative vote and that action may be taken only by means of an affirmative

vote of the majority of the total membership of a public body [see e.g., Rockland Woods, Inc. v. Suffern, 40 AD 2d 385 (1973); Walt Whitman Game Room, Inc. v. Zoning Board of Appeals, 54 AD 764 (1975); Guiliano v. Entress, 4 Misc. 2d 546 (1957); and Downing v. Gaynor, 47 Misc. 2d 535 (1965)].

With respect to your requests for records, to the extent that the Town Clerk maintains possession of local laws and similar records, I believe that such records 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, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, prescribe time limits within which agencies must 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

It is possible, too, that the Town Board might have established rules of procedure concerning requests by Board members, and it is suggested that you inquire about any such rules.

Lastly, since you requested advice concerning your "alternatives" if a municipal official fails to comply with the Freedom of Information Law or the Open Meetings Law, I point out that a lawsuit could be initiated pursuant to Article 78 of the Civil Practice Law and Rules to seek to compel compliance. However, as indicated at the outset, it is my hope that this opinion will serve to educate and persuade, and that it will negate any need to initiate a suit.

I hope that I 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: Pauline D. Levo, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1473

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

March 16, 1988

Mr. Jack Steinkamp
[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, unless otherwise indicated.

Dear Mr. Steinkamp:

I have received your letter of March 1, which reached this office on March 7.

According to your letter, the Board of Trustees of the Village of Sodus Point has held a series of closed meetings. For example, after hearing "rumors" that a meeting was being held, you described the situation as follows:

> "I personally went to the clerk's office and witnessed three of our trustees, our building inspector and the supervisor of our water dept. sitting at a desk in the back of the office. The lights in the form of the office were turned off and a 'closed' sign was in the window.
>
> "I walked in and asked them if they were holding a meeting and was told, 'There is no meeting tonight, come back on Thursday'. I again asked if this was a meeting and was told no. After a few minutes I asked for a third time if this was a meeting and if any village business was to be discussed. I was then told, 'Just because three of us are here doesn't mean we are having a meeting...come back on Thursday'.

> "I then left and found a 'fourth' trustee. I asked him if he knew that a 'closed' meeting was taking place in the clerks office. He said, yes he was aware of this, and he was not happy about it. I asked him why he wasn't trying to stop the meeting. He replied that, 'They all know what they are doing is wrong and if I go down there I will be breaking the law too'."

You wrote that the purpose of the meetings involved the discussion of the issuance of a building permit to a developer. You also indicated in our telephone conversation that your requests for minutes of meetings have been denied.

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 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 informal 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.

Third, a public body cannot exclude the public from a meeting to discuss the subject of its choice. A public body, such as the Board of Trustees, may exclude the public when it conducts an "executive session". 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. As such, an executive session is not separate and distinct from an open meeting, but rather is a part of an open meetings. Section 105(1) of the Law prescribes a procedure that must be accomplished by a public body, during a open meeting, before it may enter into an executive session. Specifically, the cited provision states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion 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..."

The ensuing provisions specify and limit the topics that may appropriately be discussed during an executive session. Therefore, it is reiterated that a public body may not enter into an executive session to discuss the topic of its choice; on the contrary, unless the subject matter falls within one or more of the topics listed in paragraphs (a) through (h) of section 105(1)

of the Law, a public body would not have the authority to conduct an executive session. Based upon the facts described in your letter, assuming that the gatherings were "meetings", it does not appear that any basis for entry into executive session could justifiably have been asserted.

Fourth, the Open Meetings Law requires that minutes of meetings be prepared and made available. Specifically, section 106 of the Law provides 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.

Further, 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, 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."

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

I hope that I 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, Village of Sodus Point

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5018
OML-AO-1474

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

March 16, 1988

Hon. Patricia N. Dohrenwend
Town Clerk
Town of Eastchester
40 Mill Road
Eastchester, NY 10709

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. Dohrenwend:

I have received your letter of March 4 in which you requested an advisory opinion concerning the required content of minutes. You also sought my comment "on the necessity to include statements or letters which are given to the secretary of the meeting and not formally acknowledged by the board as documents to be inserted".

In this regard, I offer the following comments.

Second, section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies and prescribes what may be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 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 meetings 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, with respect to open meetings, minutes must, at a minimum, consist of a record or summary of all motions, proposals, resolutions and any other matters upon which votes are taken. Minutes of open meetings are, in my view, available in their entirety. With respect to action taken in an executive session, a record or summary of the final determination of action must be prepared and made available to the extent required by the Freedom of Information Law. If a public body enters into an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

In addition to the Open Meetings Law, the Freedom of Information Law has, since its enactment in 1974, contained what may be considered an "open vote" provision. Section 87(3) states in relevant part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Since a Town Board is an "agency" [see Freedom of Information Law, section 86(3)], when a final vote is taken by the Board a record must be prepared that indicates the manner in which each member cast his or her vote. An analogous requirement is imposed upon town boards by section 63 of the Town Law.

In view of the foregoing, it is clear in my opinion that minutes need not consist of a verbatim account of what transpired at a meeting. Similarly, minutes need not refer to each person who spoke at a meeting or the nature of a speaker's remarks. Although minutes may be more expansive than the Open Meetings Law requires, they must consist only of a record or summary containing the information described in section 106 of the Open Meetings Law.

Lastly, with respect to your question concerning reference to or the acknowledgement of statements or letters presented to the Board, my opinion is based upon the same rationale as that offered with regard to the contents of minutes. In short, many public bodies at their meetings read or acknowledge statements or correspondence they receive. However, I am unaware of any law that requires those activities or that reference to such activities be included in 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:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1475

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

March 18, 1988

Hon. Catherine Nolan
NYS Assembly
Legislative Office Bldg.
Room 833
Albany, NY 12248

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 Assemblywoman Nolan:

I have received your letter of March 15, as well as the materials attached to it.

Among the materials is legislation that you have introduced to amend the Public Authorities Law, section 1263(4). The cited provision pertains to committees established by the chairman of the Metropolitan Transportation Authority (MTA). The proposed legislation states that:

> "The meetings of each committee shall be open to the public and at every meeting there shall be a period of time alloted by the chairman for members of the public to speak on any topic on the agenda, or on any topic raised by a member of the committee at the meeting."

Based upon a recent news article containing my comments concerning the right of the public to speak at meetings, you expressed the belief that I "would be hesitant to encourage such legislation". Nevertheless, you have sought my views on the bill, and I appreciate having the opportunity to do so.

First, my comments in the article were based on the law as it exists. In brief, although the Open Meetings Law enables any person to attend meetings of public bodies, the Law is silent with respect to public participation. Consequently, it has been

advised that a public body is not required to permit the public to speak or otherwise participate at meetings. Concurrently, there is nothing in the law that precludes a public body from permitting public participation. As such, if a public body wants to permit the public to speak, it has also been advised that it may do so, presumably based on reasonable rules that treat members of the public equally.

To be sure, I am not at all opposed to enabling the public to speak at meetings; however, when a question is raised concerning the right to speak, in good faith, I feel that I must advise that there is no right to do so.

As indicated in the memorandum in support of the legislation, the committees subject to the legislation often discuss critical issues in detail. For that reason, I would favor the bill, for public participation would likely require the committees to address issues of concern and shed additional light on those issues. Further, the legislation would guarantee openes and generally enhance accountability.

My only suggestion to improve the bill involves an area addressed in the memorandum in support. The summary indicates that the Chairman would have "the authority to determine how much, and at what time during the meeting the public should be allowed to speak". It is suggested that reference to that authority be included in the bill. For instance, a sentence might be added to the effect that: "The chairman shall adopt reasonable rules governing public participation at such meetings", or the "The chairman shall adopt rules concerning the length of individual comments and comment periods, the times during such meetings during which the public may speak, and the manner in which members of the public may be selected to speak on the aforementioned topics considered at such meetings."

If you would like to discuss the matter, or if you feel that I can be of assistance, please do not hesitate to contact me.

Once again, I appreciate having had an opportunity to comment.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1476

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

March 22, 1988

Mr. David L. Schreiber
Chairman
Essex Planning Board
Box 263
Essex, NY 12936

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. Schreiber:

I have received your letter of March 7 in which you requested an advisory opinion concerning the Open Meetings Law.

Your question involves:

> "the right of the Town of Essex Planning Board (and the Town Board also) to conduct an executive session for the purpose of weighing the evidence before the Board and applying the applicable law, so as to reach a decision -- a quasi-judicial function -- and thus exempt from 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 it is clear in my view that a town board or a planning board would each constitute a "public body."

Second, there are two vehicles under which a public body may exclude the public from its gatherings. One involves the holding of an executive session. It is noted that section 102(3) of the 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 prescribes a procedure that

must be accomplished by a public body during an open meeting before an executive session can be held, and paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

The other vehicle involves an "exemption" from the Law. Section 108 describes three such exemptions. In short, if a matter is exempt from the Open Meetings Law, the Law has no application.

Section 108(1) exempts from the Open Meetings Law "judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals."

In my view,it is often difficult to determine exactly when a public body is involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administrative functions. For example, having reviewed provisions of the Town Law concerning planning boards, it appears that the authority of planning boards may vary, depending upon the kinds of activities that they perform, as well as the nature of local laws or regulations developed by a governing body that confer powers upon planning boards. Similarly, some provisions requires that public hearings be held; others permit discretion to hold a public hearing. Further, the holding of public hearings and providing an opportunity to be heard does not in my opinion render a proceeding quasi-judicial in every instance. Those requirements may be present in a variety of contexts, many of which precede legislative action.

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

> "The test may be stated to be that action is judicial or quasi-judicial, when and only when, the body or officer is authorized and required to take evidence and all the parties interested are entitled to notice and a hearing, and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only when there is an opportunity to be heard, evidence presented, and a decision had

thereon" [Johnson Newspaper Corporation v. Howland, Sup. Ct., Jefferson Cty., July 27, 1982; see also City of Albany v. McMorran, 34 Misc. 2d 316 (1962)].

Another decision that described a particular body indicated that "[T]he Board is a quasi-judicial agency with authority to make decisions reviewable only in the Courts" [New York State Labor Relations Board v. Holland Laundry, 42 NYS 2d 183, 188 (1943)]. Further, in a discussion of quasi-judicial bodies and decisions pertaining to them, it was found that "[A]lthough these cases deal with differing statutes and rules and varying fact patterns they clearly recognize the need for finality in determinations of quasi-judicial bodies..." [200 West 79th St. Co. v. Galvin, 335 NYS 2d 715, 718 (1970)].

Similarly, it is my opinion that the determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

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

When a planning board is engaged in deliberations upon which it will rely in making a final and binding determination, it appears that such gatherings could be characterized as "quasi-judicial". In other circumstances, however, a planning board serves in an advisory role, engages in quasi-legislative or administrative functions, or does not render a determination that is reviewable only by the courts. In those circumstances, it would not be involved in a quasi-judicial proceeding.

With respect to town boards, it would be rare in my opinion for those boards to engage in quasi-judicial proceedings. The great majority of their activities involve legislative, fiscal, policy-making and personnel functions.

In sum, many activities of a planning board must in my view be conducted in public in accordance with the Open Meetings Law. However, in those situations in which the Board must hold a public hearing, weighs the evidence, applies the law and renders a final and binding determination reviewable only by a court, it appears that its deliberations could be characterized as "quasi-judicial" and, therefore, exempt from the Open Meetings Law.

Lastly, it is noted that, although the deliberations of a planning board may be exempt from the Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409, 418 (1978)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1477

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

March 22, 1988

Ms. Mary W. Wood
Trustee
Board of Education
Wappingers Central School District
90 Remsen Avenue
Wappingers Falls, NY 12590

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

Dear Ms. Wood:

I have received your letter of March 8, with an attachment, in which you requested an advisory opinion concerning the Open Meetings Law.

According to the materials, the Board of Education of the Wappingers Central School District, of which you are a member, held a meeting on January 20 during which an executive session was convened to discuss certain matters pertaining to a personal computer bid. You indicate that, "The reason stated for executive session by Mr. Robar was 'Legality of Bid'". Based on your description of the executive session, the topics discussed involved the specifics of the machinery, compatibility with your present system, placement, usefulness, adaptability for future use, type of software and related issues. You also state that, "No discussion of legality took place". Further, according to your letter and the minutes of the Board's January 27 meeting, a copy of which you enclosed, it appears that at that January 27 meeting, Mr. Edward M. Broderick, Vice President of the Board, stated that:

> "all of the technical questions regarding this bid have now been answered, and questions on the viability of both the vendor and the manufacturer have been reviewed and, in his opinion, are

> more than acceptable. Mr. Broderick said he would recommend to the Board that it vote tonight to accept the bid."

The Board then voted to accept the bid. Your question involves the propriety of the January 20 executive session. 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 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. Unless and until one of those topics arises, a public body, in my opinion, is required to conduct its business open to the public.

Second, with respect to the reason cited as the basis for the executive session, "Legality of Bid", it appears that the Board was relying on section 105(1)(d) of the Law. That provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing that language, 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. Additionally, it is noted that discussions pertaining to the "legality" of a particular matter would not likely, without more, fall within any of the grounds for which an executive session may be convened.

Third, it is unclear from the statement made by Mr. Broderick at the January 27 meeting (see earlier) whether the discussion during the January 20 executive session included a review of "the viability of both the vendor and the manufacturer". To the extent that those topics were discussed, section 105(1)(f) of the Open Meetings Law may be relevant. The cited provision states that an executive session may be convened 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's discussion focused on the "employment history of a particular...corporation", matters "leading to the employment" of a "particular...corporation", or perhaps the "financial or credit history" of a particular corporation, I believe that an executive session could properly have been held.

Fourth, however, as you may be aware, the Open Meetings Law 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..."

Further, judicial decisions indicate that a motion to enter into executive session should refer to the topic to be discussed with some degree to specificity. 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, where section 105(1)(f) may be asserted, I believe that the 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 financial history of a particular corporation" would be proper. As suggested earlier, a motion that cites "Legality of Bid" as the basis for the executive session, in my view, makes no reference to any of the grounds for denial and would not be sufficient to comply with the statute.

Finally, except to the extent that section 105(1)(b) might have been applicable, it is unlikely, in my view, that any other ground for executive session would have applied to the discussion you described. Therefore, with the one possible exception it appears that the discussion should have been conducted in public.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1478

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

March 23, 1988

Mr. Joseph Sluzar
Attorney at Law
110 Grant Avenue
Endicott, NY 13760

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. Sluzar:

I have received your letter of March 11, as well as the newspaper article attached to it.

The article deals with a vote conducted during an executive session held by the Village of Endicott Board of Trustees and my comment that the Board's actions were proper. You have questioned my views on the matter.

First, the question posed to me by the reporter involved the issue of the propriety voting during an executive session and whether the vote in question constituted an appropriation. I do not recall that I was informed of the substantive nature of the discussion or the basis for entry into an executive session. In short, my advice was that if the vote did not constitute an appropriation, it could have occurred during a proper executive session. The example that I provided involved a situation in which monies had been budgeted and appropriated by a municipality for a position. If the position became vacant, and a municipality sought to fill it, its vote to hire a new person would not, in my view, constitute an appropriation, but rather a decision to expend monies that had already been appropriated.

Again, the substantive nature of the discussion was not described to me. Further, I believe that the paragraph pertaining to the Open Meetings Law in the article is inaccurate. The paragraph stated that:

> "Nestor said the board was within its legal rights in handling the matter in private. The state Open Meetings Law allows government bodies to discuss contractual matters privately, and only votes which approve the expenditure of public money must be taken publicly, he said."

As you are aware, the only specific reference in the Open Meetings Law to "contractual matters" pertains to collective bargaining negotiations conducted in conjunction with the Taylor Law [section 105(1)(e)]. Moreover, the use of the word "expenditure" in the article is misleading, for the Law refers to prohibition against voting to "appropriate" public monies during an executive session.

From my perspective, the only possible basis for conducting an executive session would have been section 105(1)(f) as it pertains to discussions of the financial or credit history of a particular person or corporation. Based on the article, however, it appears that little, if any, of the executive session involved that kind of issue. Other than that possibility, I would agree with your inference that there was apparently no basis for entry into executive session. Moreover, as I understand the situation, there was neither an appropriation nor an expenditure of public monies.

Under the circumstances, I can understand your confusion regarding the article. A narrow question was asked of me, and that question was not raised with an indication of the subject matter or substance of the issue being considered by the Board. The result was commentary in the article which, in my view, is misleading.

I hope that the foregoing serves to clarity the situation. Certainly I appreciate receipt of the article and your concern. If you would like to discuss the matter, 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

FOIL-AO - 5030
OML-AO - 1479

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

March 24, 1988

Mr. John Wright
[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. Wright:

I have received your letter of March 11 in which you raised a variety of questions, most of which pertain to the Open Meetings Law. It is assumed that your inquiry concerns the Town Board of the Town of Ticonderoga, for you enclosed a copy of minutes of a recent Board meeting. I will attempt to respond to your questions, but not necessarily in the order in which they appear.

First, you asked whether the public can be charged for a copy of an agenda of a meeting of the Town Board. In this regard, I direct your attention to the Freedom of Information Law. That statute pertains to records of an agency, and section 86(4) defines the term "record" broadly to mean:

> "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."

As such, an agenda would, in my view, constitute a "record" subject to rights of access granted by the Freedom of Information Law. Since section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge a fee of up to twenty-five cents per photocopy, I believe that the Town could charge for a copy of an agenda. This is not to suggest that a fee must be charged, but rather that a fee for a copy of an agenda may be charged.

Second, you asked whether special meetings and meetings of the zoning board of appeals, the planning board, workshops, committees consisting of town board members or persons appointed by the Town Board, and advisory committees are subject to the Open Meetings Law. In conjunction with that question, you asked whether those entities must prepare and disclose minutes, and whether their meetings can be conducted by telephone.

The coverage of the Open Meetings Law is determined in part by means of the definition of "public body" in section 102(2). Clearly, the Town Board, the planning board and the zoning board of appeals are public bodies, for their creation is based upon statutory provisions found in the Town Law. In addition, the legislative history of the Open Meetings Law indicates that committees or subcommittees established by the Town Board or other bodies are also public bodies subject to the Law. By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject involved a situation in which a governing body, 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 those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in section 102(2) to include:

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more persons designated or created to serve as a body by the Town Board, or any public body, would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Further, I believe that the same conclusion can be reached with respect to committees by viewing the definition of "public body" in terms of its components.

It is assumed that committees would be "entities" that consists of "two or more members". Further, although the action of the governing body that created the committees might not refer to any quorum requirement, I believe that section 41 of the General Construction Law would permit the those committees to carry out their 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 committees are "persons charged with [a] public duty to be performed or exercised by them jointly". The were likely established to advise the Town Board or perhaps to determine particular issues. 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, supra; 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 they must exercise their duties pursuant to the quorum requirements set forth in section 41 of the General Construction Law.

In addition, such committees, in my view, would conduct public business and perform a governmental function for a public corporation, the Town. Based upon the foregoing, I believe that the committees meet the definition of "public body" and would be thus subject to the provisions of the Open Meetings Law.

Further, the term "meeting" has been broadly construed by the courts. In Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of Appeals, the state's highest court, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Law, whether or not there is an intent to take action, and irrespective of the manner in which such gatherings may be characterized. It is noted that the decision specifically involved "work sessions" and similar "informal" gatherings during

which there was no intent to take action. As such, a "workshop" or "special meeting" held by a public body for the purpose of conducting public business would, in my opinion, constitute a "meeting" that falls within the requirements of the Open Meetings Law.

With respect to meetings conducted by means of a series of telephone conversations, once again, I refer to section 41 of the General Construction Law. Based upon that provision, which was quoted earlier, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at 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, i.e., to vote, 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 assembly syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" requires the assembly of a group in order to constitute a quorum of a public body. Therefore, I believe that a meeting can be held only after a quorum of a public body has physically convened.

With regard to minutes of meetings, section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies and prescribes what may be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 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 meetings 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, with respect to open meetings, minutes must, at a minimum, consist of a record or summary of all motions, proposals, resolutions and any other matters upon which votes are taken. Minutes of open meetings are, in my view, available in their entirety. With respect to action taken in an executive session, a record or summary of the final determination of action must be prepared and made available to the extent required by the Freedom of Information Law. If no action is taken during an executive session, minutes need not be prepared.

I point out that, in addition to the Open Meetings Law, the Freedom of Information Law has, since its enactment in 1974, contained what may be considered an "open vote" provision. Section 87(3) states in relevant part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Since a town board or committee is an "agency" [see Freedom of Information Law, section 86(3)], I believe that when a final vote is taken by a public body, a record must be prepared that indicates the manner in which each member cast his or her vote. Therefore, the minutes should include reference to each member's vote as affirmative or negative as the case may be.

Lastly, section 104 of the Open Meetings Law pertains to notice of meetings. That provision states in relevant part that:

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

With respect to your questions, all public bodies must, in my opinion, post notice of the time and place of all meetings. If a meeting is scheduled at least a week in advance, section 104(1) requires that notice must be given to the news media (at least two) and "conspicuously posted in one or more designated public locations" not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, section 104(2) requires that notice be given to the news media and posted in the same manner as prescribed by section 104(1), "to the extent practicable", at a reasonable time prior to the meeting. Section 104(2) is most often applicable to unscheduled, special or emergency meetings. Therefore, while the Open Meetings Law does not preclude a public body from convening quickly, it does impose a requirement that notice be given to the news media and to the public by means of posting prior to every meeting.

While the Law does not specify where notice must be posted, it does indicate that notice must be posted "conspicuously" in one or more "designated public locations". As such, a bulletin board in town offices would likely be an appropriate location for posting notice.

It is noted that section 62(2) of the Town Law deals specifically with special meetings of town boards. Enclosed is a copy of that provision.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

cc: Town Board, Town of Ticonderoga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1480

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

March 31, 1988

Ms. Kathleen Keating
[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. Keating:

I have received your letter of March 18, as well as the news articles attached to it.

Your inquiry concerns a "gathering" of members of the Mechanicville Board of Education on February 4, and whether that gathering constituted a "meeting" subject to the Open Meetings Law. You wrote that the Board:

> "...is composed of 7 elected members and the superintendent of schools. On the night in question, at least 6 of these individuals were present at the elementary school building simultaneously to discuss unknown issues related to a vote that occurred the previous night at the regularly scheduled meeting. The members were not present by coincidence; they were there for the purpose of discussing this unknown issue."

You added that the gathering was discussed at meetings held in March and that, at those meetings, "it was clearly stated that the 6 people present discussed the issue at hand for approximately 20 minutes."

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

> "1. Do the facts presented indicate that the 'gathering' did in fact constitute a meeting?
>
> 2. As the topic was described as 'personal' as opposed to 'personnel' could the meeting be described as an 'executive session' as one board member has suggested?
>
> 3. Does the public have the right to know the exact topic of discussion, and the decisions reached, even if a vote was not taken."

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 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).

Therefore, if there was an intent to convene for the purpose of conducting public business, the gathering in question would in my opinion have constituted a "meeting" subject to the Open Meetings Law.

Further, assuming that the gathering was a meeting, I point out that 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.

Second, although the subject matter considered at the gathering is unclear, the news articles suggest that the discussion might have involved whether to begin an honors program, or perhaps a "personal problem" of a Board member. Without knowledge of the nature of the discussion, I cannot advise as to whether an executive session could appropriately have been held. Nevertheless, it is noted that the Open Meetings Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded [see section 102(3)]. In addition, a procedure must be accomplished during an open meeting before a public body may conduct an executive session. Specifically, section 105(1) states in relevant part that:

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

Therefore, a motion to enter into an executive session must be made during an open meeting, and the motion must indicate the reason for entry into executive session. Moreover, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, the Law specifies and limits the subjects that may appropriately be considered during an executive session.

Third, the so-called "personnel" exception, 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..."

If the issue considered by the Board involved the establishment of an honors program, I do not believe that section 105(1)(f) or any other ground for entry into executive session could have been asserted.

Lastly, you alluded to the public's right to know of "decisions reached, even if a vote was not taken." From my perspective, decisions must generally be reached by means of a vote. When a vote is taken, minutes must be prepared. Section 106 of the Open Meetings Law pertains to minutes of meetings and provides 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."

With respect to the taking of action in executive session, I point out that, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law, section 105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to section 106(2). Nevertheless, various interpretations of the Education Law, section 1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. As such, based upon the judicial decisions cited above, if action was taken by the Board, I believe that it should have been accomplished by means of a vote taken during an open meeting.

As you requested, a copy of this opinion will be sent to the Carmen Bagnoli, President of the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carmen Bagnoli, President, Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1481

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

March 31, 1988

Mr. Vernon Ryder
[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. Ryder:

I have received your letter of March 17 in which you requested advice concerning the Open Meetings Law.

According to your letter, the Town Board and the Planning Board in the Town of Palermo hold closed "work sessions" which the public is not permitted to attend. You asked for an explanation of how the Open Meetings Law applies to work sessions and whether the Law contains "advertising" requirements for such sessions. You also inquire as to whether the public may be excluded from these gatherings. In this regard, I offer the following comments.

First, the Open Meetings Law applies to meetings of public bodies. The term 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."

Thus, town boards and planning boards, including the Palermo Town Board and the Planning Board, are public bodies subject to the Law.

Second, the courts have held that the convening of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which the gathering is characterized, is 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)]. As such, the work sessions you described are, in my view, "meetings" subject to the Law if a quorum of the members of either the Planning Board or the Town Board is present.

Third, section 103(a) of the Open Meetings Law states that, "Every meeting of a public body shall be open to the general public" except to the extent that discussions fall within the scope of one or more among eight grounds for entry into executive session listed in section 105(1)(a) through (h) of the Law. As such, a public body cannot enter into an executive session to discuss the subject of its choice. It is also noted that section 102(3) of the Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, a public body is required to accomplish a procedure during an open meeting before it may enter into an executive session. Specifically, section 105(1) states in relevant part that:

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

Fourth, every meeting of a public body must be preceded by notice of the time and place of the meeting. Specifically, section 104 of the Law states in part that:

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

> the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto."

I point out that, in accordance with section 104, public bodies must give notice by means of posting and by notifying the news media; they are not required to "advertise" by paying to place a notice in a newspaper, for example.

In sum, from my perspective, all meetings of the Town Board and the Planning Board, including work sessions, must be preceded by notice given in accordance with section 104 of the Law and conducted open to the public, unless and until an executive session may be held to discuss one or more of the topics described in section 105(1) of the Law.

Enclosed is a copy of "Your Right to Know", a pamphlet that describes the Freedom of Information Law and the Open Meetings Law.

Finally, in an effort to enhance compliance with the Law, copies of this advisory opinion will be sent to the Palermo Town Board and the Planning Board.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
cc: Palermo Town Board
Palermo Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1482

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

March 31, 1988

Mrs. Barbara Ames
[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 Mrs. Ames:

I have received your letter of March 16 in which you requested a clarification of the Open Meetings Law.

Specifically, your inquiry was apparently precipitated by a situation in which a lengthy discussion occurred at a meeting and was extensively reported by a newspaper. The minutes of the meeting, however, merely included reference to the action taken; no reference was made to the discussion. Further, the Town Clerk informed you that the minutes need not include reference to discussions.

In this regard, I offer the following comments.

First, section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies and prescribes what may be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 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 meetings 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, with respect to open meetings, minutes must, at a minimum, consist of a record or summary of all motions, proposals, resolutions and any other matters upon which votes are taken. Minutes of open meetings are, in my view, available in their entirety. With respect to action taken in an executive session, a record or summary of the final determination of action must be prepared and made available to the extent required by the Freedom of Information Law. If a public body enters into an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

In view of the foregoing, in my opinion, minutes need not consist of a verbatim account of what transpired at a meeting. Similarly, minutes need not refer to persons who spoke at a meeting or the nature of speakers' remarks. Although minutes may be more expansive than the Open Meetings Law requires, they must consist only of a record or summary containing the information described in section 106 of the Open Meetings Law. Therefore, with respect to the situation that you described, I do not believe that the Law would require that the minutes describe the discussion, irrespective of its length or the significance of comments made.

Second, if you would like to have a more expansive record of the events occurring at meetings, I believe that you or any person in attendance could tape record the meetings. Although the Open Meetings Law is silent with regard to the use of tape recorders, it has been held by the courts that any person may use a portable tape recorder at open meetings of public bodies [see e.g., Mitchell v. Johnston, Supreme Ct., Nassau County, April 6, 1984; People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1483

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

March 31, 1988

Ms. Stephanie Wenk
Greenwich Citizens' Committee, Inc.
103 Main Street
Greenwich, NY 12834

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. Wenk:

I have received your correspondence of March 18, which pertains to meetings of the Washington County Board of Supervisors.

Specifically, you wrote that several major issues have recently been considered by the Board, and that, during its meetings, those issues have been discussed at length and have been hotly contested. It is your view that minutes of previous meetings should be read aloud in order to ensure continuity of discussion of the issues. You pointed out that the Board's rules of conduct specify that "At every meeting of the Board, upon the members being called to order by the Chairman, the condensed minutes of the preceding meeting shall be read". Nevertheless, the "condensed minutes" have not been read at the meetings.

In this regard, I offer the following comments.

First, section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies and prescribes what may be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 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 meetings 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, with respect to open meetings, minutes must, at a minimum, consist of a record or summary of all motions, proposals, resolutions and any other matters upon which votes are taken. Minutes of open meetings are, in my view, available in their entirety. With respect to action taken in an executive session, a record or summary of the final determination of action must be prepared and made available to the extent required by the Freedom of Information Law. If a public body enters into an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

In view of the foregoing, in my opinion, minutes need not consist of a verbatim account of what transpired at a meeting. Similarly, minutes need not refer to persons who spoke at a meeting or the nature of speakers' remarks. Although minutes may be more expansive than the Open Meetings Law requires, they must consist only of a record or summary containing the information described in section 106 of the Open Meetings Law. Therefore, with respect to the situations that you described, I do not believe that the Law would require that the minutes describe the discussions, irrespective of their length or the significance of comments made.

Second, if you would like to have a more expansive record of the events occurring at meetings, I believe that you or any person in attendance could tape record the meetings. Although the Open Meetings Law is silent with regard to the use of tape recorders, it has been held by the courts that any person may use

a portable tape recorder at open meetings of public bodies [see e.g., Mitchell v. Johnston, Supreme Ct., Nassau County, April 6, 1984; People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979)].

Lastly, there is nothing in the Open Meetings Law that requires that minutes be read aloud at meetings. Nevertheless, according to your correspondence, the Board's rules require that condensed minutes be read. Therefore, although a failure to read such minutes aloud would not constitute a violation of the Open Meetings Law, such failure would apparently be inconsistent with the Board's rules of conduct.

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:gc
cc: Washington County Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1484

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

April 4, 1988

Mr. Peter L. Bisulca
[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. Bisulca:

I have received your letter of March 16, with attachments, in which you requested an advisory opinion concerning the Open Meetings Law.

According to the materials, the Supervisor of the Town of North Salem met with two Board members to discuss matters apparently pertaining to town business. As indicated in an article appearing in the February 4 edition of the Patent Trader, a copy of which you enclosed, Mr. Spinna, the Town Supervisor, stated that the gathering "was an informal fact gathering session in which he sought information from the two men based on their experiences during the previous administration" and that it was an "investigation", not a "meeting". You indicate that no public notice was given prior to the gathering and that the two other Town Board members, yourself and Mr. Ginenthal, were not given notice. It appears that at the outset of the gathering, Mr. Murphy and Mr. White, the two Board members in attendance, questioned its propriety, but were assured by Mr. Spinna that the gathering was legal. You also note that the gathering was not a political caucus since two republicans and one democrat attended, and the excluded councilmen represent both parties. You seek an advisory opinion concerning the propriety of the gathering. In this regard, I offer the following comments.

First, I point out that the courts have held that 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 how the gathering is characterized, is 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)]. Thus, in my view, the gathering or "investigation" that you described was a meeting that fell within the requirements of the Open Meetings Law.

Second, as you noted, it does not appear that the meeting could have been considered exempt from the Open Meetings Law on the ground that it is a political caucus exempt from the Open Meetings Law pursuant to section 108(2) of the Law. That provision indicates that the requirements of the Open Meetings Law do not apply to political caucuses and states in part that a political caucus includes:

> "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...".

Since you indicated that the meeting was attended by Board members representing both the democratic and the republican parties, and that the two members who were excluded represent different parties, the gathering would not, in my opinion, have constituted a political caucus exempt from the requirements of the Open Meetings Law.

Third, every meeting of a public body must be preceded by notice of the time and place of the meeting. Section 104(1) of the Open Meetings Law, which pertains to meetings scheduled at least a week in advance, requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 104(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in section 104(1) "to the extent practicable" at a reasonable time prior to such meetings. As such, I believe that notice must be given prior to all meetings, whether regularly scheduled or otherwise, and notwithstanding the manner in which a gathering is characterized.

Further, it is noted that section 62(2) of the Town Law states in part that, "the supervisor of any town may...call a special meeting of the town board by giving at least two days notice in writing to members of the board of the time when and the place where the meeting is to be held". While I am not an expert on Town Law, it appears, based on the cited provision, that you and Mr. Ginenthal should have received notice of the meeting.

Finally, in an effort to enhance compliance with the Law, a copy of this advisory opinion will be sent to the North Salem 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

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1485

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

April 4, 1988

Mr. Edwin J. Shoemaker
Andrews, Pusateri, Brandt, Shoemaker,
Higgins & Roberson, P.C.
Attorneys at Law
929 Lincoln Avenue
Lockport, NY 14094-6199

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. Shoemaker:

I have received your letter of March 24, as well as the materials attached to it.

You referred to an advisory opinion rendered on February 25 at the request of Ms. Betty Perry concerning the Town of Somerset Planning Board. Specifically, you questioned my comments concerning the Board's policy as it pertains to discussions relative to special permits. It is your view that those kinds of discussions may in some instances constitute quasi-judicial proceedings that are exempt from the Open Meetings Law.

You have requested an informal opinion on the matter. In this regard, I offer the following comments.

First, as you are aware, there are two vehicles under which a public body may exclude the public from its gatherings. One involves the holding of an executive session. It is noted that section 102(3) of the 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 prescribes a procedure that must be accomplished by a public body during an open meeting before an executive session can be held, and paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

The other vehicle involves an "exemption" from the Law. Section 108 describes three such exemptions. In short, if a matter is exempt from the Open Meetings Law, the Law has no application.

Section 108(1) exempts from the Open Meetings Law "judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals."

In my view,it is often difficult to determine exactly when a public body is involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administrative functions. For example, having reviewed provisions of the Town Law concerning planning boards, it appears that the authority of planning boards may vary, depending upon the kinds of activities that they perform, as well as the nature of local laws or regulations developed by a governing body that confer powers upon planning boards. Similarly, some provisions requires that public hearings be held; others permit discretion to hold a public hearing. Further, the holding of public hearings and providing an opportunity to be heard does not in my opinion render a proceeding quasi-judicial in every instance. Those requirements may be present in a variety of contexts, many of which precede legislative action.

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

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

Another decision that described a particular body indicated that "[T]he Board is a quasi-judicial agency with authority to make decisions reviewable only in the Courts" [New York State Labor Relations Board v. Holland Laundry, 42 NYS 2d 183, 188 (1943)]. Further, in a discussion of quasi-judicial bodies and decisions pertaining to them, it was found that "[A]lthough these cases deal with differing statutes and rules and varying fact patterns they clearly recognize the need for finality in determinations of quasi-judicial bodies..." [200 West 79th St. Co. v. Galvin, 335 NYS 2d 715, 718 (1970)].

Similarly, it is my opinion that the determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

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

When a planning board is engaged in deliberations upon which it will rely in making a final and binding determination, it appears that such gatherings could be characterized as "quasi-judicial". In other circumstances, however, a planning board serves in an advisory role, engages in quasi-legislative or administrative functions, or does not render a determination that is reviewable only by the courts. In those circumstances, it would not be involved in a quasi-judicial proceeding.

In sum, many activities of a planning board must in my view be conducted in public in accordance with the Open Meetings Law. However, in those situations in which the Board must hold a public hearing, weighs the evidence, applies the law and renders a final and binding determination reviewable only by a court, it appears that its deliberations could be characterized as "quasi-judicial" and, therefore, exempt from the Open Meetings Law.

Lastly, it is noted that, although the deliberations of a planning board may be exempt from the Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply

> the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409, 418 (1978)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1486

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

April 4, 1988

Ms. Elinor Boice
[redacted]

Dear Ms. Boice:

I have received your message from the Department of State "Hotline" concerning the Open Meetings Law.

As requested, enclosed are six copies of "Your Right to Know".

In addition, according to the Hotline message, you believe that the Town Board of the Town of Olive seeks to permit the public to attend a gathering of less than a quorum of the Board. However, when a quorum is present, the Board will attempt to meet in private.

Based upon those facts, I offer the following comments.

First, as a general matter, the Open Meetings Law applies to meetings of public bodies, such as town boards.

Second, if no quorum is present, the Open Meetings Law does not apply. In brief, a gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law. Every meeting must be preceded by notice given in accordance with section 104 of the Law and convened open to the public.

Third, a public body cannot exclude the public from meetings to discuss the subject of choice. It may, however, conduct closed or "executive" sessions to discuss certain topics. More specifically, 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. Moreover, 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. The cited provision states in relevant part that:

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

As suggested earlier, the Open Meetings Law specifies and limits the topics that may appropriately be discussed during an executive session. Those topics are described on page 13 of "Your Right to Know".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Town Board, Town of Olive
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1487

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

April 5, 1988

Mr. Stephen L. Epstein
Chairman, Zoning Committee
Nottingham Association, Inc.
1481 East 26 Street
Brooklyn, NY 11210

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. Epstein:

I have received your letter of March 25, as well as the correspondence attached to it.

Among the materials is a memorandum addressed to New York City community board chairpersons by Harold Nass, Deputy Director of the Community Assistance Unit of the Office of the Mayor. The memorandum deals with the implementation of the Open Meetings Law by community boards. You have asked whether, in my view, Mr. Nass' memorandum "conflicts with the Open Meetings Law". Having reviewed the memorandum, I believe that it accurately reflects the requirements of the statute.

You also asked whether the deliberations of a regional committee of a community board, or those of a community board itself when a zoning variance application is considered, could be considered "quasi-judicial" and, therefore, exempt from the Open Meetings Law.

In this regard, I offer the following comments.

First, section 2800(d) of the New York City Charter describes the powers and duties of community boards. In conjunction with your question, section 2800(d)(15) provides that a community board shall:

> "Exercise the initial review of applications and proposals of public agencies and private entities for the use,

> development or improvement of land located in the community district, including the conduct of a public hearing and the preparation and submission to the city planning commission of a written recommendation."

Consequently, as I understand the powers conferred upon a community board, it may conduct an "initial review" of an application for a zoning variance. However, a community board does not render a final and binding determination concerning such an application; rather it submits a recommendation to the City Planning Commission. If my understanding is accurate, I do not believe that a community board or a committee designated by a community board could characterize its deliberations as "quasi-judicial".

As you are aware, section 108(1) of the Open Meetings Law exempts from the coverage of the Law "judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals."

In my view, it is often difficult to determine exactly when a public body is involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administrative functions. The holding of public hearings and providing an opportunity to be heard does not in my opinion render a proceeding quasi-judicial in every instance. Those requirements may be present in a variety of contexts, many of which precede legislative action.

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

> "The test may be stated to be that action is judicial or quasi-judicial, when and only when, the body or officer is authorized and required to take evidence and all the parties interested are entitled to notice and a hearing, and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only when there is an opportunity to be heard, evidence presented, and a decision had

> thereon" [Johnson Newspaper Corporation v. Howland, Sup. Ct., Jefferson Cty., July 27, 1982; see also City of Albany v. McMorran, 34 Misc. 2d 316 (1962)].

Another decision that described a particular body indicated that "[T]he Board is a quasi-judicial agency with authority to make decisions reviewable only in the Courts" [New York State Labor Relations Board v. Holland Laundry, 42 NYS 2d 183, 188 (1943)]. Further, in a discussion of quasi-judicial bodies and decisions pertaining to them, it was found that "[A]lthough these cases deal with differing statutes and rules and varying fact patterns they clearly recognize the need for finality in determinations of quasi-judicial bodies..." [200 West 79th St. Co. v. Galvin, 335 NYS 2d 715, 718 (1970)].

Similarly, it is my opinion that the determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

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

In sum, in those situations in which a public body must hold a public hearing, weigh the evidence, apply the law and render a final and binding determination reviewable only by a court, it would appear that its deliberations could be characterized as "quasi-judicial" and, therefore, exempt from the Open Meetings Law.

Although a community board or committees thereof might engage in some of those activities, I do not believe that they are empowered to render final determinations reviewable only by the courts. As suggested earlier, they have the authority to recommend. If that is so, I do not believe that their deliberations would be quasi-judicial in nature or exempt from the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Harold Nass
Joan Schafrann
Helen D. Henkin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5051
OML-AO-1488

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

April 5, 1988

Mr. Peter A. Stark
[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. Stark:

I have received your letter of March 24, as well as the materials attached to it. Your questions deal with the implementation of the Freedom of Information and Open Meetings Laws by the Bedford Central School District and its Board of Education.

Your first area of inquiry pertains to a request for a certain record. Rather than receiving the record sought, you were sent a copy of "the appropriate form required by the Freedom of Information Law" to be completed. There appears to be no question that the record is available, for you were informed that you could pick up copies for a fee of 40 cents. You complained that it is inconvenient to travel to the District offices to obtain the requested records.

In this regard, as indicated in an advisory opinion sent to you in 1986, the Freedom of Information Law does not require that an applicant complete a form prescribed by an agency. It was also advised that any written request that reasonably describes the records sought should suffice. Further, in many instances, applicants live hundreds of miles from the office of government that maintains custody of records. In such cases, to require the applicants to present themselves physically at the location where the records are maintained would effectively preclude those individuals from gaining access to records. Consequently, I believe that a denial of access based upon a failure to make a physical appearance at an office where records are kept would result in unreasonable or "constructive" denials of access. As such, I believe that the School District should mail the records to you, so long as any costs of copying and postage are paid in advance.

The next area of inquiry pertains to the Open Meetings Law and the Board's practice of scheduling executive sessions in advance of its meetings. Although notice is given to the effect that a meeting is scheduled to begin at 7 p.m., the Board routinely conducts an executive session until 8 p.m., at which time the "regular meeting" is called to order. I offer the following comments on the matter.

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

Second, 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..."

Therefore, I believe that every meeting must be convened open to the public, followed, where appropriate, by an executive session.

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

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session'

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

In a related vein, you questioned the sufficiency of motions to enter into executive sessions to discuss "a personnel matter", a "legal matter" or "litigation", for example.

As indicated earlier, 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 inadequate.

With respect to "legal matters" or "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 (1983); 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 original 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, supra, 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.

Lastly, you referred to information stored in a computer and described the problem as follows:

> "unlike written records which are meant to be read by humans and are not therefore generally enciphered, computer files are often encoded for use by a particular program or computer, and may often not be readable by someone who does not have that particular program or computer. Furthermore, the particular program may not be usable for applications other than those of another school district, and thus may not be generally available."

You asked whether an applicant may ask "that the data be provided in some standard format."

Here I direct your attention to the Freedom of Information Law. That statute is applicable to agency records, and section 86(4) of the Law defines "record" to mean:

> "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."

As a general matter, the 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 noted that section 89(3) of the Law states in part that an agency is not required to create or prepare a record in response to a request. Since a computer tape constitutes a "record", I believe that, upon payment of the appropriate fee, an agency would be obliged to reproduce it, assuming that the data stored on the tape is accessible under the Freedom of Information Law. In the alternative, a printout of the data could be made, assuming that the data is accessible under the Law and can be retrieved based upon existing programs. However, if, due to the nature of your hardware, the data cannot be used, I do not believe that the Law would require that the data or a program be adapted or reformatted. In essence, assuming that the data is accessible, it would be available in the format in which the agency can produce it.

As requested, enclosed is a copy of the Committee's most recent 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

Enc.

cc: Board of Education
Ms. Mary Lou Meese

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1489

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

April 6, 1988

Ms. Louise J. Campbell
[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. Campbell:

I have received your letter of March 30, which pertains to the Open Meetings Law as it affects zoning boards of appeals.

Specifically, you asked whether the amendment to section 108(1) of the Open Meetings Law should be construed to mean that "ALL proceedings of the Boards of Zoning Appeals must be open meetings", and "that there can be No part of a Board of Zoning Appeals meeting that is NOT open to the public" (emphasis yours).

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. However, as you are aware, 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, be made during an open meeting and carried by a majority vote of the total membership of a public body, and the motion must indicate, in general terms, the subject or subjects to be discussed during the executive session.

Further, as indicated earlier, a zoning board of appeals or other public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, only those topics listed in paragraphs (a) through (h) of section 105(1) may appropriately be considered during an executive session.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1490

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

April 7, 1988

Mr. J. Henry Neale, Jr.
Attorney & Counsellor at Law
222 Mamaroneck Avenue
White Plains, New York 10605

<u>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, unless otherwise indicated.</u>

Dear Mr. Neale:

I have received your letter of April 1, as well as the materials attached to it.

According to your letter, you represent three municipalities in proceedings being conducted by the Public Service Commission upon application by the Power Authority of the State of New York for permission to construct and electrical transmission facility across parts of Westchester County.

You wrote that the proceeding before the Commission is an "adjudicatory process" required by Article 7 of the Public Service Law, that public hearings have been held and that numerous documents have been introduced in evidence as exhibits. You added that the Commission has discussed aspects of the case at open meetings held in December, February and March and that stenographic records of those meetings have been prepared.

On March 28 and 29, the parties to the proceeding were informed that the Commission "would conduct a tour on March 31, 1988 for inspection of proposed alternative routes and transmission stations." In addition, a written notice, a copy of which is attached to your letter, stated the purpose of the tour and indicated that parties could join by providing their own transportation.

The tour was attended by six of the seven members of the Commission. The van carrying the six members also carried five employees of the Public Service Department, and "it was followed throughout the tour by a Commission station wagon which was completely empty, except for the driver." You wrote that several members of the public and municipal officials complained about the procedure being used during the tour, and that Acting Counsel to the Commission, Robert H. Simpson, refused to consider what you characterized as a "compromise" that would permit a representative of the affected municipalities, a representative of the Power Authority and one reporter to accompany the Commissioners on the tour, with an agreement that those persons would not speak, ask questions or otherwise participate in any discussions conducted by the Commissioners. You added that:

> "This compromise suggestion might have required that two of the five Public Service Departments employees be left behind on the tour; but, there was plenty of room on the van for all six Commissioners, the driver and a Department guide, and the three suggested representatives of the affected parties and of the public."

You have asked whether, in my view, the tour conducted by the Commission constituted a "meeting" subject to the Open Meetings Law. 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 conflicting interpretations concerning the scope of what might be considered a "meeting". It was contended that informal gatherings, so-called "work sessions" and the like held by public bodies for the purpose of discussion only, and with no intent to take action, were not "meetings" subject to the Open Meetings Law. However, soon thereafter, the Appellate Division, Second Department, rendered a unanimous,

landmark decision in Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh (60 AD 2d 409), which 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).

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 on the foregoing analysis, it was found that:

> "The clear implication then of these phrases of limitation, in the light of the other requirements of the Open Meetings Law, is that they connote a gathering, by a quorum, on notice, at a designated time and place, where public business is not only voted upon but also discussed. These meetings, regardless of how denominated, come within the tenor and spirit of the Open Meetings Law and should be open to the public...
>
> "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' (Adkins, Government in the Sunshine, Federal Bar News, vol 22, No. 11, p 317)" (id. at 416).

Under the circumstances, I do not believe that the scheduled tour of the Commission was a "casual encounter"; rather, it was apparently "a gathering by a quorum, on notice, at a designated time and place" that was held by the Commission in conjunction with the performance of its official duties -- "for the purpose of conducting public business" as a body.

Although the tour was preceded by notice and any person was permitted to follow the Commission, the issue appears to be whether the Commission should have permitted others to be present in the van in order to hear any discussions or deliberations that might have occurred. I am unaware of any judicial interpretation of the Open Meetings Law that has dealt with similar facts, where a "tour" or similar assemblage was at issue. Further, as indicated earlier, although section 103(a) of the Open Meetings Law provides that meetings of public bodies shall be open to the general public, it would have been physically impossible to permit all those who might have wanted to do so to join the Commission in the van.

In an effort to learn more of the situation, I have contacted the Commission and have spoken with Mr. Simpson. Mr. Simpson explained that, in addition to the six commissioners, two of the others present in the van were an environmentalist and an engineer, both of whom were "indispensable" to the tour. The other three persons, one of whom was Mr. Simpson, were advisors to the Commissioners. Mr. Simpson informed me that at the Commission's meeting on March 30, it was announced that the Commission would not engage in deliberations while on the tour, and that the only comments made would be questions posed by the Commissioners to the experts present in the van. He also indicated that a summary of those questions and answers would be prepared.

Consideration was given to the possibility of having a stenographer present, but it was concluded that it would be impossible for a stenographer to function in a moving vehicle. He also indicated that the use of a tape recorder would not have worked due to engine noise and the size of the van. In fact, he pointed out that those present had difficulty hearing each other and that, even if a bus or larger vehicle had been used, those present would not likely have been able to hear whatever comments were made. Further, concerns were expressed regarding the issue of liability with respect to persons other than state employees who might have been present.

In short, although the Open Meetings Law was considered and recognized, from Mr. Simpson's perspective, in view of the problems he described, the Commission's activities regarding the tour represented "the best they could do".

In my opinion, while it would have been impossible to give effect to the letter of the Law, if the problem of liability could have been resolved, the Commission might have given effect to the spirit of the Law by engaging in the kind of compromise described in your letter.

As stated in section 100 of the Open Meetings Law, its legislative declaration:

> "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."

Again, it would have been impossible to permit all of those who sought to join the Commission on the tour to be present in the van with the members. Nevertheless, in an effort to comply with the spirit of the Law, perhaps an accommodation could have been made similar to your proposed compromise to enable certain persons to observe the members and listen to any discussions in which the Commissioners might have engaged. Due to the unusual nature of the gathering and the absence of any case law dealing with an analogous situation, the propriety of the Commission's rejection of your proposal in terms of the Open Meetings law is conjectural. Consequently, although some accommodation might possibly have been made in conjunction with your proposal, it is questionable whether, under the circumstances, the Commission could have acceded to your request, particularly since the tour was scheduled on short notice.

Lastly, you indicated that the proceeding before the Commission "is an adjudicatory process". I point out that section 108(1) of the Open Meetings Law generally excludes "quasi-judicial proceedings" from the coverage of the Law. However, that provision specifically states that the Public Service Commission cannot exclude its meetings from the scope of the Law on the ground that its proceedings are "quasi-judicial".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert A. Simpson, Acting Counsel
William Barnes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5055
OMB-AO-1491

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

April 7, 1988

Mr. James Vacca
District Manager
Bronx Community Board No. 10
3100 Wilkinson Avenue
Bronx, New York 10461

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. Vacca:

I have received your letter of March 30 in which you requested an advisory opinion.

According to your letter, on February 1 and 8, the New York City Planning Commission discussed certification of a proposal involving the City's purchase of federal property for use as a shelter for the homeless. You indicated that the New York City Charter requires that, prior to any changes in land use, the Commission "must certify the application as complete before it is forwarded to the Community Board." In conjunction with the foregoing, on behalf of Community Board No. 10, which you serve as District Manager, you requested "the minutes and/or tape of these meetings dealing with finalization of the pre-certification items." Although you were informed that no such tapes or minutes exist, the Board received the certified application in mid-February. You added that:

> "At the February 8th meeting the members of the commission authorized the Chairperson to certify the completed application and she did so within several subsequent days. The Commission itself never voted to certify but relinquished their authority to the Chairperson."

You have raised the following questions:

> "Can a public body conduct business as described above without an accurate public account of what transpired?
>
> "Can a board delegate to the chairperson the authority to certify an application under the Uniform Land Use Review Procedure (Sec. 197.C) of the New York City Charter without the board itself taking a formal public and duly recorded vote?"

In this regard, I offer the following comments.

First, 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."

Based upon Chapter 8 of the New York City Charter, and particularly section 192, which describes the composition and the appointment of its members, I believe that the Commission is clearly a "public body" subject to the requirements of the Open Meetings Law.

Second, section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies and prescribes what may be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 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 meetings 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, with respect to open meetings, minutes must, at a minimum, consist of a record or summary of all motions, proposals, resolutions and any other matters upon which votes are taken. Minutes of open meetings are, in my view, available in their entirety. With respect to action taken in an executive session, a record or summary of the final determination of action must be prepared and made available to the extent required by the Freedom of Information Law.

I point out that, in addition to the Open Meetings Law, the Freedom of Information Law has, since its enactment in 1974, contained what may be considered an "open vote" provision. Section 87(3) states in relevant part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Since the commission is an "agency" [see Freedom of Information Law, section 86(3)], I believe that when a final vote is taken by a public body, a record must be prepared that indicates the manner in which each member cast his or her vote.

Further, if the meetings were tape recorded and the Commission maintains tape recordings of those meetings, the tape recordings would, in my opinion, constitute "records" subject to the Freedom of Information Law. Section 86(4) of that statute defines "record" broadly 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."

Moreover, it has been held that tape recordings of open meetings are 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].

Lastly, with respect to the delegation of authority by the Commission to its Chairperson, I am unfamiliar with the Board's rules of procedure, its by-laws, or any acts that might involve such delegation of authority. As such, while I have no knowledge of an indication of a specific authority to delegate, there may be some rule or similar document conferring such authority. Nevertheless, the language of the City Charter suggests that the kind of action described should be taken by the Commission. Section 197-c(e) of the City Charter, which appears to be relevant in the situation that you described, states that:

> "Not later than sixty days after the filing of a recommendation with it by a community board or borough board or the latest filing if there is more than one within the time allowed, the city planning commission shall approve, modify, or disapprove, the proposal or application and shall file its decision with the board of estimate. The city planning commission shall conduct a public hearing on any proposal or application of which a hearing was not held by a community board or borough board and on any other proposal or application on which a hearing is required by law. The commission may waive a public hearing if a community board or borough board held a public hearing after adequate notice. Prior to taking any action pursuant to this subdivision on a matter involving the siting of a capital project, the sale, lease, exchange or other disposition of real property, a

> franchise or a revocable consent, the city planning commission shall obtain a report from the office of management and budget, the department of general services or the bureau of franchises, as appropriate. Any action of the city planning commission which modifies or disapproves a recommendation of a community board or borough board shall be accompanied by a written explanation of its reasons for such action."

If that provision is applicable, and if there is no authority to delegate the capacity to act upon the chairperson, it would appear that only the Commission would have the authority to certify an application. If that is so, such certification could, in my opinion, be made only upon an affirmative vote of a majority of the Commission's membership (see General Construction Law, section 41). Further, the Open Meetings Law would require that any such action be recorded in 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: City Planning Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1492

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

April 8, 1988

Mr. Charles Varga
[redacted]

Dear Mr. Varga:

A message following your call to the Department of State "Hotline" 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 and Freedom of Information Laws.

According to the message, you are interested in a list of those topics that may be discussed behind closed doors. In addition, you asked whether it is compulsory that those topics be discussed in private.

In this regard, I offer the following comments.

First, by way of background, the Open Meetings Law applies 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."

As such, by means of example, the Law pertains to city councils, town boards, school boards, legislative and other bodies, as well as committees or subcommittees that those bodies might designate.

Second, a "meeting" is any gathering of a quorum of a public body for the purpose of conducting public business. It is noted that the courts have construed the term "meeting" broadly to include gatherings held for the purpose of discussing public business, even if there is no intent to vote or otherwise take action [see e.g., Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Third, the Law permits public bodies to exclude the public when an "executive session" is held. 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. Therefore, an executive session is not separate from a meeting, but rather is a part of a meeting. Further, the Law prescribes a procedure that must be accomplished by a public body, during an open meeting, before it may conduct an executive session. Specifically, section 105(1) of the Law states in relevant part that:

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

Paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session. Consequently, a public body may not enter into an executive session to discuss the subject of its choice; on the contrary, unless and until one of the topics listed in section 105(1) arises, a public body must conduct the meeting in public.

Lastly, in view of the language of section 105(1), a public body may enter into an executive session where appropriate. There is no requirement, however, that a public body must conduct an executive session, even if the subject matter could appropriately be considered behind closed doors. In addition, as indicated earlier, to enter into an executive session, a motion to do so must be carried by a majority vote of the total membership of a public body.

Enclosed are copies of the Open Meetings Law and "Your Right to Know", which describes the Law in detail. Both of those documents include reference to the topics that may be considered during an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1493

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

April 8, 1988

Mr. Anthony R. Schiavi
[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. Schiavi:

I have received your letter of March 24, which reached this office on April 4.

According to your letter and the news article attached to it, the Pelham Town Board recently established a Town Library Board. You indicated that, to date, the Library Board "has failied to give public notice of its meetings, and has met in secret." Further, although the Town Board "has recognized the Town Library Board as an official Town Board", you indicated that the members of the Library Board have never been publicly identified.

You have asked whether the Library Board is subject to the Open Meetings Law. In this regard, I offer the following comments.

First, by way of background, the Open Meetings Law applies 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."

In view of the language quoted above, it is clear that the Open Meetings Law is applicable to governing bodies, such as city councils, town boards, school boards and the like, as well as committees, subcommittees or similar bodies created by governing bodies. Since the Library Board was created by the Town Board, I believe that it constitutes a public body subject to the requirements of the Open Meetings Law.

Further, section 260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Based on the foregoing, under the terms of both the Open Meetings Law and section 260-a of the Education Law, the Library Board, which serves as the board of trustees of a public library, is, in my opinion, clearly required to comply with the Open Meetings Law.

Second, 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 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).

Third, 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.

Fourth, as a general matter, the Open Meetings Law is based upon a presumption of openness. Meetings must be conducted open to the public, except to the extent that an "executive session", a portion of an open meeting during which the public

may be excluded, may be held. Section 105 of the Law prescribes a procedure that must be accomplished during an open meeting before an executive session may be held. That section also specifies and limits the topics that may be considered during an executive session.

Lastly, section 106 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. In brief, with respect to open meetings, the Law requires that minutes must include reference to all motions, proposals, resolutions, action taken, the date and the vote of the members. If action is taken during an executive session, minutes must consist of a record or summary of a final determination of the action, that date and the vote. For instance, although the Town Board could likely have appointed the members of the Library Board during an executive session [see section 105(1)(f)], minutes identifying those who were appointed should, in my opinion, have been prepared and made available to the public within one week [see section 106(3)].

Enclosed are copies of the Open Meetings Law and an explanatory pamphlet that may be useful to you. In addition, to attempt to enhance compliance with the Law, copies of this opinion will be sent to the Pelham Town Board and Library Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Board
Library Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5061
OML-AO-1494

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

April 13, 1988

Ms. Denise Teeter
[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. Teeter:

As you are aware, I have received your letter of April 4, in which you raised a series of questions concerning documents prepared in the budget process and discussions of issues related to the budget by the Watkins Glen Board of Education.

Among the materials attached to your letter are news articles, one of which attributes various statements to me. In my view, the article is not entirely accurate. One aspect of the article indicates that I stated that "courts have ruled that documents discussed by public bodies in open session cannot be concealed from the public." I do not believe that any court has so ruled. I did mention, however, that the Committee, in its annual report, recommended that the Open Meetings Law be amended to generally require that documents to be discussed at open meetings be disclosed prior to or at meetings. That recommendation is not law, and there is no requirement that records discussed at meetings must be disclosed at the meetings.

Further, my comments concerning disclosure of budget materials focused upon the decision cited in the article, Dunlea v. Goldmark [380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. In that case, "budget worksheets" concerning a state agency were sought from the State Division of the Budget, and it was held that the numerical figures, even though they may have been estimates and subject to change, were available. As stated by the Appellate Division in Dunlea, a decision rendered under the original Freedom of Information Law, which granted access to "statistical or factual tabulations":

> "It is readily apparent that the language 'statistical or factual' tabulation was meant to be something other than an expression of opinion or naked argument for or against a certain position. The present record contains the form used for work sheets and it apparently was designed to accomplish a statistical or factual presentation of data primarily in tabulation form. In view of the broad policy of public access expressed in section 85 of the work sheets have not been shown by the appellants as being not a record made available in section 88" (54 AD 2d 446, 448).

The Court was also aware of the fact that the records were used in the deliberative process, stating that:

> "The mere fact that the document is a part of the 'deliberative' process is irrelevant in New York State because section 88 clearly makes the back-up factual or statistical information to a final decision available to the public. This necessarily means that the deliberative process is to be a subject of examination although limited to tabulations. In particular, there is no statutory requirements that such data be limited to 'objective' information and there is no apparent necessity for such a limitation" (id. at 449).

Based upon the language of the determination quoted above, which was affirmed with no opinion by that state's highest court, is is my view that to the extent that records prepared in the budget process consist of "statistical or factual tabulations or data", they are accessible under the Freedom of Information Law.

I am unaware of the specific nature or content of the records that might have been prepared or used by the District in the budget process. Any such materials could be characterized as "intra-agency" materials that fall within the scope of section 87(2)(g) of the Freedom of Information Law. The cited provision states that an agency may withhold records that:

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

> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

As such, although "statistical or factual tabulations or data" found within intra-agency materials must be disclosed, narrative materials reflective of advice, opinion or recommendation, for example, could, in my opinion likely be withheld.

You referred to documents that refer to positions rather than names. In this regard, since the budget documents pertain to the manner in which public monies may be expended, I would conjecture that names of personnel are generally not included, for monies are allocated by the function of a position or positions, rather than by the name of the person or persons who might hold those positions. Further, it is noted that the Freedom of Information Law pertains to existing records. As a general matter, an agency is not required to create or prepare a record in response to a request [see Freedom of Information Law, section 89(3)]. Therefore, if, for example, the records that you reviewed did not contain the detail that you would have wanted, the District would not have been obliged to create new records containing those details.

You expressed interest in "seeing a line-by-line detailed budget". Again, I am unaware of the contents of the records that have been prepared. Further, I do not know whether the Education Law requires that a document of that nature must be prepared. However, I point out that 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."

You also referred to meetings held to discuss the budget, and the absence of public consideration of "policy-type questions". Here I direct your attention to the Open Meetings Law.

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, 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.

Of possible significance 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..."

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. To the extent that discussions of the budget involve considerations of policy relative to the expenditures of public moneys, I do not believe that there would be 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.

It is unclear from your letter whether the Board discussed certain issues relative to the budget in private, or whether those issues were discussed by the Board at any meeting. However, it is possible that the issues were described in memoranda or other materials distributed to and reviewed by Board members individually. In short, although issues might have been decided by the Board relative to the budget, that would not necessarily mean that those issues were discussed by Board members collectively. Further, while your concerns regarding educational policy and the decision making process have merit, they may be largely unrelated to compliance with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Will Ross, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5065
OML-AO-1495

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

April 18, 1988

Mr. Thomas Friel
[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. Friel:

I have received your note of April 7, as well as the materials attached to it. You have raised several issues concerning the Suffolk County Water Authority.

In this regard, I offer the following comments.

First, according to section 1077 of the Public Authorities Law, the Suffolk County Water Authority "shall be a body corporate and public, constituting a public benefit corporation". Therefore, the Authority is, in my view, clearly an "agency" subject to the requirements of the Freedom of Information Law. For purposes of the Freedom of Information Law, section 86(3) of the 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."

Second, the Freedom of Information Law makes no reference to the use of a specific form that must be used to request records. In short, it has consistently been advised that any written request that "reasonably describes" the records sought should suffice [see Freedom of Information Law, section 89(3)]. Further, the Authority is required by section 87(1) of the Law to

have adopted rules and regulations concerning the procedural implementation of the Freedom of Information Law. Those rules and regulations, which must be consistent with the Law and the regulations promulgated by the Committee on Open Government (21 NYCRR part 1401) must include reference to the designation of a records access officer, a person having the duty of coordinating the response to requests for records, and an appeals person or body to whom appeals may be made following a denial of access to records.

I point out, too, that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government prescribe time limits for response to request and appeals. 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

Third, 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 is noted, however, that the Freedom of Information Law generally pertains to existing records. Unless otherwise specified, an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, the Authority does not maintain a list of all retired or vested employees, it would not be required to create such a list on your behalf. Moreover, even if such a list exists, section 89(7) of the Law states that the Authority is not required to disclose the home addresses of current or former employees or beneficiaries of an employees' retirement system. The Authority is required by section of 87(3)(b) of the Freedom of Information Law to maintain a list of current officers or employees by name, public office address, title and salary.

Fourth, I believe that the Board of the Authority is a "public body" required to comply with the Open Meetings Law. Section 102(2) 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 subcommittee or other similar body of such public body."

In brief, the Open Meetings Law requires that meetings of public bodies 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, can be held. A public body cannot conduct an executive to session discuss the subject of its choice; on the contrary, section 105(1) specifies and limits the subjects that can appropriately be discussed during an executive session.

Section 104 of the Open Meetings Law requires that notice of the time and place of all meetings must be given. If a meeting is scheduled at least a week in advance, notice must be given to the news media and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such a meeting. If a meeting is scheduled less than a week in advance, notice must be given to the news media and to the public by means of posting in the same manner as indicated earlier "to the extent practicable" at a reasonable time prior to the meeting.

If the Board of the Authority has scheduled its meetings for the remainder of the year, a record indicating its schedule would, in my opinion, be accessible under the Freedom of Informa-

tion Law. However, as suggested earlier, if there is no schedule, the Board of the Authority would not be required to prepare a schedule of its meetings on your behalf.

Lastly, the Open Meetings Law provides any member of the public with the right to attend and listen to the deliberations and discussions of public bodies at meetings. Nevertheless, the Law is silent with respect to public participation. As such, I believe that the Board of the Authority may permit you to speak, ask questions or otherwise participate at its meetings. However, it is not required to permit you to engage in those activities.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated under that statute by the Committee, and the Open Meetings Law. Copies of those materials and this opinion will be forwarded to Mr. Campo, Chairman of the Board of the Authority.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Mr. Campo, Chairman
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1496

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

April 20, 1988

Mr. Tony Adamis
Bureau Editor
Daily Freeman
Northern Dutchess Bureau
13 West Market Street
Rhinebeck, New York 12572

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. Adamis:

I have received your letter of April 11 in which you requested an advisory opinion concerning the Open Meetings Law.

Your inquiry concerns the status of the Milan Zoning Review Advisory Committee under the Open Meetings Law. According to your letter:

> "The 15-member Zoning Review Advisory Committee was appointed in January by the Milan Town Board. Committee Chairwoman Joan Howe has said the committee will do a line-by-line review of the town zoning regulations and make recommendations for revision to the Town Board by Oct. 4. Supervisor Kenneth Kremenick, who is not a member of the committee, has said the committee was 'appointed by the Town Board to revise the zoning ordinances to make them more compatible with the master plan.' The committee, he said, will 'put together some suggestions and recommendations and probably the changes...eventually will become what the new zoning ordinances end up being.'

> "Chairwoman Howe maintains the committee is an advisory, temporary panel not subject to the Open Meetings Law and, therefore, not required to hold its meetings in public. Town Attorney Robert Winne maintains the body is informal and, having adopted no parliamentary rules, is not required to have a quorum to meet and, therefore, is not subject to the Open Meetings Law.
>
> "The board is known to have met five times, but has never given public notice. A sixth meeting was apparently postponed when two reporters attempted to attend."

Further, one of the news articles attached to your letter suggests that the Chairwoman indicated that the presence of the public and the news media at meetings of the Committee would "inhibit" discussion, and that a meeting would not be held "if the press shows up".

In my opinion, based upon the following analysis, the Committee in question is a "public body" required to comply with the Open Meetings Law.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, 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 those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in section 102(2) to include:

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more persons designated or created to serve as a body by the Town Board, or any public body, would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

I believe that the same conclusion can be reached by viewing the definition of "public body" in terms of its components.

The Committee is an "entity" that consists of at least two members. Further, although the action of the governing body that created the Committee might 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 Town Board with respect to certain aspects of its duties, specifically the revision of Town zoning ordinances. 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, supra; 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 a committee of the Board must exercise its duties 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 perform a governmental function for a public corporation, the Town of Milan. 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.

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 to discuss one or more of the topics of discussion described in section 105(1) of the Law.

Lastly, as a general matter, meetings of public bodies must be conducted open to the public. An "executive session", a portion of an open meeting during which the public may be excluded, may be held only to discuss topics that are specified in section 105(1) of the Open Meetings Law. In view of the function of the Committee and the subject matter of its discussions, it is unlikely, in my opinion, that an executive session could justifiably be held.

In an effort to enhance compliance with the Open Meetings Law, copies of this opinion will be sent to the Chairwoman of the Committee and Town officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Joan Howe, Chairwoman
Kenneth Kremenick, Town Supervisor
Town Board, Town of Milan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1497

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

May 5, 1988

Mr. David Zinman
Newsday
Long Island, NY 11747

<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. Zinman:

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

The materials consists of copies of minutes of executive sessions held over the course of some 13 months by the Board of Managers of the Nassau County Medical Center. You have asked that I review the minutes for the purpose of providing an opinion concerning the Board's compliance with the Open Meetings Law.

In this regard, I offer the following comments.

It is noted at the outset that the Open Meetings Law is applicable to meetings of public bodies. 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."

I believe that the Board of Managers is a "public body" subject to the requirements of the Open Meetings Law. Specifically, the Board consists of at least two members. It is, in my opinion, required to conduct its business by means of a quorum pursuant to

section 41 of the General Construction Law. Further, the Board conducts public business and performs a governmental function for a public corporation, Nassau County. I point out, too, that a county board of supervisors is authorized to "establish a public general hospital" and designate the members of a board of managers pursuant to section 127 of the General Municipal Law. The powers and duties of boards of managers are conferred by section 128 of the General Municipal Law.

The Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings of public bodies must be conducted open to the public, except to the extent that an "executive session" may properly be convened. 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. Consequently, an executive session is not separate and distinct from an open meeting; rather it is a portion of an open meeting that enables a public body to consider certain issues in private. 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 appropriately be considered during an executive session.

Having reviewed the minutes of executive sessions, at virtually every executive session, certain "personnel matters" were considered, such as issues involving appointments, leaves of absences, resignations and the like. Those and similar issues, insofar as they involved matters pertaining to a particular person or persons, could in my opinion have been discussed during executive sessions. However, I believe that others relating to personnel generally, such as policy concerns or fiscal matters, should have been discussed in public.

Because many of the topics that were considered during executive sessions seem to have related in some manner to personnel, I point out by way of background that the so-called "personnel" exception for entry into executive session has been clarified since the original 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.

At this juncture, I will refer to specific executive sessions and comment on their propriety. Some of the issues relate to personnel matters; others, in my view, simply would not have qualified for consideration during executive sessions.

<u>Executive Session of February 2, 1987</u>

Item 4B involved a review of State Health Department deficiency citations and a discussion of corrective actions. As I interpret the minutes, none of the grounds for entry into an executive session would have applied.

Item 5 concerned a request by the County Executive "for a report on ways to eliminate the hospital's operating deficit by year's end." That kind of issue, in my opinion, involves questions of policy, financial management and, generally, the means by which public moneys are expended. Those considerations might have pertained to personnel indirectly, but the focus would not have been on any "particular person". As such, I do not believe that there would have been any basis for entry into an executive session.

Executive Session of February 12, 1987

The only matter considered pertained to a review of a draft "Report To The County Executive On Ways To Reduce the County's Support Of The Nassau County Medical Center". Again, the substance of the discussion appears to have involved fiscal matters. If that was so, in my opinion, the discussion should have occurred in public, for none of the grounds for entry into executive session would have applied.

Executive Session of March 30, 1987

Item 3B under "Personnel Matters" involved the discussion of "the physician interviewing procedure which is part of the credentialling process for new staff appointments". As indicated earlier, although the issue might have pertained to a class of "personnel", it does not appear that any "particular" member of staff was the subject of the discussion. If my interpretation is accurate, the discussion should have been conducted in public, for it dealt with procedures and policies that would have been applicable to new staff appointments generally.

Item 3D concerned a discussion of "foreign-born physician's [sic] proficiency in the English language and how it is related to physician-patient relations and care". Mr. David Eisenberg, the Executive Director of the Medical Center, led the discussion and indicated that measures would be considered to improve competency in English. For the same reason stated earlier, that the issue involved a class of employees rather than a particular employee, I do not believe that there would have been a basis for entry into executive session.

Executive Session of April 27, 1987

Under the heading of Personnel Matters, item 3B indicates that Mr. Eisenberg "reviewed with the Board the history of the Department of Family Medicine". Following that discussion, a motion was made and approved to appoint a named physician as acting chairman of the Department of Family Medicine. While that portion of the discussion dealing with a "matter leading to the appointment of a particular person" could have been considered during an executive session, a review of the history of the Department of Family Medicine should, in my opinion, have been discussed in public.

Item 3C involved Mr. Eisenberg's comments on Newsday articles regarding the "Health Department-issued Statements of Deficiencies". He also suggested that the Board conduct a special meeting with the department chairman to discuss "possible modifications of the hospital's Rules and Regulations..." Neither topic, the response by the Hospital to findings of deficiencies or the consideration of amendments to Hospital rules and regulations should in my opinion have been discussed in executive

session. In particular, a discussion of rules and regulations, which apparently would involve the policy of the Hospital, would appear to have been a topic of general interest to the public and with respect to which no ground for entry into an executive session would have applied.

Item 3D indicates that Mr. Eisenberg informed the Board that discussions were ongoing concerning "round-the-clock on-site coverage by attending physicians in the Department of Obstetrics and Gynecology". The issue of coverage by attending physicians is a "personnel matter". Nevertheless, it does not appear that the discussion involved a particular physician or physicians, but rather an issue of policy, coverage in a Department. Consequently, I do not believe that there was a basis for entry into an executive session.

Executive Session of May 11, 1987

Item 2 entitled "Medical Supervision" indicates that Mr. Eisenberg reviewed the reasons why the administration believes it is necessary to revise sections of the Medical Staff Bylaws, Rules & Regulations governing the supervision of house staff by attending staff. The discussion resulted in an agreement that certain matters should be evaluated and that each Department should submit an assessment of necessary changes and the cost of those changes.

The issue involved the rules with which the staff of the Hospital must comply, as well as the operational and fiscal consequences of new rules and procedures. Consequently, I do not believe that any basis for entry into an executive session could have been asserted.

Item 3 concerned the review of "White Paper", which appears to have involved the Board's lack of information concerning problems faced by medical staff. A related issue involved the nursing shortage and the problems of operating within the Civil Service system and a large County bureaucracy. Those issues seem to have related to classes of personnel generally rather than any specific individual or individuals. As such, I believe that the issues should have been discussed publicly.

Item 4 involved consideration of the feeling of chairmen of departments that the medical staff might be better served if a member of staff could attend meetings of the Board. It was contended by a member of the Board that there currently are mechanisms for ensuring open and direct communications between the staff and the Board. For the reasons discussed earlier, those issues should in my view have been discussed in public, for none of the grounds for entry into an executive session would have been applicable.

Executive Session of May 18, 1987

In item 3D under Personnel Matters, the minutes indicate that Mr. Eisenberg reported that the County Executive's Office had reviewed the Hospital's "outline proposal for programs for the elderly" and that further discussion of that proposal would ensue.

That issue appears to involve matters of policy and program concerns that should have been discussed in public.

Executive Session of June 22, 1987

Under the heading of personnel matters, item 3B, the minutes reflect that Mr. Eisenberg brought to the Board's attention an application to establish a comprehensive center for the treatment of patients with brain injuries. Item 3C concerned recommended changes in rules and regulations of the medical staff. In neither instance in my opinion could an executive session have appropriately been convened, for none of the grounds for entry into executive session would have applied.

Executive Session of July 27, 1987

Item 4 indicates that there has been an expression of community concern regarding the Hospital's incinerator and compliance with operating standards. In item 5, the Executive Director reported that a new estimate of the cost of emergency room renovations exceed the original estimate. Under item 6, Mr. Eisenberg indicated that he informed the County Executive's Office of the Center's desire to establish a comprehensive injury treatment center. Item 7 pertained to an analysis of Health Department Statements of Deficiencies. Item 8 concerned Mr. Eisenberg's discussion of the position of a bylaws committee related to proposed changes of rules and regulations of medical staff.

In my opinion, none of those topics would have qualified for discussion in an executive session.

Executive Session of October 26, 1987

Item 4 refers to an invitation to counsel to the County Executive to the meeting to discuss "the relationship between the County Executive's office and the hospital". The minutes indicate that the Board expressed concern regarding "the pattern of poor communication that may be developing between the County Executive's office and the hospital." A discussion followed concerning the development of a "more collegial" arrangement. Again, it does not appear that any basis for entry into an executive session could justifiably have been asserted to discuss the issue.

Executive Session of November 23, 1987

Item 4 entitled "Medical Staff Bylaws" involved a discussion and clarification of those bylaws. For reasons discussed earlier, I do not believe that a discussion of rules, regulations or bylaws applicable to the Center generally or to certain classes of its staff may be discussed during an executive session.

Executive Session of December 21, 1987

Item 4 is entitled "Joint Conference Committee" and the minutes indicate that Mr. Eisenberg reminded the Board of the date of an upcoming joint conference committee meeting and briefly discussed the agenda. It is unclear what the agenda contained. However, if the discussion pertained to a description of general topics to be considered, I do not believe that there would have been a basis for entry into an executive session.

Executive Session of January 25, 1988

Item 4 entitled "Decertification of Beds" indicates that Mr. Eisenberg described to the Board "the pros and cons of reducing the medical-surgical bed complement..." The issue appears to have involved a matter of policy that should have been discussed in public.

Item 5 is entitled "Proposed Charge Increases", and the minutes indicate that the Board approved certain daily charges to become effective on February 1. In my opinion, none of the grounds for entry into an executive session could have been cited to discuss increases in daily charges. Further, since that topic would apparently affect members of the public generally, it is clear in my view that it should have been discussed publicly.

Executive Session of February 23, 1988

According to item 2, Mr. Jaffe, a hospital administrator, summarized the results of a Health Department survey and indicated that a plan of correction would be completed in March. Under item 3 Mr. Jaffe reported that, due to a new admissions policy the census on medical/surgical services is approaching acceptable levels. He also reported that the administration will continue to monitor the nurse/patient ratio and resume admissions when the ratios reach acceptable levels. In addition, a discussion regarding nurse recruitment ensued.

Although the specific nature of the discussion concerning the plan of correction is unclear, it does not appear that the issue or that described in item 3 could properly have been discussed during an executive session.

Executive Session of February 24, 1988

Item 2 indicates that Mr. Jaffe informed the Board of a conversation with the "JCAH" concerning an article recently published by Newsday, and a discussion regarding the press ensued. It does not appear that the portion of the discussion concerning the JCAH relative to the Newsday article would have fallen within any of the grounds for entry into an executive session. Further, I do not believe that a discussion concerning the press could have validly been held during an executive session.

Under item 4, the new President of the Board, Mrs. C. Patricia Meyers, invited various hospital officials to meet with the Board of Managers. The minutes indicate that "Mrs. Meyers introduced the new officers of the Board and read a short statement pledging the Board's support and dedication to the hospital and asking the staff for their continued support and energy in order to improve the moral and conditions of the hospital." In my view, that portion of the meeting should clearly have been conducted in public, for none of the grounds for entry into an executive session would have been applicable.

Executive Session of March 4, 1988

Under item 2, the minutes indicate the Mr. Eisenberg "updated the Board on patient diversions..." and discussed issues concerning the hospital census. He also briefed the Board on the status of nursing staffing and described the terms of a nursing settlement reached at a nearby hospital. The minutes also referred to the fact that the County Executive's Office "recently released over 150 applications for employment..." at the Medical Center.

The first aspect of the discussion concerning patient diversions should have in my opinion been conducted in public. Similarly, a general discussion of nursing staffing should likely have been discussed in public. However, it is noted that section 105(1)(e) of the Open Meetings Law permits a public body to discuss collective bargaining negotiations during an executive session. Therefore, to the extent that the discussion involved collective bargaining negotiations in which the Medical Center is involved with nurses, for example, an executive session could likely have been conducted.

In sum, it is reiterated that personnel related issues that focused upon particular employees, but which were not specifically referenced above, were, in my opinion, properly considered during executive sessions. Nevertheless, a variety of other issues, many of which related to personnel generally or tangentially, as well as issues involving the management of the Medical Center, should in my opinion have been discussed during an open meetings, for none of the grounds for entry into executive sessions would have been applicable.

It is emphasized that the Open Meetings 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.

Further, 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, copies of this opinion will be sent to the President of the Board of Managers, the Executive Director of the Medical Center and to the County Executive.

I hope that I 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: C. Patricia Meyers, President of the Board
Donald H. Eisenberg, Executive Director
Thomas Gulotta, County Executive

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1498

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

May 11, 1988

Ms. Dee Maggio
CARE
RR 1, Box 231
Athens, NY 12015

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. Maggio:

I have received your letter of April 22, as well as the materials attached to it.

Your inquiry concerns a "Secret Board Meeting" of the Town of Athens Zoning Board of Appeals. A news article attached to your letter states that the Board met to discuss a permit application "without public notice, according to ZBA Chairman John Lubera, who indicated that he was not concerned by the apparent violation of state open meetings laws. He would not say where or when the meeting took place". The article also states that "the ZBA Chairman has said a decision will be issued within the week through a legal notice".

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

By way of background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards 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. As such, those deliberations could be conducted in private. 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. 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 may be 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 of 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.

It is noted, too, that every meeting of a public body, including a zoning board of appeals, must be convened open to the public and preceded by notice given in accordance with section 104 of the Open Meetings Law. The term "meeting" has been broadly construed by the courts to include any gathering of a quorum of a public body for the purpose of conducting public business, even if there is no intent to take action [see e.g. Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409 aff'd 45 NY 2d 947 (1978)]. Therefore, if, for example, the Board met to discuss the issue but did not intend to vote or act, such a gathering, in my opinion, would nontheless have constituted a "meeting" subject to the Open Meetings Law. Section 104 of the Law generally requires that notice of the time and place of every meeting be given to the news media and posted in one or more conspicuous, public locations.

Assuming that there is no basis for entry into an executive session, a zoning board of appeals must vote in public. In fact, even prior to the amendment in 1983, it was held that,

following quasi-judicial deliberations, a zoning board of appeals was required to vote in public, for the act of voting was found to be non-judicial [see Orange County Publications v. City of Newburgh, 60 AD 2d 409, 418 (1978)].

Lastly, I believe that action taken by a public body remains valid unless and until a court renders a contrary determination. Nevertheless, I point out that a court has the authority to nullify action taken during an executive session or "private" meeting that was inappropriately held. Section 107(1) of the Open Meetings Law 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. 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."

Therefore, if a zoning board of appeals votes behind closed doors when the vote should have been taken in public, a court may, in its discretion, nullify its action (see Park Newspapers v. City of Ogdensburg, Supreme Court, St. Lawrence County, April 26, 1984).

Enclosed are copies of the Open Meetings Law and "Your Right to Know", which describes the Law in detail.

I hope that I 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: Zoning Board of Appeals
Hon. William Mosher, Town Supervisor
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1499

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

May 12, 1988

Mr. William Valletta
Office of Counsel
NYC Department of Planning
22 Reade Street, Rm. 2N
New York, NY 10007-1216

Mr. James Vacca
District Manager
Bronx Community Board No. 10
3100 Wilkinson Avenue
Bronx, NY 10461

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 Messrs. Valletta and Vacca:

I have received your recent letters, which respectively are dated April 22 and April 25. Both letters deal with requirements concerning minutes of meetings of the New York City Planning Commission and an advisory opinion that I prepared on April 7.

Mr. Valletta contends that the advice given in that opinion is inaccurate, for I did not have the capacity to review "ULURP Rules of Procedure" with respect to the "certification" process. Specifically, Mr. Valletta wrote that:

> "By 'certification' the Rules of Procedure describe the action which triggers the beginning of the formal 180 day ULURP. It occurs at the point at which the planning staff of the Department of City Planning, and the environmental review staffs of the CEQR co-lead agencies, have completed their technical review of an application and all its supporting documentation. 'Certification' is

the statement by the Commission, or the Director of the Department (also the Commission Chair), that the technical review and environmental review have been fulfilled to a sufficient level that the formal process of ULURP may being. The statement involves no judgment about the substance of any application. It is based upon a presentation by department staff members that documents, plans, and other submissions, are in order and that the required analyses have been completed.

"Because of the procedural nature of certification, it takes place at a public meeting, not a public hearing. The agenda prepared for that meeting and noting each item to be considered for certification, is posted at least 24 hours in advance.

"The Commission does not take a formal vote to certify, since the statement of completeness reflects a judgment of the Department. The commissioners are given the opportunity to question the staff to insure that the statement rests on a thorough review, and that pertinent issues of concern have been or will be addressed. The Rules of Procedure state that either the Commission or the Director of the Department shall certify. Since the Chairperson and the Director are the same person, the usual practice is for the Director to exercise her authority if the other commissioners have raised no pertinent problems or objections."

As such, it is Mr. Valleta's contention that:

"Since certification is a procedural step which does not involve 'motions, proposals, resolutions or matters formally voted upon' by the Commission, there is no requirement under the Public Officers Law that minutes of a hearing and a record of Commis-

> sion action be prepared beyond the requirement that the item be noted on the record agenda of the Commission's meeting for the given day."

On the other hand, Mr. Vacca expressed the belief "that whenever a quorum of a public agency is present and discussion [sic] and/or votes on an item, an account (minutes/tapes) must be maintained" and "that such a certification to the Community Board can be triggered only by a Commission vote". In addition, Mr. Vacca wrote that:

> "if the rules of procedure of the Planning Commission allow one individual (the Chairperson) to certify an application, then such rules are a violation of the Public Information Law and Open Meetings Act. These 'procedures' delegate to one person, or to staff of commission, a commission function. ...Certification of an ULURP item is prepared by a public body. In this case, this body operates in secret and refuses to maintain any records of what they call their 'briefing' sessions. In fact, it is here where the actual business of the Commission takes place as their 'public' hearings often prove to be pro-forma."

In this regard, I offer the following comments.

First, having reviewed the opinion of April 7, I believe that, with the exception of one area, it is rather general, for it merely describes the requirements of certain aspects of the Open Meetings and Freedom of Information Law. The only portion of the opinion that might be inaccurate or based upon a misapplication of the City Charter appears to involve the last portion of the opinion. That portion dealt with section 197-c(e) of the Charter and the issue of delegation of authority by the Commission to its chairperson. If indeed that aspect of the opinion involved the application of a provision that is irrelevant to the issue, it should be viewed as irrelevant.

Second, to avoid reiteration of points made in the April 7 opinion, suffice it to say that minutes of meetings may but need not be expansive. In brief, minutes must include reference to all "motions, proposals, resolutions and any other matter formally voted upon and the vote thereon" [Open Meetings Law, section 106(1)].

As indicated in the earlier opinion, I have no knowledge of Commission's by-laws or procedures, or the extent to which it might properly have delegated authority to its chairperson. Nevertheless, it appears that there should be minutes that indicate that "certification" has occurred. Once again, according to Mr. Valletta's letter, "certification" indicates that the formal process of ULURP may begin. Consequently, it is apparently a necessary step in the process. Further, even though the Commission "does not take a formal vote to certify", certification apparently occurs "if the other commissioners have raised no pertinent problems or objections". The inference is that if the Commissioners do raise problems or objections, certification does not occur. If that is so, the granting or approval of certification apparently involves the reaching of a consensus by the Commission to confirm or ratify the recommendation of the chairperson. If my assumptions are accurate, the absence of a formal vote, under the circumstances, has the same effect as a vote by the Commission, for the chairperson's recommendation does not result in certification without the tacit approval of the Commission as a whole. I point out that, in a situation in which a public body contended that it was not required to prepare minutes because it did not formally vote, but rather reached a consensus, it was determined that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute" [Previdi v. Hirsch, 524 NYS 2d 643, 646 (1988)].

In sum, as I understand the procedure, certification involves action taken by the Commission that should be memorialized in minutes.

If I have inaccurately described or interpreted the situation, I would be more than willing to discuss the matter with you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500

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

May 12, 1988

Mrs. Theresa Birdsall
[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. Birdsall:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOML-AO-1500a

May 12, 1988

Mr. William Sloan
[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. Sloan:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500aa

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

May 12, 1988

Ms. Dorothy Jacobs
[redacted]

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

Dear Ms. Jacobs:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500b

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

May 12, 1988

Mr. Frank Marcuccilli
[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. Marcuccuilli:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states that:

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> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

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> "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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500 66

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

May 12, 1988

Mr. and Mrs. S Marcuccilli
[redacted]

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

Dear Mr. and Mrs. Marcuccilli:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

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> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500c

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

May 12, 1988

Mrs. Helen Maddalo
[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. Maddalo:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

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Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500 cc

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

May 12, 1988

Mr. and Mrs. E. Fedonick
[redacted]

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

Dear Mr. and Mrs. Fedonick:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500d

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

May 12, 1988

Mr. Thomas Auley
[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. Auley:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500dd

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

May 12, 1988

Mr. and Mrs. Steven DeLucia
[redacted]

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

Dear Mr. and Mrs. Delucia:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500

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

May 12, 1988

Mr. Dale DiDonato
[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. DiDonato:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500ee

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

May 12, 1988

Mr. and Mrs. Michael Corrado
[redacted]

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

Dear Mr. and Mrs. Corrado:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500f

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

May 12, 1988

Mr. Denis DiDonato
[redacted]

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Dear Mr. DiDonato:

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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: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500ff

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

May 12, 1988

Mr. and Mrs. Joseph DeFeo
[redacted]

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

Dear Mr. and Mrs. DeFeo:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500g

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

May 12, 1988

Mrs. Elizabeth DiDonato
[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. DiDonato:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

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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: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500gg

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

May 12, 1988

Mr. and Mrs. Bernard Cecere
[redacted]

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

Dear Mr. and Mrs. Cecere:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states that:

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 1500 h

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

May 12, 1988

Mr. Frank Petronella
[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. Petronella:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

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Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states that:

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In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500 hh

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

May 12, 1988

Mr. and Mrs. John Truinfo
[redacted]

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

Dear Mr. and Mrs. Truinfo:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

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In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500i

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

May 12, 1988

Ms. Mary Ann Flanagan
[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. Flanagan:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

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> "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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

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In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500ii

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

May 12, 1988

Mr. and Mrs. M. Terlizzi
[redacted]

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

Dear Mr. and Mrs. Terlizzi:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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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: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500j

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

May 12, 1988

Mr. Joseph Gennarelli
[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. Gennarelli:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500jj

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

May 12, 1988

Mr. and Mrs. Nat Carilli
[redacted]

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

Dear Mr. and Mrs. Carilli:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control

> over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500K

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

May 12, 1988

Mr. Michael Gattuso
[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. Gattuso:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states that:

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500KK

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

May 12, 1988

Mr. and Mrs. George Kovacs
[redacted]

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

Dear Mr. and Mrs. Kovacs:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states that:

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In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1500L

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

May 12, 1988

Ms. Dora Stella DiDomizio
[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. DiDomizio:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

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Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states that:

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> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

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In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500 11

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

May 12, 1988

Mr. and Mrs. James Mullin
[redacted]

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

Dear Mr. and Mrs. Mullin:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

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In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500m

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

May 12, 1988

Mrs. A. Ardovino
[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. Ardovino:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

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In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500 mm

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

May 12, 1988

Mr. and Mrs. Frank Perrone
[redacted]

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

Dear Mr. and Mrs. Perone:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500n

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

May 12, 1988

Mrs. M. Molino
[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. Molino:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

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> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1500nn

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

May 12, 1988

Mr. and Mrs. Neil Corrado
[redacted]

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

Dear Mr. and Mrs. Corrado:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control

> over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500

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

May 12, 1988

Mrs. A. Fillipi
[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. Fillipi:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500 00

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

May 12, 1988

Mr. John J. Schutty
[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. Schutty:

I have received your correspondence of April 27 in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control

> over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500p

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

May 12, 1988

Mr. and Mrs. Joseph Valentino
[redacted]

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

Dear Mr. and Mrs. Valentino:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500 pp

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

May 12, 1988

Ms. Mette Spaniardi
[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. Spaniardi:

I have received your correspondence of April 26 in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control

> over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500

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

May 12, 1988

Mr. Frank Vitale
[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. Vitale:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

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Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500 88

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

May 12, 1988

Mr. Carmine Milo
[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. Milo:

I have received your correspondence of April 28 in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control

> over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

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> "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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500r

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

May 12, 1988

Mr. Peter G. Marzziotti
[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. Marzziotti:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500rr

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

May 12, 1988

Mr. Vincent Nunlosi
[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. Nunlosi:

I have received your correspondence of May 4 in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control

> over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1500s

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

May 12, 1988

Miss Rita Retoske
[redacted]

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

Dear Miss Rita Retoske:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500 SS

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

May 12, 1988

Mr. and Mrs. Michael Pontillo
[redacted]

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

Dear Mr. and Mrs. Pontillo:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control

> over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

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> "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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

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Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500t

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

May 12, 1988

Mr. Michael Cioppa
[redacted]

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

Dear Mr. Cioppa:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

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> "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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500tt

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

May 12, 1988

Mr. Raymond A. Carili
[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. Carili:

I have received your correspondence of May 8 in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states that:

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Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500a

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

May 12, 1988

Mr. John A. Bordash
[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. Bordash:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states that:

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> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

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In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500 uu

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

May 12, 1988

Mr. Paul J. Bordash
[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. Bordash:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

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Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500

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

May 12, 1988

Ms. Dolores Bordash
[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. Bordash:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500vv

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

May 12, 1988

Ms. Marie Agnoletto
[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. Agnoletto:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control

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Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500w

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

May 12, 1988

Mr. Peter Bordash
[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. Bordash:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states that:

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In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500 ww

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

May 12, 1988

Mr. Gilbert Agnoletto
[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. Agnoletto:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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> over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

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> "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."

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In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

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Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500x

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

May 12, 1988

Mr. Emil Koch
[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. Koch:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

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Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500xx

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

May 12, 1988

Mr. and Mrs. Americo DeLucia
[redacted]

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

Dear Mr. and Mrs. Delucia:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1500y

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

May 12, 1988

Miss Phyllis Ciliberti
[redacted]

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

Dear Miss Ciliberti:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

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Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1500z

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

May 12, 1988

Mr. Abraham Jacobs
[redacted]

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

Dear Mr. Jacobs:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1501

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

May 16, 1988

Mr. William C. Klein
Vice President
Rochester Memorial Society, Inc.
[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. Klein:

I have received your recent letter and the correspondence attached to it.

The correspondence consists of a letter sent to you by Thomas R. Frey, Monroe County Executive, concerning an increase in fees paid to funeral directors by the County on behalf of individuals or families that meet the eligibility criteria for indigent burials. You have questioned the propriety of private meetings held to discuss the matter. According to Mr. Frey's letter to you:

> "Discussions with the Funeral Directors Association took place over an eight month period, and the Association was represented by Mr. Phillip Perotta and Mr. James Gray. Mr. William Carreo and Mr. Donald Vaccanti represented the Monroe County Department of Social Services. Meetings such as this are not open to the public. No formal minutes were kept."

It is your view that the County Executive is "in error", and that the meetings should have been open to the public.

In this regard, as I understand the facts, the Open Meetings Law would not have applied, and the meetings could, therefore, have been conducted in private.

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."

It appears that officials of the Department of Social Services attended the gatherings in question. If that was so, no "public body" was present and the Open Meetings Law would not have applied.

For purposes of clarification, the County Legislature and Human Services Committee, for example, would constitute "public bodies". Whenever a quorum of a public body convenes for the purpose of conducting public business, such a gathering would be a "meeting" as defined by the Open Meetings Law that would be subject to the requirements of the Law. However, it appears that the gatherings in question did not include a quorum of a public body. As such, those gatherings would have been outside the coverage 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:gc
cc: Thomas R. Frey, County Executive

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5103
OML-AO-1502

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

May 16, 1988

Mr. Robert M. Shaw
Director
Committee on Higher Education
1779 Middle Country Road
Centereach, NY 11720

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. Shaw:

I have received your letter of May 5, as well as a copy of Chapter 171 of the Laws of 1987, which is codified as sections 341-a and 346-a of the Education Law.

Section 1 of the legislation indicates that:

> "It is in the public interest to insure that standardized tests used in the process of college or graduate school admissions do not have the effect of discriminating invidiously against test takers on the basis of race, ethnic background or gender. It is the intent of the legislature to obtain the information necessary to investigate the fairness and equity of such tests with respect to race, ethnicity, linguistic background and gender and to explore means of making such tests as fair and equitable as possible."

Section 346-a(1) of the Education Law provides that:

> "There shall be created a temporary committee to advise the legislature and make findings and recommendations with respect to the effect of standardized tests used in the process of

> post secondary admissions on test subjects of varying racial, ethnic, linguistic background and gender and consider other possible analytical methods to assure the fairness and equity of such tests."

Subdivision (2) requires that the Committee consist of ten members and describes the method of their appointments. The remainder of section 346-a describes the powers and duties of the Committee and requires that it report its finding to the State Legislature by a certain date.

You have asked whether the meetings of the Committee are subject to the Open Meetings Law and whether the materials it collects are "available" under the Freedom of Information Law.

In this regard, I offer the following comments.

In brief, 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 in section 105(1)(a) through (h) of the Law. 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."

In my view, the Committee in question is a public body required to comply with the Open Meetings Law for the following reasons.

First, the Committee is an "entity" consisting of two or more members.

Second, section 346-a in my opinion clearly indicates that it conducts public business when it carries out its statutory duties relative to the collection and analysis of data and in conjunction with its reporting requirement to the State Legislature.

Third, while the 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 Committee consists of three or more "persons charged with a public duty...", in that they are appointed to advise, recommend, collect and analyze information relative to standardized testing. 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 Committee must exercise its duties pursuant to the quorum requirements set forth in section 41 of the General Construction Law.

Fourth, the Committee in my view performs a governmental function for the State Legislature and for the state generally when it carries out the statutory duties described in section 346-a.

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

As a general matter, the courts have construed the term "meeting" broadly to include any gathering of a quorum of public body held for the purpose of conducting public business even if there is no intent to vote or otherwise take action [see e.g., Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

With respect to access to records, the Freedom of Information Law, as it applies to agencies, 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. However, it appears that the Committee is an entity of the State Legislature. For purposes of the Freedom of Information Law, section 86(2) of the Law defines "state legislature" to mean:

> "the legislature of the state of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof."

The provisions concerning access to state legislative records are found in section 88 of the Freedom of Information Law. Paragraphs (a) through (k) of subdivision (2) of section 88 specify the kinds of legislative records that must be disclosed. Several of those provisions may be relevant to the records of the Committee. Among others, section 88(2) requires the disclosure of:

> "(f) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law...
>
> (i) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the legislature...
>
> (k) any other files, records, papers or documents required by law to be made available for public inspection and copying..."

Under section 88(2)(f), the issue involves the extent to which the Committee collects "statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to" section 88 or any other applicable provision of law. It would appear that much of the data to be collected would consist of "statistical or factual tabulations". Further, it also appears that the data would be derived from "item reports" prepared by test agencies and filed with the Committee. Section 341-a(5)(a) of the Education Law states in part that "Such report shall be subject to the provisions of subdivisions two and three of section three hundred forty-one of this article". Those provisions state that:

> "2. If any reports or other documents submitted pursuant to this section contain information identifiable with any test subject or test user institution, such information shall be deleted prior to filing with the commissioner.
>
> 3. All reports or other documents submitted pursuant to this section shall be public records."

As such, it appears that the data collected by the Committee would consist of statistical or factual tabulations or with respect to reports and other documents that are accessible pursuant to sections 341 and 341-a(5)(a) of the Education Law. If my understanding of those provisions is accurate, the statistical or factual tabulations would be accessible on that basis.

If you believe that may analysis of the provisions of the Education Law cited above is inaccurate, I would be pleased to discuss the matter with you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1503

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

May 17, 1988

Ms. Georgia I. Connelly
[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. Connelly:

I have received your letter of May 2 in which you requested an advisory opinion concerning compliance with the Open Meetings Law by the Board of Education of the Pawling Central School District.

According to your letter:

> "On April 11, 1988, at a Board of Education meeting, the members of the Board approved a new contract for Vincent Vecchiarella, our Superintendent of Schools. At the time of Visitor's Comments, which was after the Board's decision, the question was raised concerning why the superintendent's contract was being renewed when he still had another four years to go before his present contract was due to expire. The answer given by Mr. Charles Stewart, President of the Board of Education, was that the Superintendent of Schools had requested that the contract be renegotiated and the board members had approved the request. The first opportunity that the public had to become aware of this matter was the night that the Board of Education voted to approve the new contract."

You asked whether "it was appropriate for the Board of Education to decide to renegotiate the contract while they were in executive session and to proceed without public knowledge".

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, all meetings must be conducted open to the public, except to the extent that an executive session may be held pursuant to section 105(1) of the Law.

Second, it appears that the substance of the issue could have been discussed during an executive session. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

> "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 issue involved the employment history of a particular person, i.e., the Superintendent, it appears that the issue could have been discussed during an executive session.

However, a public body must accomplish a procedure, during an open meeting, before it may conduct 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..."

I point out, too, that 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 matters" would not in my view be sufficient to comply with the statute.

Lastly, I believe that the Board's action to approve the Superintendent's request that the contract be renegotiated should have occurred in public. With respect to the taking of action in executive session, I point out that, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law, section 105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to section 106(2). Nevertheless, various interpretations of the Education Law, section 1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. As such, based upon the judicial decisions cited above and the facts that you have provided, it would appear that the action taken by the Board to approve the request to renegotiate should have been accomplished by means of a vote taken during an open meeting. Further, that action should, in my opinion, have been recorded in minutes indicating the manner in which each Board member voted on the issue [see Freedom of Information Law, section 87(3)(a)].

As you requested, copies of this opinion will be sent to those identified in your letter, as well as 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, Pawling Central School District
Hon. Vincent Leibell, Member of the Assembly
Hon. Jay P. Rolison, Jr., Member of the Senate
The News Chronicle
Poughkeepsie Journal
Harlem Valley Times
The Reporter Dispatch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1504

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

May 20, 1988

Mr. T.B. Conklin III
The American Hotel
Sag Harbor, NY 11963

<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. Conklin:

I have received your letter of May 3, as well as the materials attached to it. You have requested an advisory opinion with respect to several issues arising under the Open Meetings Law involving the Village of Sag Harbor.

The first issue concerns the absence of any "public deliberation" by the Board of Trustees of the Village of Sag Harbor prior to its decision to solicit bids for the purchase of its Municipal Building. According to an excerpt from minutes of a meeting held on April 5, an executive session was held to discuss several topics including "the sale and possible asbestos contamination" of the Municipal Building. Following the executive session, the Board returned to an open session, and the minutes state that:

> "On a motion offered by Trustee Schiavoni, seconded by Trustee Gregory, it was resolved to seek solicitations for bids for the proposed sale of the Municipal Building, that the purchaser would be exempt from any parking requirements and that if a realtor handles the sale it must be a net bid. Bids to be opened July 5, 1988. All in favor, motion so carried.

> "On a motion by Trustee Schiavoni, seconded by Trustee McDade it was resolved to declare an emergency situation due to office space requirements and seek a contractor to remove asbestos immediately based on Storch Associates verbal recommendations to be followed by a written report on asbestos in the Municipal Building."

In this regard, I offer the following comments.

First, as a general matter, it is noted that 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.

Second, the Law requires that a procedure be accomplished during an open meeting before a public body may enter into an executive session. Specifically, section 105(1) of the Law states in relevant part that:

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

On the basis of the excerpted minutes, it is unclear whether the motion to conduct the executive session identified the topics to be discussed.

Third, 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 may appropriately be discussed during an executive session. In my view, the discussion of the possible sale of the Municipal Building should have occurred during an open meeting, for none of the grounds for entry into an executive session could properly have been asserted. I point out that section 105(1)(h) permits a public body to enter into an executive session to discuss:

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

In view of the fact that the possible sale of the Municipal Building was considered and disclosed in public following the executive session, it is obvious that, at that stage, publicity would not have "substantially affected" the value of the property. Moreover, according to news articles attached to your letter, Richard DePetris, the Village Attorney, "said that it is 'a misconception' that the Trustees had decided to sell the Municipal Building. He said no decision had been made and 'the Building has not legally been offered for sale'". In short, based upon the facts as I understand them, there was no basis for discussing the issue during an executive session.

Your second question pertains to a letter sent by the Mayor to the Chairman of the Planning Board "asking him to refrain from seeking the advice of the (unsanctioned) Waterfront Review Committee". You have asked whether the Open Meetings Law "ensure[s] the right of a Planning Board to (openly) consult with the public or representative of the public". The Open Meetings Law, very simply, does not address the issue. However, the Village Law provides some guidance. Section 7-718 indicates that a planning board is established and that its members are appointed by the board of trustees; section 7-720 states that a planning board "may adopt rules and regulations in respect to procedure before it and in respect to any subject matter over which it has jurisdiction under this article or any other statute, after public hearing by the planning board and subject to the approval of the board of trustees", and section 7-726 states that:

> "The planning board shall have full power and authority to make such investigations, maps and reports and recommendations in connection therewith relating to the planning and development of the village as to it seems desirable providing the total expenditures of said board shall not exceed the appropriation for its expenses."

As such, it does not appear that the Mayor can act unilaterally with respect to oversight of the activities of the Planning Board.

Lastly, you asked that I comment with respect to an article dealing with the "Hanna C.O.", an application of a certificate of occupancy. The news article concerning the issue indicates that the decision on the matter "had been arrived at during an executive session last month". The Village Attorney, Mr. DePetris, "said the Board had a right to obtain legal advice in a closed session, invoking an 'attorney-client privilege'". The article refers to my comment that, while discussions falling within the scope of an attorney-client relationship are outside the scope of the Open Meetings Law, after legal advice is given, "the remainder of the deliberations must clearly be made in public".

The article also indicates that:

> "Several arguments were given by the attorney, the chairman, and a member to support the Board's practice, Mr. DePetris said that to discuss the pros and cons of a case in public would give 'potential legal arguments' to anyone thinking of suing 'You can't discuss that kind of thing in public. You'd be asking for a lawsuit.'
>
> "Mr. Waring said he saw nothing wrong with deciding on a case-by-case basis. 'Some may, and some may not' be decided in closed session, he said. 'If a case is complex' it definitely would be.
>
> "Another Board member, Marshall Garypie Jr., said he believed it was in the interest of 'expediency' to discuss cases privately. Public knowledge or participation would delay the Board, he said.
>
> "'Expediency', said Mr. Freeman, 'is not grounds to hold an executive session'. As to Mr. DePetris's argument about lawsuits, Mr. Freeman noted that 'anything that any municipal board does' could result in a lawsuit."

In this regard, I offer three areas of comment.

First, by way of legislative history, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards 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. As such, those deliberations could be conducted in private. 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. 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 or when a different exemption may apply.

Therefore, 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.

Further, assuming that there is no basis for entry into an executive session, a zoning board of appeals must vote in public. In fact, even prior to the amendment in 1983, it was held that, following quasi-judicial deliberations, a zoning board of appeals was required to vote in public, for the act of voting was found to be non-judicial [see Orange County Publications v. City of Newburgh, 60 AD 2d 409, 418 (1978)].

According to the article, a vote was taken in an executive session concerning the "Hanna C.O." and later announced in public. In my view, the action, the vote, should have occurred during an open meeting.

Second, the Open Meetings Law provides two vehicles under which a public body may meet in private. One vehicle is the executive session, a portion of an open meeting that is closed to the public in accordance with section 105 of the Law. The other arises under section 108 of the Open Meetings Law which contains three exemptions from the Law. When a discussion falls within the scope of an exemption, the provisions of the Open Meetings Law do not apply. Relevant to the assertion of an attorney-client privilege is section 108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law".

in which the Board deliberates toward a decision. The former, in my view, would be exempted from the Open Meetings Law; the latter, however, would be subject to the Law and should generally be conducted in public.

And third, I disagree with contentions that the complexity of issues or the possibility of litigation would permit a public body to conduct an executive session. I believe that appellate courts have rendered decisions contrary to the opinions expressed by the Village Attorney and Board members.

Of relevance with respect to litigation is section 105(1)(d), which states that an executive session may be convened for "discussions regarding proposed, pending or current litigation". With respect to a contention that litigation might occur, it has been found that a threat or mere possibility of litigation does not, without more, constitute a valid basis for entry into executive session. Further, it has been held that the purpose of the so-called litigation exception 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 (1983); also Matter of Concerned Citizens to Review the Jefferson Mall v. Town Board, 83 AD 2d 612, 613, appeal dismissed, 54 NY 2d 957 (1981)]. In its discussion of a claim that litigation might possibly ensue, the Court in Weatherwax stated 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).

As such, based upon judicial interpretations of the Open Meetings Law, where there is merely a possibility that litigation may be forthcoming, section 105(1)(d) would not in my opinion provide a ground for convening 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:gc
cc: Board of Trustees
Zoning Board of Appeals
Richard DePetris, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1505

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

May 23, 1988

Mrs. Karen Maresco
[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. Maresco:

I have received your letter of May 6, as well as the materials attached to it. You have raised a series of questions concerning the implementation of the Open Meetings Law by the Beacon City School District Board of Education, particularly with respect to a meeting held on March 21.

The first issue involves the posting of notice of meetings, for you wrote that "There is no public posting place". In this regard, section 104 of the Open Meetings Law 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 or 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."

Therefore, notice must be given to the media. In addition, a public body must designate one or more conspicuous, public locations for the purpose of posting notice of meetings.

The second area of inquiry involves the authority to conduct an executive session and the procedure for entry into an executive session. You wrote that, during the meeting, a motion was made to enter into an executive session, without any indication of the subject to be discussed. The minutes attached to your letter state that the executive session was held "to discuss personnel".

As you are aware, the Open Meetings 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, a motion to discuss "personnel", without more, would be insufficient.

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 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 matters" would not in my view be sufficient to comply with the statute.

The third issue involves the propriety of an executive session held to discuss an extension of "the terms of appointment for the Superintendent of Schools to June 30, 1992 and authorize the President of the Board to modify the existing terms and Conditions of Employment document to reflect this extension". It is your view that the matter "should have been debated openly in front of the public."

I do not necessarily agree with your contention, for the specific subject matter discussed would have determined whether or the extent to which an executive session could have been held. As indicated earlier, section 105(1)(f) permits a public body to discuss certain topics pertaining to a "particular person" during an executive session. From my perspective, if the Board discussed the performance of the Superintendent, i.e., his employment history, to that extent, an executive session could justifiably have been held. On the other hand, to the extent that the issue involved the duties of the position of superintendent, duties that would be carried out by any incumbent of that position, the discussion should, in my opinion, have occurred in public.

Lastly, you were informed that "there are not minutes taken at executive sessions and never have been". In this regard, 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 2d 157 aff'd 58 NY 626 (1982)]. Therefore, since a school board cannot vote during an executive session, minutes of an executive session need not be prepared.

Enclosed are copies of the Open Meetings Law and "Your Right to Know", which describes the Law in detail.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Board of Education, Beacon City School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1506

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

May 24, 1988

Ms. Joan Giambo Finucane
[redacted]

Dear Ms. Finucane:

As you are aware, your letter of April 26 sent to the Commissioner of the Department of Environmental Conservation has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Open Meetings Law.

In brief, you described problems relative to a public hearing conducted by the Planning Board of the Town of Philipstown concerning a draft environmental impact statement (DEIS). You referred to inadequacies in the DEIS and the conduct of the hearing. According to your letter, due to the size of the crowd, some people could not hear the proceeding, others were not given an opportunity to speak, and the facility did not permit barrier-free access to physically handicapped persons. You also raised questions concerning the application of law relative to the preservation of wetlands.

In this regard, although your questions relate to a public proceeding, I do not believe that the Open Meetings Law is legally relevant. As I understand the situation, the gathering in question was a hearing rather than a meeting. A hearing, in my view, generally is a gathering in which members of the public are given an opportunity to speak with respect to a particular matter of public concern. A meeting generally involves a gathering of a public body for the purpose of discussing or deliberating with regard to public business.

Nevertheless, as a service to you, I offer the following comments.

First, section 74-a of the Public Officers Law states that:

> "It shall be duty of each public officer responsible for the scheduling or siting of any public hearing to make reasonable efforts to ensure that such hearings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

In my view, the provision quoted above does not require that a facility be renovated, for example, to guarantee barrier-free access to physically handicapped persons. However, I believe that a it does require that a reasonable effort be made to hold a hearing in a facility that permits barrier-free access. For instance, if the site of the hearing did not permit barrier-free access, but another facility available to the Board would have permitted such access (i.e., another Town facility or a local school), the alternative site should, in my opinion, have been designated for conducting the hearing.

Second, as a general matter, a reasonable opportunity must be given to interested members of the public to be heard at a public hearing [see Lamb v. Town of East Hampton, 162 NYS 2d 94, 96 (1957); Rod v. Monserrat, 312 NYS 2d 377, 380 (1970)]. If indeed the hearing was conducted unreasonably or in violation of law, it would appear that a challenge to its adequacy or legality could be made by means of a proceeding brought under Article 78 of the Civil Practice Law and Rules.

The remaining issues raised in your correspondence are outside the jurisdiction and expertise of this office.

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

FOML-AO-1507

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

May 27, 1988

Mr. Vito P. DiCesare
President BEAA
[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. DiCesare:

I have received your letter of May 12, as well as the materials attached to it. On behalf of the Beacon Educational Administrators Association, you have asked that I investigate or render an opinion with respect to the implementation of the Open Meetings Law by the Beacon City School District Board of Education.

In this regard, although the Committee on Open Government and its staff may provide advice concerning the Open Meetings Law, we have no authority to "investigate" or obtain records on behalf of an individual or organization.

You have raised a series of issues, and I will attempt to advise with respect to each.

The first issues involve notice, and you wrote that "no public notice" of a certain meeting was posted or indicated in a newspaper. The requirements concerning notice appear in section 104 of the Open Meetings Law, which 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."

As such, notice must be given to the news media and posted in one or more designated, conspicuous public locations prior to all meetings. It is noted that although a public body must provide notice to the news media, there is no requirement that the news media must publish or publicize notice of a meeting.

The second issue involves an executive session held to discuss the District's "Organizational Chart". You wrote that it is your view that certain matters concerning "personnel" relative to an individual, for example, may be discussed during an executive session. You also wrote that:

> "This discussion however, realigned the entire district structure, reassigned personnel eliminating positions in general terms, and redefined lines of authority and policy procedures. This discussion as indicated by a board member was not about a specific person or persons."

Here I point out that 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.

> 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 matters" would not in my view be sufficient to comply with the statute.

The third topic raised in your letter involves a section of the Board's "Internal By-Laws", No. 8310, which states that an issue requiring the establishment or revision of policy must be drafted and permitted to be reviewed for 30 days prior to adoption. You wrote that those guidelines were violated. In my view, the by-law in question is unrelated to the Open Meetings Law, and the issue involves compliance by the Board with its own rules.

Fourth, you indicated that "addendums to the agenda" were not disclosed to the public prior to a meeting. In this regard, the Open Meetings Law is silent with respect to the preparation or disclosure of agendas. Although many public bodies, as a matter of policy, prepare and distribute agendas, the Open Meetings Law does not refer specifically to agendas.

Fifth, you wrote that "The Board of Education had three specific members indicate that public informational matters and public decisions were made and discussed in executive session". At this juncture, it is emphasized 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) specify and limit the subjects that may appropriately be considered during an executive session. In addition, as inferred earlier, the Open Meetings Law prescribes a procedure that must be accomplished by a public body before it may enter into an executive session. Specifically, section 105(1) of the Law states in relevant part that:

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

Lastly, with respect to action taken during an executive session, regard, 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). When an issue is discussed during an executive session, but no action is taken, minutes of the executive session need not be prepared. It is noted that under section 106(3) of the Open Meetings Law minutes of both open meet-

ings 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 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)]. Therefore, if indeed decisions were made during executive sessions, it would appear that the Educational Law may have been violated.

Enclosed are copies of the Open Meetings Law and "Your Right to Know", which describes the Law in detail.

I hope that 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, City of Beacon School District
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1508

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

June 1, 1988

Mr. David L. Lewis
Gannett Westchester Newspapers
733 Yonkers Avenue
Yonkers, New York 10704

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. Lewis:

I have received your letter of May 18, as well as the materials attached to it.

Your inquiry deals with the implementation of the Open Meetings Law by the Board of Education of the City of Mount Vernon School District. According to your letter, the Board "routinely meets in closed session to discuss a variety of topics, in apparent violation of the spirit, if not the letter, of the Open Meetings Law". For example, you wrote that:

> "before every regularly scheduled public board meeting, the board votes to meet in a closed 'working session' which ostensibly covers 'personnel matters' but in reality covers many topics. For instance, [you] have learned that in the 'working session' before the May 4 meeting, the Board discussed the future of a controversial high school detention policy. [You] do not know the substance of the discussion."

Another topic considered by the Board during an executive session:

> "was whether or not they should relieve the district's Affirmative Action Officer of some of his teaching duties so he can devote more time to affirmative action."

However, you expressed the belief that:

> "the discussion speaks more directly to the district's commitment to affirmative action -- a sensitive issue in Mount Vernon, where 78 percent of the students are black and 22 percent of district employees are black, and where blacks boycotted the school system four years ago because of the district's hiring practices."

You described other instances in which you believe that executive sessions might have been inappropriately held.

In view of the foregoing, you have requested a "ruling...on whether or not the phrase 'personnel matters' can be routinely invoked without amplification to justify closed sessions". You also seek my opinion concerning the propriety of discussing "the affirmative action officer and his duties in closed session". Finally, you asked what recourse is available, particularly when you "learn about these discussions after the fact".

In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law 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, a motion to discuss "personnel", without more, would be insufficient.

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 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 matters" would not in my view be sufficient to comply with the statute.

Second, with respect to the discussion concerning the duties of the affirmative action officer, as indicated earlier, section 105(1)(f) permits a public body to discuss certain topics pertaining to a "particular person" during an executive session. From my perspective, if the Board discussed the performance of the affirmative action officer, i.e., his or her employment history, to that extent, an executive session could justifiably have been held. On the other hand, to the extent that the issue involved the duties of the position, duties that would be carried out by any incumbent of that position, or the District's commitment to affirmative action, the discussion should, in my opinion, have occurred in public.

In terms of recourse, section 107 of the Open Meetings Law 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. 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 thereto taken in violation of this article in whole or in part."

As an alternative to litigation, perhaps the most appropriate course of action would involve efforts to educate the Board of its responsibilities under the Open Meetings Law. In an attempt to do so, a copy of this letter will be sent to the Board.

Lastly, since you requested a "ruling", I point out that the Committee is authorized to advise (see Open Meetings Law, section 109); this office has no power to "rule" or to render a binding determination to compel compliance with the Law. As such, the foregoing should be considered as advisory.

I hope that I 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, Mount Vernon School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1509

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

June 1, 1988

Mr. Robert P. Lewis
Office of Cayuga County Attorney
County Office Building
160 Genesee Street
Auburn, NY 13021

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. Lewis:

I have received your letter of May 16 and appreciate your interest in complying with the Open Meetings Law.

According to your letter:

> "The County of Cayuga has appointed an ethics committee to review problems that might exist in the Cayuga County Government and one of the things that has bothered them is whether or not any meetings they hold relative to questions presented by county employees is open to the general public."

You have asked whether, in my view, the meetings in question should be "open or closed". In this regard, I offer the following comments.

First, I believe that the County's Ethics Committee is a public body required to comply with the Open Meetings Law. The scope of the Law is determined in part by section 102(2), which defines "public body" to mean:

> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental

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

The Ethics Committee in my view is subject to the Law, for it was likely created by the County's legislative body, it consists of at least two members, it may conduct its business only by means of a quorum (see General Construction Law, section 41), and it conducts public business and performs a governmental function for a public corporation, in this instance, Cayuga County. Further, the definition makes specific reference to committees, subcommittees and similar bodies.

Second, section 104 of the Law requires that notice of the time and place be given prior to meetings held by public bodies. Subdivision (1) pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Subdivision (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 in the manner described in subdivision (1), to the extent practicable, at a reasonable time prior to such meetings. Consequently, I believe that notice must be given prior to all meetings of the Committee in accordance with section 104 of the Law.

Third, although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally be conducted open to the public, section 105(1) of the Law lists eight grounds for entry for entry into executive session.

Relevant to your inquiry is section 105(1)(f) of the Law, which permits a public body to enter into an executive session to discuss:

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

If the issue before the Ethics Committee involves a particular person in conjunction with one or more of the subjects listed in section 105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with

the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, section 105(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

Lastly, the Law prescribes a procedure that must be accomplished by a public body during an open meeting before conducting 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..."

In sum, while it appears that many issues considered by the Ethics Committee could likely be discussed during executive sessions, I believe that meetings of the Committee must be preceded by notice and convened open to the public prior to 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:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1510

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

June 10, 1988

Ms. Shirley Zeller
Town Clerk
Town of Deerpark
Drawer A
Huguenot, NY 12746

<u>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.</u>

Dear Ms. Zeller:

I have received your letter of May 27 and appreciate your interest in complying with the Open Meetings Law.

You have requested a clarification concerning the preparation of minutes. Specifically, you raised the following questions:

> "Is there a set time setforth in the law stating the number of days in which the minutes for a regular municipal meeting which was held to be made available to the public?
>
> "Also, is it necessary for the minutes to be approved by the said municipal board before they are available to the public?"

Further, you asked whether there is a "set time for the filing and availability" of minutes with respect to appointed boards, such as planning and zoning boards and assessment boards of review.

In this regard, I offer the following comments.

First, the Open Meetings Law pertains to public bodies, and section 102(2) of the Law defines the phrase "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."

Therefore, the requirements of the Open Meetings Law are applicable to the town board, the boards to which you specifically referred, and to other public bodies generally.

Second, 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.

Third, 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.

I hope that 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-1511

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

June 14, 1988

Ms. Juanita R. Vazquez
[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. Vazquez:

I have received your letter of May 26, as well as the materials attached to it. You have requested a clarification of the Open Meetings Law as it pertains to the Board of Trustees of the Village of East Williston.

First, you wrote that:

> "The Village Board and Mayor will not make minutes of meetings available until after their final approval which is not until after the next monthly meeting. It has been stated that minutes are not minutes until after they are approved. How soon after a meeting are minutes in whatever form, to be available for reviewing?"

In this regard, 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.

Further, while the Open Meetings Law does not require that minutes be approved, it is recognized that many public bodies routinely, or as a matter of policy, 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.

The second area of inquiry deals with notice of meetings. With respect to that issue, you indicated that:

> "the only meeting notice which is posted is for the monthly 'open' meeting. Notices of other regularly

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

It is also noted that section 107(1) also provides 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."

Fourth, you referred to a notice of a hearing concerning a local law. You ask:

> "If this public hearing is part of a regularly scheduled monthly meeting, or a meeting scheduled at least a week in advance, is publication notice of such hearing required together with a notice of the regularly scheduled meeting?"

From my perspective, a hearing may be different from a meeting. A hearing generally involves a situation in which members of the public are permitted to express their views on a given issue. Often a hearing must be preceded by the publication of a legal notice. A meeting, on the other hand, is a gathering of a public body held to deliberate and/or act with respect to matters of public business. A meeting must be preceded by notice given pursuant to the Open Meetings Law. If a meeting and a hearing are scheduled on the same date, I believe that separate notices would likely be required to comply with the Open Meetings Law and the law under which the hearing is conducted.

Your final questions deal with notice of public hearings and distinctions between a proposed local law and the existing law. Those questions do not pertain to the Open Meetings Law. As such, I regret that I have neither the authority nor the expertise to respond to those questions.

I hope that 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 East Williston

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1512

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

June 15, 1988

Mr. Sal T. Generoso
City Clerk
City of New Rochelle
515 North Avenue
New Rochelle, NY 10801

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. Generoso:

I have received your letter of May 31 and appreciate your kind comments.

You have requested information concerning the kinds of information that are "essential for inclusion in minutes of City Council Meetings". The issue has apparently arisen because, with respect to some meetings, you prepare minutes that include "verbatim comments", and your intent is to "reduce this area of work".

In this regard, I offer the following comments.

First, section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies and prescribes what may be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 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 meetings 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 but does not engage in the making of "motions, proposals, resolutions" or voting, presumably the minutes need not indicate 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 Council discusses an issue during an executive session, but takes no action, there is no requirement that minutes of the executive session be prepared.

Lastly, I point out that, in addition to the Open Meetings Law, the Freedom of Information Law has, since its enactment in 1974, contained what may be considered an "open vote" provision. Section 87(3) states in relevant part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Therefore, when a final vote is taken by a public body, such as the Council, a record must be prepared that indicates the manner in which each member cast his or her vote. Further, unless a vote is unanimous, the minutes should include reference to each member's vote as affirmative or negative as the case may be.

I hope that 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-1513

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

June 16, 1988

Mr. P.J. Bocchieri
[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. Bocchieri:

I have received your recent correspondence in which you complained that the Yonkers City Council has been conducting its meetings in a facility too small to accommodate all of those who seek to attend.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized by section 109 of the Open Meetings Law to advise with respect to that statute. The Committee is not empowered to enforce the Open Meetings Law or to compel a public body to comply with that statute.

Second, as a general matter, the Open Meetings Law provides that any person may attend a meeting of a public body, such as the Yonkers City Council. Specifically, section 103(a) of the Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Further, the "Legislative declaration", section 100 of the Law, states 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 by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public

> policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

Third, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the City Council has the capacity to hold its meetings in a variety of locations, I believe that meetings should be held in a facility that is most likely to accommodate the needs of people with handicapping conditions.

In the context of the situation described in your correspondence, if, for instance, a flight of stairs must be climbed to attend meetings in the facility where the meetings have been held, but if a school auditorium permits barrier-free access to physically handicapped persons, I believe that compliance with the Law would require that meetings be held in the school auditorium. As stated in Fenton v. Randolph:

> "The 'reasonable efforts' required by the Legislature must be viewed in the context of the force of the public policy expressed by it and the statutes should be interpreted in a manner which will tend to accomplish the legislative goal. Plainly,

> 'reasonable efforts' can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining those options when necessary" [400 NYS 2d 987, 990-991 (1977)].

Similarly, if there is a City facility that is larger than the facility which has been used for Council meetings, I believe that the legislative declaration, as well as section 103(a) of the Open Meetings Law, indicate that the facility that would accommodate those interested in attending should be used to comply with the Law.

Lastly, it is emphasized that the Open Meetings Law is silent with regard to public participation at meetings. Therefore, although the Law generally permits the public to attend open meetings, the Law does not provide the public with the right to speak or otherwise participate at meetings.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Yonkers City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 5128
OML-AO- 1514

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

June 16, 1988

Mr. Seymour Sub
Legal Consultant
Educational Services Dept.
Bide-A-Wee Home Association, Inc.
3300 Beltagh Avenue
Wantagh, New York 11793

The staff of the Committee 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. Sub:

I have received your letters of May 23, with attachments, in which you requested an advisory opinion.

According to the materials and our recent telephone conversations, Ms. Cynthia Grimaldi made a request under the Freedom of Information Law to the State University of New York at Stony Brook for various records pertaining to the use of animals in its research laboratories. With respect to her request for minutes of the Stony Brook Laboratory Animal Users Committee, she was advised by Ms. Rosemarie Williams Nolan, Administrator for Claims, Records and Risk Management, that such minutes "are intra-agency documents which are not final in nature and do not affect the public. Accordingly, they are not within the purvue [sic] of the Freedom of Information Act". Additionally, Ms. Grimaldi sought to attend the meetings of the Laboratory Animal Users Committee. Ms. Nolan denied the request, stating that "those meetings are not within the purvue of the State Open Meetings Law" and "such attendance...is not a right of the general public". You seek an advisory opinion as to whether animal care committee meetings are subject to the Open Meetings Law and whether minutes of such meetings are subject to the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records of an agency. The term "agency" is defined in section 86(3) of the Law to include:

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

It has consistently been held that the State University is an integral part of the government of New York State and is engaged in carrying out governmental functions [see e.g., State University v. Syracuse University, 284 App. Div. 59 (1954); Westgate North v. State University of New York, 354 NYS 2d 281, aff'd 47 AD 2d 1004 (1975); Matter of Melvin, 483 NYS 2d 941 (1984)]. As such, I believe that the State University and its components, such as SUNY at Stony Brook, constitute "agencies" required to comply with the Freedom of Information Law.

With respect to the Stony Brook Laboratory Animal Users Committee, the federal Animal Welfare Act (Title 7 USC section 2143) requires the establishment of a research facility committee at each "research facility". The term "research facility" is defined in section 2132(e) of the Act to include any school institution or organization or person that uses or intends to use live animals in research, tests or experiments. Section 2143(b)(i) of the Act states, in part, that:

> "Each Committee shall be appointed by the chief executive officer of each such research facility and shall be composed of not fewer than three members. Such members shall possess sufficient ability to assess animal care, treatment, and practices in experimental research as determined by the needs of the research facility and shall represent society's concerns regarding the welfare of animal subjects used at such facility."

Additionally, section 2143(b)(4)(A) of the Act requires each committee to conduct semiannual inspections of animal study areas and facilities and file an inspection certification report of each inspection at the research facility.

Further, in accordance with Title 10 Section 55-1.4(b) of the regulations of the New York State Health Department, each "laboratory or institution shall have an animal care committee

which shall be responsible for the review of the propriety of the procedures used and the scientific justification for the use of animals in experiments, tests, and investigations, including educational demonstrations."

Based on the cited provisions, since the members of the committee are appointed by an official of the State University and the committee conducts inspections of the University's facility and files inspection reports at the facility, and since state regulations require the establishment of the committees, SUNY Stony Brook's animal care committee as a component of SUNY is, in my view an "agency" subject to the Freedom of Information Law, for it is a "state...committee [or] office" that performs a governmental function for the state (i.e., SUNY at Stony Brook).

Second, the Freedom of Information Law pertains to agency records and the term "record" is defined in section 86(4) of the Law to include "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever". Based on the foregoing, minutes of meetings are "records" and, assuming that the Committee is an "agency", its records, including minutes, would in my view be accessible in accordance with the provisions of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based 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. Further, minutes of open meetings are generally available, since none of the grounds for denial would apply to a record that summarizes public deliberations or discussions.

Third, you inquired as to whether meetings of the animal care committee of SUNY Stony Brook are subject to the Open Meetings Law. That statute generally requires that meetings of public bodies be conducted open to the public. The question, therefore, is whether the committee is a "public body" subject to the Open Meetings Law. 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 consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

From my perspective, each of the elements contained in the definition is present with respect to the committee. In accordance with the federal Act, each committee must "be composed of not fewer than three members" (see earlier). Further, section 2143(b)(2) of the federal Act states that "A quorum shall be required for all formal actions of the Committee, including inspections under paragraph(3)."

Moreover, as discussed earlier with regard to the Freedom of Information Law, I believe that the committee conducts public business and performs a governmental function for the state and the State University system.

Therefore, it is my view that the Stony Brook Laboratory Animal Users Committee is a public body subject to the Open Meetings Law. As such, its meetings must be open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law.

Fourth, section 106 of the Open Meetings Law pertains to minutes of meetings of a public body. It states that:

> "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.
>
> 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."

As indicated earlier, minutes of open meetings are generally available. With respect to access to minutes of an executive session, I believe that they are available, except to the extent that one or more of the grounds for denial appearing in the Freedom of Information Law may justifiably be asserted.

In sum, it is my opinion that minutes of the Committee meetings are "available to the public in accordance with the provisions of the freedom of information law".

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
cc: Rosemarie Williams Nolan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5143
OML-AO-1515

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

June 22, 1988

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

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. Kent:

I have received your letter of June 9, which concerns the status of "private organizations" under the Freedom of Information and Open Meetings Laws.

Specifically, you wrote that:

> "It is [your] understanding that private organizations such as the Orange County Assessors Association, or the New York State Assessors Association are not subject to the Freedom of Information Law, or the Open Meetings Law."

You have requested "a clarification" of the matter. In this regard, I offer the following comments.

It is assumed that the assessors associations that you described are not-for-profit entities. Although they may be composed of representatives of various governments, they would not in my view constitute governmental entities.

With respect to the Freedom of Information Law, the scope of that statute is determined in part by the definition of "agency" for the Law applies to agency records. Section 86(3) of the Law defines "agency" to mean:

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

It appears that the associations in question are not state or municipal offices or governmental entities that perform governmental functions. If my assumptions are accurate, neither of the associations would constitute an "agency", and the Freedom of Information Law would not be applicable to their records.

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 town board or 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 organizations that you described, likely are not subject to the Law.

Assuming that the associations serve as forums 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 associations are in no way binding upon the municipalities that may be represented by means of membership in the associations and that the associations do not in any way conduct public business collectively, as a body, for any particular municipality. If that is so, and if the associations are merely vehicles for exchanging ideas, I do not believe that they are public bodies, or that the Open Meetings Law applies to their 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

OML-AO-1516

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

June 24, 1988

Hon. Paul A. Tokasz
Member of the Assembly
Room 432
Legislative Office Building
Albany, New York 12248

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 Assemblyman Tokasz:

I have received your letter of June 22. You wrote that you have received numerous inquiries concerning the status of volunteer fire companies under the Open Meetings Law. Consequently, you have requested a "clarification" concerning the issue.

In this regard I offer the following comments.

It is noted at the outset that the Open Meetings Law (see attached) is applicable to meetings of public bodies. 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 reviewing the components in the definition of "public body", I believe that each is present with respect to the board of a volunteer fire company. 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 elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law.

I point out that the status of volunteer fire companies had long been unclear. Those 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 they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the 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, I believe that the board of a volunteer fire company, as well as committees that it may designate, fall within the definition of "public body" and would be required to comply with the Open Meetings Law.

Most recently, another decision confirmed in an expansive manner that volunteer fire companies are subject to the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court stated that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:

> '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having, by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This Court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

In my view, the foregoing bolsters the contention that meetings of boards of volunteer fire companies are subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5147
OML-AO-1517

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

June 24, 1988

Mr. Richard Lucinski
Assistant City Editor
Niagara Gazette
310 Niagara Street
Niagara Falls, NY 14303

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

Dear Mr. Lucinski:

I have received your letter of June 9, as well as the news articles attached to it.

You have requested an advisory opinion concerning rights of access to "expense records obtained by a special Niagara County Legislature committee on investigation". According to your letter:

> "That committee in investigating a junket taken to Florida last December by three county legislators. As part of that probe, it obtained records from the Sheraton Bal Harbour Hotel, the Sea Escape Cruise Company, and the Miami Airport Quality Inn. The committee has denied the public access to those records, and some committee members indicate they may remain closed to the public after the investigation concludes."

It is noted that I have received a letter from Glenn S. Hackett, Niagara County Attorney, after informing him of your request for an advisory opinion. Mr. Hackett wrote that:

"The basis of the denial is that the Committee is an investigatory committee of the Niagara County Legislature formed pursuant to section 209 of the County Law to investigate the possible misuse of County funds by County Legislators on a trip to attend the American Bus Association convention in Miami in December of 1987. Such investigation could result in a disciplinary ruling against the Legislators involved and, thus, would be a permitted action in executive session pursuant to section 105(1)(f) of the Public Officers Law of the state of New York. Likewise, the documents involved are being introduced into evidence before the Committee, which is acting in a judicial or quasi-judicial proceeding, and, therefore, are exempt from public disclosure pursuant to section 108 of the Public Officers Law.

"At the outset the Investigating Committee voted unanimously to close from the public those sessions of the Committee that deal with the taking of testimony, fact-finding, and evidence production. The documents obtained were from the state of Florida and, thus, beyond the reach of the normal subpoena power of the County under the CPLR of New York (Practice Commentary under section 2303). Further, in order to obtain the information we received a written authorization from the individual County Legislators to obtain the records for use within the investigatory process only.

"Based upon the foregoing and the determination of the Investigating Committee, we will not be opening these records for the inspection of anyone unless ordered to do so by a court of competent jurisdiction."

In this regard, I offer the following comments.

First, I believe that the documents that you are seeking, irrespective of their origin or use, are, once they come into the possession of the of the County, records subject to rights conferred by the Freedom of Information Law. Section 86(4) of the Law defines "record" 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."

I point out that the courts have construed the language quoted above as broadly as its specific terms suggest. The first decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)]. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

Similarly, in a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records", thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY

2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

Most recently, the Court of Appeals rendered a decision based upon the language of the definitions of "agency" [see Freedom of Information Law, section 86(3)] and "record" and held that the so-called "Corning Papers" constitute agency records, despite claims that some of the records were "personal" or involved the late Mayor acting in his capacity as a political party official [Capital Newspapers v. Whalen, 69 NY 2d 246 (1987)]. In its description of the controversy, the Court stated:

> "At issue in this appeal by petitioners's newspapers is whether two categories of documents in custody of respondent City of Albany should be held to be "records" under FOIL: correspondence of a former Mayor of Albany, the Late Erastus Corning, II, concerning matters of a personal nature and correspondence concerning the activities of the Albany County Democratic Committee. The narrow question of statutory construction presented arises from respondents' contention that although these papers are literally within the FOIL definitions as 'record[s]' being 'kept' or 'held' by an 'agency' (the City of Albany), they are, nonetheless, outside of the scope of FOIL because of the private nature of their contents. For reasons to be discussed, we disagree with respondents' contention and conclude that there should be a reversal" (id. at 249).

In determining the issue, it was found that:

> "It is fundamental that in interpreting a statute, a court should look first to the particular words in question, being guided by the accepted rule that statutory language is generally given its natural and most obvious meaning (see, Price v Price, 69 NY2d 8, 15-17; McKinney's Cons Laws of

> NY, Book 1, Statutes section 94, p. 232). Here, if the terms 'record' and 'agency' are given their natural and obvious meanings, the Corning papers would fall within such definitions. The term 'record' is defined as 'any information kept [or] held * * * by, with or for an agency * * * in any physical form whatsoever' (Public Officers Law section 86[4]). Unquestionably the Corning papers constitute 'information * * * in [some] physical form' stored, 'kept [or] held' by the city, a 'governmental entity' and, as such, an 'agency' for purposes of FOIL..." (id. at 251).

Based on the decisions cited above, the documents furnished to the County are, in my view, "records" that fall within the scope of rights conferred by the Freedom of Information Law.

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.

In his letter, the County Attorney indicated that various records were received from entities in Florida in conjunction with a "written authorization from individual County Legislators to obtain the records for use within the investigatory process only". As such, it appears that the records were obtained by means of an assurance that they would be kept confidential and used for a specific purpose. While that may be so, I believe that an assurance or promise of confidentiality is irrelevant to a consideration of rights granted by the Freedom of Information Law. As noted earlier, a promise of confidentiality is largely irrelevant. In its discussion of the definition of "record", the Court of Appeals in Washington Post, supra, held that:

> "The definition does not exclude or make any reference to information labeled as 'confidential by an agency', confidentiality is relevant only when determining whether the record or a portion of it is exempt...Nor is it relevant that

> the documents originated outside the government... "(id. at 565; see also Gannett News Service v. State, 415 NYS 2d 780].

Therefore, even though the records may have been obtained with the consent of particular individuals for a narrow purpose, those factors, without more, are not determinative of rights of access. The issue, in my view, involves the extent, if any, to which one or more of the grounds for denial may appropriately be asserted.

Although the County Attorney did not cite any of the exemptions from disclosure appearing in section 87(2) of the Freedom of Information Law, he referred to certain instances in which the public may be excluded from meetings or quasi-judicial proceedings under the Open Meetings Law. In this regard, it is emphasized that the grounds for entry into an executive session appearing in section 105(1) of the Open Meetings Law are not necessarily consistent with the grounds for denial of access to records appearing in section 87(2) of the Freedom of Information Law. In some instances, although the discussion of a particular topic might justifiably be conducted during an executive session, records related to that topic would not necessarily fall within any ground for denial in the Freedom of Information Law. For instance, if a public body discusses the possible appointment of a particular individual to a position, an executive session would likely be proper, for 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..."

Since such a discussion would involve matters "leading to the appointment...of a particular person", an executive session would in my view be appropriate. Nevertheless, if a public body chooses to appoint an individual to a position, records reflective of the appointment would be made available as minutes required to be prepared under section 106 of the Open Meetings Law. Moreover, section 87(3)(b) of the Freedom of Information Law requires each agency to maintain and may available a payroll record indicating the name, public office address, title and salary of all officers or employees of the agency. As such, even though a discussion resulting in the appointment of an individual to a position might be closed under the Open Meetings Law, records related to the appointment of the individual might be accessible under the Freedom of Information Law.

In this instance, it is clear in my view that the County Legislature or a committee thereof could conduct an executive session to discuss "matters leading to the...discipline...of a particular person..." Nevertheless, records related to the discussion, such as vouchers, bills, receipts for expenditures claimed, and similar records have long been available under the Freedom of Information Law and other statutes (see e.g., General Municipal Law, section 51). In short, the fact that a meeting or proceeding might justifiably be closed under the Open Meetings Law or perhaps exempt from the provisions of that statute does not constitute a basis for withholding records under the Freedom of Information Law.

Under the circumstances, it appears that two grounds for denial appearing in the Freedom of Information Law may be relevant with regard to the records sought.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Although that standard is flexible and reasonable people may have different views regarding privacy, the courts have provided significant direction, particularly with respect to the privacy of public officers and employees. It has been held in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than others. Further, with respect to the Freedom of Information Law, it has generally been determined that records pertaining to public employees that are relevant to the performance of their duties are available, for disclosure in those instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty, NYLJ, October 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981]. Conversely, to the extent that records or portions of records are irrelevant to the performance of one's official duties, it has been held that section 87(2)(b) may appropriately be asserted [see Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, November 22, 1988 and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

One of the decisions cited above may be of particular relevance to the situation. Capital Newspapers v. Burns dealt with a request for attendance records indicating the days and dates of sick leave claimed by a particular employee. In holding that the records are available, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the right of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [109 AD 2d 92, 94-95 (1985); aff'd 67 NY 2d 562 (1986)].

Further, in affirming the decision of the Appellate Division, the Court of Appeals held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers (Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [citing Public Officers Law section 84]).

> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (see, Public Officers Law section 87 [2]; Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY2d 75, 79-80, supra)... Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 80, supra; Matter of Fink v Lefkowitz, 47 NY 2d 567, 571..." (67 NY 2d 564-566).

In this instance, the individuals who are the subject of the investigation traveled to Florida in the performance of their official duties as representatives of County government by means of public funds. As in Capital Newspapers, the taxpayers have an interest in knowing whether those individuals appropriately performed their duties during their stay. The records sought would apparently describe the activities of those individuals while in Florida. As such, based upon judicial interpretations, it would appear that the records sought are relevant to the performance of public officers' official duties and that, therefore, disclosure would generally result in a permissible rather than an unwarranted invasion of personal privacy. I point out that there may be portions of such records that could be withheld. For example, a receipt might include a credit card account number or a person's home phone number. Those kinds of items are irrelevant to the performance of one's official duties and could, in my view, be deleted. However, for the reasons discussed above, I believe that the remainder would likely be available.

Another ground for denial of possible significance is section 87(2)(e), which permits an agency to 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..."

It is questionable, in my view, whether the records sought can be characterized as records "compiled for law enforcement purposes". The hotels and other commercial entities that supplied the records obviously prepared the records in the ordinary course of business rather than for any law enforcement purpose. Further, it appears that the investigation is intended to determine whether disciplinary action should be taken; there is no suggestion that criminal charges or sanctions are to be imposed. Even if the records could be considered as having been "compiled for law enforcement purposes", it is difficult to envision how disclosure, particularly after the investigation is concluded, could result in the harmful effects of disclosure described in subparagraphs (i) through (iv) of section 87(2)(e).

I hope that I 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: Glenn S. Hackett
Hon. John Tylec

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5149
OML-AO-1518

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

June 28, 1988

Mr. Michael A. McCarthy

[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. McCarthy:

I have received your recent letter in which you requested advice.

According to your letter, you attended and spoke at a public hearing held by the Town of Theresa Zoning Board of Appeals on June 1. It appears that, initially, when you requested a copy of the minutes of the hearing, there was some question regarding your rights of access but that the minutes were subsequently made available. You indicate that the minutes were not "accurate...on every thing that was stated at the...meeting. That (your) notes on what (you) had said find almost 75% of (your) statements not in the record." You were advised by Town Attorney Russ Egleston that it was within the discretion of the clerk to "record what she/he deemed important". You informed Mr. Egleston that you disagreed and that you would make a written complaint to this office. Additionally, you stated that the secretary of the Zoning Board did not attend the June 8 meeting of the Board, which was a continuation of the June 1 public hearing. You inquire as to whether the secretary's failure to attend the meeting constitutes a "violation of the FOIL". In this regard, I offer the following comments.

First, I point out that the Committee on Open Government is authorized to render advisory opinions on issues concerning the Freedom of Information and Open Meetings Laws. It is not within the scope of the Committee's responsibilities to investi-

gate complaints, to enforce the law or to render advice on issues concerning other laws. Since some of the issues you raised pertain to issues that do not arise under the Freedom of Information Law or the Open Meetings Law, such as the Town Law, I have forwarded a copy of your letter to Mr. Harry Willis, an attorney with the Department of State who deals with local government matters for response with respect to those issues.

Second, the Freedom of Information Law pertains to rights of access to records maintained by entities of state and local government. In brief, the 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. With respect to minutes of a public hearing of a town zoning board of appeals, such minutes are generally available, since none of the grounds for denial would apply to a record that summarizes public discussions, statements, testimony or other matters conducted in public.

Third, the Open Meetings Law pertains to meetings of public bodies. The term "meeting" is defined in section 102(1) of the Law to mean "the official convening of a public body for the purpose of conducting public business". Further, in Orange County Publications (id.), the state's highest court held that any time a quorum of the members of a public body gathers for the purpose of discussing public business, that gathering is a "meeting" under the Open Meetings Law.

I point out that there is often a distinction between a "meeting" and a "hearing". As indicated earlier, a meeting involves a situation in which a quorum of a public body seeks to conduct business or deliberate as a body. It is my understanding that the term "hearing" generally refers to situations where there may be no quorum requirement and during which members of the public are given an opportunity to express their views, or in which a person or entity seeks testimony from witnesses or interested parties, or investigates in a quasi-judicial manner. Thus, if a quorum of the members of the Zoning Board attended the June 1 public hearing and if the members discussed or conducted public business in addition to hearing public comment and testimony, the hearing may have been a "meeting" subject to the Open Meetings Law. If there was no quorum, in my opinion, the public hearing was likely not a "meeting" and the Open Meetings Law would not have applied.

Fourth, in the event that the public hearing was a meeting, it is noted that section 106 of the Open Meetings Law sets forth minimum requirements with respect to the content of minutes of open meetings. Specifically, section 106(1) provides 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.

As such, the Open Meetings Law does not require that minutes include a summary of discussions or statements that are made at open meetings. Further, in my view, the Law does not require that discussions which are reflected in the minutes be recorded in their entirety or that minutes consist of a verbatim account of what transpired at a meetings. However, it is my understanding that Mr. Willis will furnish additional advice with respect to other statutes or judicial decisions concerning this issue as it relates to public hearings of zoning boards of appeals.

Fifth, it is also noted that section 106(3) of the Open Meetings Law, which pertains to the availability of minutes, 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."

Further, as indicated earlier, records of public hearings are generally available since none of the grounds for denial in the Freedom of Information Law would likely apply.

Finally, you inquire as to whether the absence of the secretary of the Zoning Board from the June 8 meeting is "a violation of the Freedom of Information Law". In this regard, the Freedom of Information Law pertains to access to records and does not apply to the issue you raise. Further, the Open Meetings Law does not require that a designated individual must attend the meetings and take the minutes. I believe that Mr. Willis will provide additional guidance with respect to this issue.

I hope that I have been of some assistance. Should any further questions arise concerning the Freedom of Information Law or the Open Meetings Law, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
cc: Town of Theresa Zoning Board of Appeals
Russ Egleston, Town Attorney
Harry Willis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5148
OML-AO-1519

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

June 28, 1988

Ms. Frances J. Thompson
[redacted]

Dear Ms. Thompson:

I have received your letter of June 12, as well as a copy of a request to review minutes of meetings of the Board of Trustees of the New York City Fire Department Pension Fund.

That request was made on April 18 and directed to Michael Munns, Acting Counsel to the Department and Freedom of Information Officer. On the basis of your letter, it appears that you received no response. Consequently, on May 26, you spoke with Mr. Munns, who, according to your letter, indicated that the minutes are "confidential" and added that he would respond to that effect in writing. Having received no written response following that conversation, you contacted Mr. Munns by phone on June 6. You stated in your letter that Mr. Munns said he did not provide a written response "because he had 'a lot of work to do'."

It is your view that "these minutes are public records", and you asked that I contact Mr. Munns. As you requested, a copy of this letter will be sent to Mr. Munns, and I offer the following comments regarding the situation as you described it.

First, as you are aware, the Committee on Open Government has promulgated general regulations that govern the procedural implementation of the Freedom of Information Law (21 NYCRR Part 1401). Section 87(1) of the Law requires that the head or governing body of a public corporation, such as New York City, must adopt uniform rules and regulations applicable to agencies within the public corporation. Mayor Koch promulgated such rules applicable to City agencies in 1979. Both the Committee's regulations and those adopted by the Mayor require that a denial of a request be made in writing.

Second, the Freedom of Information Law and the Committee's regulations prescribe time limits within which agency officials must 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 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, sections 1401.5(d) and 1401.7(c)].

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

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

The Mayor's Uniform Regulations are consistent with the Freedom of Information Law and the Committee's regulations.

Third, I believe that Board of Trustees of the Fire Department Pension Fund is a "public body" subject to the requirements of the Open Meetings Law [see Public Officers Law, Article 7, section 102(2)].

Assuming that the Board of Trustees is a public body, section 106 of the Open Meetings Law requires that the Board prepare minutes of meetings and disclose them to the extent required by the Freedom of Information Law. Section 106 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."

As such, minutes of open meetings must be prepared and made available within two weeks of such meetings. If action is taken during executive sessions, minutes indicating the nature of the action must be prepared and made available in accordance with the Freedom of Information Law within one week of the executive sessions to which they pertain.

I hope that I 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 Munns

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1520

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

June 30, 1988

Mr. Rich Zahradnik
General Manager
Peekskill Herald
P.O. Box 2250
Peekskill, NY 10566

<u>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, unless otherwise indicated.</u>

Dear Mr. Zahradnik:

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

Specifically, you have questioned the propriety of an executive session conducted by the Peekskill Common Council at a meeting held on June 13. By way of background, the developers of a certain project made a presentation at the meeting, and you wrote that:

> "The developers said they wanted a memorandum of understanding from the city guaranteeing certain things, including a change in the zoning of some of the land they are developing. They said they needed this because major improvements they planned for the property - namely piping a creek through a culvert - would involve a large capital investment on their part.
>
> "The developers currently hold an option on about 2.3 acres of city land for which they will pay an established price if they buy the land (approximately $118,000). At the work session, the developers also requested that rather than pay for the land in one payment,

> the city agreed to hold a purchase-money mortgage. One of the developers told [you] after the meeting he and his partners are not looking for a change in option itself."

Following the presentation, the Mayor stated that he wanted to discuss the proposal during an executive session and a motion to enter into an executive session was made "for the purposes of discussing real estate". Despite your objection:

> "City Manager Joseph Seymour responded the developers' request that the purchase be changed from an outright purchase to a mortgage qualified under the law. After some discussion, Corporation Counsel William Florence insisted the Common Council had the right to an executive session because a property owner down stream from the development site had in the past sued the city over matters relating to the creek. [You] did not think reviewing the developers' proposal qualified as a discussion on 'proposed, pending or current litigation', and, moreover, it was not a part of the council's motion to go into executive session."

In this regard, I offer the following comments.

First, on the basis of your letter, it appears that the Council relied upon two grounds for entry into executive session, but that its motion to conduct an executive session cited only one. Here I point out that section 105(1) of the Open Meetings Law prescribes a procedure that must be accomplished prior to entry into an executive session. Specifically, the cited provision states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion 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, proved, however, that no action by formal vote shall be taken to appropriate public moneys..."

As such, if indeed the executive session was held to discuss "real estate" and "proposed, pending or current litigation", the motion for entry into an executive session should, in my opinion, have referred to both of those subjects.

Second, the initial basis for entry into an executive session, to discuss "real estate", pertains to section 105(1)(h). That provision permits a public body to conduct an executive session to discuss:

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

Although there is little in the way of judicial decisions that deals with the scope or interpretation of section 105(1)(h), it is clear in my view that not every issue relating to the proposed acquisition, sale or lease of real property may validly be considered during an executive session. The key qualification concerning the assertion of section 105(1)(h) involves whether "publicity would substantially affect the value" of the property that is the subject of the discussion. Under the circumstances that you described, I do not believe that publicity would have "substantially affected the value" of the real property sought to be purchased from the City. The site of the property was known; the identity of the purchaser was known; and a price for the property had been established. In view of the amount of information that had already been disclosed about the transaction, it is difficult to envision how, at the time of the meeting, publicity would have "substantially" affected the value of the property, despite the fact that negotiations concerning the transaction were ongoing.

In an effort to learn more of the situation, I contacted the City Manager, Mr. Joseph Seymour. He suggested that, since the transaction was the subject of continuing negotiations, that an executive session was justified. Nevertheless, it is noted that only reference to "negotiations" in the Open Meetings Law pertains to collective bargaining negotiations under the Taylor Law, negotiations between a public employer and a public employee union [see Open Meetings Law, section 105(1)(e)]. As such, I do not believe that section 105(1)(h) could justifiably have been asserted to conduct the executive session.

The other basis for entry into an executive session to which reference was made, section 105(1)(d), permits a public body to conduct an executive session to discuss "proposed, pending or current litigation". Having discussed that issue with Mr. Seymour, it appears that a portion of the executive session may have been proper, but not for the reason that you described in your letter. You wrote that the Corporation Counsel "insisted" that Council could have conducted an executive session "because a

property owner down stream from the development site had in the past sued the city over matters relating to the creek". You expressed the view that a review of the developers' proposal would not have "qualified" for conducting an executive session pursuant to section 105(1)(d).

In a decision that described the intent and scope of the so-called "litigation" exception for executive session, the Appellate Division, Second Department, 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 Gitizens 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. Therefore, to the extent that the executive session was based upon the possibility that litigation might ensue, rather than a consideration of litigation strategy, it appears that the executive session was improperly held.

However, Mr. Seymour informed me that the Council sought to discuss the nature of claims currently pending against the City in the context of their relationship to the proposal. To that extent, it would appear that the executive session was proper, for the discussion would likely have involved the City's "litigation strategy" relative to pending litigation and the proposal.

Lastly, with regard to the sufficiency of a motion to conduct an executive session pursuant to section 105(1)(d), 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].

If the motion for entry into an executive session had been more precise, it is possible that some aspects of the controversy could have been avoided.

I hope that I 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: Joseph Seymour, City Manager
Richard E. Jackson, Jr., Mayor
William Florence, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 5181
OML-AO- 1521

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

July 1, 1988

Mrs. Audrey L. Glover
[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 Mrs. Glover:

I have received your letter of June 7, with attachments, in which you requested advice.

Specifically, you raised a number of issues pertaining to the procedures of the Town Board and the Town Clerk of the Town of Kirkwood with respect to meetings and minutes of meetings. You inquired about the "difference between Regular Town Board Meetings and Town Board Work Sessions", "the procedure" for Special Town Board Meetings, requirements with respect to the taking of minutes and tape recording of meetings, the availability of such minutes and tape recordings and the circumstances under which a town board may conduct an executive session to discuss litigation strategy. Additionally, you raised several issues pertaining to the salary of the Town Supervisor and the annual pick-up of trash items that are not accepted during the rest of the year.

It is noted that I have received a letter from Mr. Joseph A. Griffin, Supervisor of the Town of Kirkwood, after informing the Town Board of your request for an advisory opinion. With respect to Town Board work sessions, Mr. Griffin stated that:

> "In an effort to develop an efficient style in dealing with these matters and to encourage Town residents to participate in these discussions, at our annual meeting the Town Board establishes the first Tuesday of each month at 7:00 p.m. as a regular Town Board meeting and the last Tuesday of

> each month at 7:00 p.m. as a Town Board work session, with additional work sessions on the third Tuesday of each month as needed and called.

With regard to the taping of work sessions, Mr. Griffin stated that:

> "This policy of tape recording work sessions was initiated approximately 7 years ago by Supervisor Griffin so that absent board members or members of the public could review the same."

Regarding special meetings of the Town Board, it was advised that:

> "Special Town Board meetings are called in strict compliance with Town Law section 62. If a special Town Board meeting is deemed necessary, the Town Board at a regular meeting may schedule the same. If an unpredicted special meeting is required, the Town clerk sends written notice to each Town Board member at least three days prior thereto and simultaneously sends notice of the meetings to the news media mentioned above. In an emergency, if all five Town Board members are present, the Town Board may determine to call a special meeting to deal with a matter occurring on short notice requiring immediate action."

Further, with respect to the April 26 special meeting to which you made reference, Mr. Griffin advised that "The records of our Town Clerk show a special Town Board meeting duly called on April 26, 1988 at which time Mrs. Glover addressed the Town Board relating to an emergency matter affecting the Town's wells". On the issue of availability of minutes, Mr. Griffin stated that:

> "Minutes are kept of all special meetings as well as regular meetings and are posted on the Town Clerk's Bulletin Board and are available upon request from the Town Clerk."

Finally, with respect to executive sessions called to discuss litigation strategy regarding a proposed resource recovery facility, Mr. Griffin stated that:

> "The Town Board has engaged a special environmental attorney as a special consultant to the Town and a special bonding attorney in addition to the Town Attorney on this project. From time to time, one or all of these attorneys finds it necessary to discuss with the Town Board various aspects of certain litigation that could be commenced by the Town against the Broome County Resource Recovery Agency or the County of Broome. It is true that to this date the Town has not commenced a lawsuit on this matter but it is closely studying the situation and preparing to commence such litigation dependent upon certain environmental actions which are being considered by the Agency and the County of Broome. Each time that the Town Board has chosen to go into Executive Session relating to this project, it goes into Executive Session from a regular or special Town Board meeting and particularly identifies that the litigation strategy is regarding the proposed Broome County Resource Recovery facility."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to render advisory opinions on issues concerning the Freedom of Information Law and the Open Meetings Law. This office is not empowered to enforce the Law or to render advice concerning others laws generally. I point out that several of the issues you raised, including the salary of the Town Supervisor and the annual trash pick-up do not pertain to either the Freedom of Information Law or the Open Meetings Law. As such, I cannot comment on those issues.

Second, regarding your inquiry as to the "difference between Regular Town Board Meetings and Town Board Work Sessions", it is noted that the Open Meetings Law pertains to meetings of public bodies. Section 102(2) of the Law defines the term "meeting" as "the official convening of a public body for the purpose of conducting public business". Further, the state's highest court has held that any time a quorum of the members of a public body gathers for the purpose of discussing public business, such a gathering is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and irrespective of the manner in which 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)]. Thus, in my view, with respect to the application of the Open Meetings Law, there is no distinction between a regular town board meeting, a special town board meeting and a work session.

Third, you inquire "What is the procedure when a municipality holds a special meeting?" Section 104 of the Open Meetings Law, which pertains to notice requirements, 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 should 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 hours prior to the meeting. If a meeting is scheduled less than a weeek 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 quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations. Since the April 26 special meeting was an emergency meeting "scheduled less than a week in advance", notice for that meeting should in my opinion have been given "to the extent practicable", at a reasonable time prior to the meeting.

Additionally, section 62(2) of the Town Law states in relevant part that:

> "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to members of the board of the time and the place where the meeting is to be held."

It is my understanding that, based on an opinion of the state comptroller and an opinion of the Attorney General, a special meeting may be held without two days written notice if all town board members have actual notice of the meeting and if all members attend and participate in the meeting [see 1980 Op Atty Gen April 14 (informal) and 1962 Ops St Compt #977; see also Brechner v. Incorporated Village of Lake Success, 25 Misc. 2d 920 (1960)].

Fourth, with respect to the taking of minutes at open meetings, section 106(1) of the Open Meetings Law states that:

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

Based on the language quoted above, minutes need not consist of a verbatim transcript or account of the entire discussion at a meeting. On the contrary, the Open Meetings Law requires that minutes must consist of "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 or content of the discussion.

Further, with respect to the tape recording of work sessions or other meetings, I do not believe that there is any statutory requirement that meetings be recorded or, if they are, that they be recorded in their entirety or that tape recordings be of good quality. As Mr. Griffin pointed out, the practice of tape recording work sessions was initiated by the Town Board to provide additional access to absent Board members and members of the public (see earlier). I discussed the matter with Mr. Herbert A. Kline, Town Attorney, who advised me that the March 22nd work session was not taped because the Town Clerk was absent that night.

Sixth, you contend that there were two sets of minutes for the May 11 Town Board meeting, one more detailed than the other, and that you were only allowed access to the less detailed of the two. Regarding this matter, Mr. Kline advised me that only one set of minutes is prepared for each meeting, including the May 11 meeting. However, in some instances, there are attachments, as in the case of the May 11 meeting. Mr. Kline further stated that all minutes of open meetings and all attachments to such minutes are fully available to anyone upon request to the town clerk. He also advised that if you are denied access to any such records, you should feel free to bring the matter to his attention.

Further, as you have been previously advised, 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. With respect to minutes or tape recordings of open meetings, such records are generally available, since none of the grounds for denial would apply to records that summarize discussions, voting or other matters conducted in public.

Finally, you indicated that on a number of occasions the Town Board has gone into executive session to discuss "litigation strategy" regarding a proposed resource recovery facility. As yet, however, no litigation has been commenced.

The provision in the Open Meetings Law concerning discussions of "litigation" is 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 REview Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply by expressing the

> fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the language quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Further, since "possible" or "potential" litigation could be the result of nearly any topic discussed by a public body, an executive session could not, from my perspective, be held to discuss an issue merely because there is a "potential" for litigation. As such, in my view, the executive sessions were likely proper to the extent that they focused on the "litigation strategy" to be used by the Town in conducting a proposed lawsuit, should it be commenced. However, without knowing the scope and content of the subjects discussed during the executive sessions, I cannot offer specific advice as to the extent to which they were properly 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

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
cc: Joseph A. Griffin, Town Supervisor
Herbert A. Kline, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5182
OML-AO-1522

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

July 5, 1988

Mr. Harvey M. Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your letter of June 18, as well as the materials attached to it.

You have requested an advisory opinion concerning rights of access to records of Community School District 24 in New York City. The request was apparently denied initially by the District and on appeal by the Chancellor's representative, Robert H. Terte. The basis for the denial is a supposed agreement between yourself and various officials to the effect that you would cease submitting requests under the Freedom of Information Law.

Your request involves:

> "all agendas and minutes of Community School Board 24 executive and regular sessions which prove that the August 31, 1980 dismissal of [redacted] 'was reviewed and endorsed by the Community School Board' and which prove that the Community School Board 'voted to stand by Supt. Morrissey's decisions'; a record setting forth the vote tally of the Community School Board 24 members who 'endors[ed] the superintendent's action' which dismissed [redacted] and who 'voted to stand by Supt. Morrissey's decision', the portions of the tape recordings of the Community School Board 24 meetings which prove that the 'review[ing] and en-

ing

> dors[ing]' and 'vot[ing] to stand by Supt. Morrissey's decision' did, in fact, take place; all records containing statements of fact about the teaching service of [redacted] that were provided to the members of the Community School Board 24 prior to the 'review[ing] and endors[ing]' and 'vot[ing] to stand by Supt. Morrissey's decision'; all Chancellor's Committee reports, Education Law 3020-a reports, and 'unsatisfactory' lesson observation reports in the possession of the Community Distict/School 24, to the extent that these reports contain 'factual data' or other material subject to production under the Freedom of Information Law."

It is your view that my earlier opinions on the matter should be altered due to recent decisions and your contention that a particular decision that has been cited in the past "misapplied" section 87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, I have not seen and will not comment on the validity of the supposed agreement between you and officials of the New York City School system.

Second, I do not believe that the two new decisions that you cited, Akras v. Suffolk County Department of Civil Service [524 NYS 2d 266; ___ AD 2d ___ (1988)] or MacRae v. Dolce [130 AD 2d 577 (1987)] are inconsistent with McAulay v. Board of Education [61 Ad 2d 1048 (1978), aff'd 48 NY 2d 659] or the opinions previously rendered by this office. In both Akras and MacRae, it was found that "statistical or factual tabulations or data" found within inter-agency or intra-agency materials must be disclosed. The opinions rendered by this office have always so advised. Further, the Appellate Division's language in McAulay, in my opinion, indicates that the records sought did not contain statistical or factual data; rather, the court, in referring to the records, alluded to an advisory panel's "nonfinal recommendations". In short, based upon the Court's description of the records at issue in McAulay, I do not believe that there is any inconsistency between that and later decisions. Moreover, McAulay was affirmed by the Court of Appeals.

Third, with respect to your request, agendas and minutes of School Board meetings during which the Board reviewed and took action relative to your dismissal would, in my view, likely be available. Assuming that an agenda briefly describes topics to be discussed at a meeting, I believe that it would be available,

except to the extent that disclosure would constitute an unwarranted invasion of personal privacy concerning persons other than yourself [see Freedom of Information Law, section 87(2)(b)]. Minutes of open meetings are accessible under both the Freedom of information Law and the Open Meetings [see Open Meetings Law, section 106(3)]. With regard to minutes of executive sessions, I point out that, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law, section 105(1)]. If action is taken during an executive session, minutes reflective of the action, that 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 2d 626 (1982)]. Further, if a public body merely discusses an issue during an executive session but takes no action, there is no requirement that minutes of the executive session must be prepared.

A vote taken to dismiss you must in my opinion indicate the manner in which each member cast his or her vote, for section 87(3)(a) of the Freedom of Information Law requires that each agency shall maintain "a record of the final vote of each member in every agency proceeding in which the member votes".

Tape recordings of open meetings are, in my opinion, accessible, for none of the grounds for denial would apply [see Zaleski v. Board of Education of Hicksville Union Free School District, Sup. Ct., Nassau County, NYLJ, December 27, 1978]. If there are tape recordings of executive sessions, I believe that any such records could be characterized as "intra-agency materials" subject to section 87(2)(g) of the Freedom of Information Law. Since you are familiar with section 87(2)(g), the provision pertaining to intra-agency materials, I will not recite its provisions. As you are aware, the extent to which those materials are accessible or deniable is dependent upon the specific contents of the records.

The remaining aspect of your request pertains to Chancellor's Committee reports, Education Law 3020-a reports and unsatisfactory lesson observation reports to the extent that those records contain "factual data". It is unclear whether you are seeking those records as they pertain to you, or whether you seek any such documents maintained by the District. Further, it is unclear what you mean by "3020-a reports". Assuming that your request involves only to those records pertaining to you, rights of access to Chancellor's Committee reports and unsatisfactory

lesson observation reports would be governed by section 87(2)(g). Again, the contents of the records would determine the extent to which they must be disclosed. To the extent that they pertain to you and consist of "factual data", I believe that they would be available. Lastly, it appears that the only "report" prepared pursuant to section 3020-a of the Education Law involves a report of a hearing panel [see subdivision (4)]. Although I am not an expert with respect to the cited provision, it would appear that if the panel's recommendations are sustained, the recommendations become a final determination and are available to the public. However, section 3020-a(4) also states that "If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record."

Lastly, as you requested, enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee on Open Government, and several copies each of "Your Right to Know" and "You Should Know". You also inquired as to certain items of legislation. I have no materials on the subject other than the bills themselves.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 5185
OML-AO- 1523

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

July 6, 1988

Mr. Joseph G. Colao
Cole & Deitz
Counselors at Law
175 Water Street
New York, NY 10038-4981

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

Dear Mr. Colao:

I have received your letter of June 21, as well as the materials attached to it.

The materials consist of requests made under the Freedom of Information Law on behalf of your client, the Seaboard Contracting and Material, Inc., for records of the Town of Smithtown, and the responses to those requests by the Town. It is your view that the Town has "refused to provide certain information that [you] believe should be disclosed pursuant to the Freedom of Information Law.

The request dated June 7, in brief, involved applications made to the Town for "Tree Preservation and Land Clearing" permits, as well as documents indicating decisions to grant or deny those applications and minutes of meetings during which such applications were discussed. In this regard, in an effort to obtain additional information concerning the requests, I have contacted Ms. Sandra L. Berman, Town Attorney. Ms. Berman informed me that, since 1984, when the Town's tree clearing ordinance was adopted, there has been but one application for a permit, and that application was withdrawn. As such, no determinations relating to applications for the permits in question have been rendered. It is my understanding that Ms. Berman has disclosed the single application that was made and later withdrawn. She also indicated that there were no public hearings on the matter.

The other request, which was dated June 9, involved three categories of records, characterized in your request as "a", "b" and "c".

Under item "a", you requested:

> "A transcript or access to a tape recording of any meeting of the Town Board or Executive Session, wherein the determination was made to hire outside consultants, environmental experts, real estate appraisers, or attorneys to review Seaboard's EIS and examine the possible environmental affects of Seaboard's proposed mining project in the Town of Smithtown..."

According to her response to you and our conversation, Ms. Berman indicated that a transcript of the meeting would be and at this juncture has been made available. She also indicated that there are neither minutes nor a tape recording of an executive session. I point out that when a public body enters into an executive session and deliberates but takes no action, minutes of the executive session need not be prepared (see Open Meetings Law, section 106). Further, there is no requirement that open meetings or executive sessions be tape recorded. Similarly, in terms of the preparation of records generally, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part as a general matter that an agency need not create a record in response to a request. Therefore, if, for example, no action is taken during an executive session, an agency need not create minutes indicating the substance of a discussion in order to respond to a request.

Under item "b", you requested:

> "Any document, including any memoranda or other submissions provided to the Town Board by the Town of Smithtown Department of Environmental Protection and/or Messrs. Barnett and Barton, in connection with the determination of the Town Board to hire outside consultants, environmental experts, real estate appraisers or attorneys, in this matter..."

Ms. Berman wrote that no documents falling within the scope of the request exist. Again, to the extent that the information sought does not exist in the form of a record or records, an agency is not obligated to create new records to fulfill a request.

The final aspect of the request, item "c", pertains to:

> "Any reports or independent studies prepared by outside consultants, environmental experts, attorneys or real estate appraisers, hired by the Town of Smithtown in the past, regarding the potential environmental affects [sic] of any industrial, commercial, residential, shopping center or subdivision project in the Town of Smithtown, including any analysis of the noise level generated by any of these projects."

In response, Ms. Berman wrote that:

> "First, the Town does not possess such a previously identified class or category of documents. Second, the records, as described, are not reasonably identifiable. Finally, even if such records were so categorized or could reasonably be identified, disclosure of the documents or portions thereof would be precluded pursuant to Public Officers Law section 87 (2) (g) and/or attorney-client privilege."

From my perspective, the key aspect of Ms. Berman's response is that the records were not, in her words, "reasonably identifiable". The standard in the Freedom of Information law when making a request is that the applicant "reasonably describe" the records sought [see section 89(3)]. When an agency can locate and identify requested records, the applicant meets the responsibility of reasonably describing the records [see Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)]. Often an agency's capacity to locate and identify records may be dependent, in part, upon its filing system. In this instance, Ms. Berman informed me that, to locate the kinds of records you seek, a request would have to identify a particular project before the Town or perhaps the name of the consultant. Moreover, the terms of your request are open-ended; there is no limitation in terms of time or the kind of proposed use of real property. As such, under the circumstances, I do not believe that your request in item "c" reasonably described the records sought.

Lastly, if the records had been reasonably described, I would disagree in part with Ms. Berman's statement that the records could be withheld under section 87(2)(g) of the Freedom of Information Law. I agree that consultants' reports could be characterized as "intra-agency materials" that fall within the scope of section 87(2)(g). Nevertheless, due to the structure of

that provision, a determination regarding the extent to which those kinds of records are accessible or deniable is dependent upon the specific contents of the records [see Xerox Corp. v. Webster, 65 NY 2d 131 (1985)]. For example, to the extent that a consultant report is reflective of advice, opinion or recommendation, it could in my view be withheld; however, to the extent that it consists of "statistical or factual tabulations or data", for instance, I believe that it would be accessible pursuant to section 87(2)(g)(i).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sandra L. Berman, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1524

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

July 6, 1988

Hon. Paul Claffey
Mayor
Village of Potsdam
Civic Center
P.O. Box 5168
Potsdam, NY 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 June 28 and appreciate your interest in complying with the Open Meetings Law.

You have requested an advisory opinion concerning the propriety of holding an executive session to discuss a matter to be discussed by the Board of Trustees at an upcoming meeting. According to your letter, the purpose of the meeting:

> "is to discuss with a hydro-electric power developer (Adirondack Hydro) a contract to build a second hydo-electric power plant at Potsdam with projected benefits for both the developer and the Village. [Your] Administrator argues that, since [you] are in litigation with the people who built [your] first hydro-electric power plant (Rist-Frost), [you] should not discuss this new proposal in public. The two power plants are completely separate, one at the dam on the east side of the river and the other on the west side of the island on the west side of the river."

From my perspective, except in the unlikely situations that will be described in the following paragraphs, I do not believe that an executive session could justifiably be held. In this regard, I offer the following comments.

It appears that the Administrator is contending that the pendency of a lawsuit involving a different hydro-electric power developer constitutes a valid basis for conducting an executive session to consider the construction of a second power plant. In my opinion, the pendency of unrelated litigation would not constitute a valid basis for entry into an executive session, unless discussion involves the Village's litigation strategy in that suit.

Section 105(1)(d), the so-called "litigation" exception, permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In a decision that described the intent and scope of section 105(1)(d), the Appellate Division, Second Department, 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, so as not to divulge that strategy to its adversary, who might be present at the meeting.

As I understand the situation, there would be no litigation to consider with respect to the proposal that is the subject of the meeting, and the litigation currently pending is unconnected with the issue before the Board. The only possibility that I can envision in which section 105(1)(d) might be asserted

would involve a discussion of pending litigation in the context of or in relation to the proposal. Only to that extent, in my opinion, would an executive session be proper under section 105(1)(d).

Another possibility for discussion in executive session involves section 105(1)(f). That provision permits 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..."

If, for example, the discussion pertains to the financial or credit history of a particular corporation, i.e., the developer, I believe that, to that extent, an executive session would be proper.

In sum, based on the facts that you presented, except for those kinds of discussions described above that could appropriately be conducted in an executive session, it is unlikely in my opinion that an executive session could justifiably be held.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 5196
OML-AO- 1525

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

July 11, 1988

Mrs. Genevieve E. MacLean
[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 Mrs. MacLean:

I have received your letter of June 22, as well as the materials attached to it. You have raised a series of issues concerning the implementation of the Freedom of Information and Open Meetings Laws by the Village of Valley Stream. Your criticisms involve "private meetings, unanimous Board actions without any apparent deliberations, and censoring of files before admitting to access", as well as denials of requests for records characterized as "interagency".

A specific area of criticism pertains to a meeting of the Planning Board that was apparently scheduled to begin at 8 p.m. and during which the Board was to review an application for a subdivision approval made by a Mr. Kefalas. You wrote that you were present at the meeting:

> "when the Planning Board was called to order at 8:55 (The 8 p.m. meeting was delayed because the Board members were meeting.) The first order of business was the reading by Mr. McDonough, Chairman, of a well organized, detailed 'decision' approving the proposal to carve 3 house sites out of the plot at 16 7th Street.
>
> "[You] asked when the public deliberation on the matter had taken place since the public meeting [you] attended at which the proposal was received by the Planning Board along

> with many objections from neighbors and residents. Mr. McDonough told us--perhaps 15 or so residents in attendance--that the Board did not meet together to address the problems but instead had talked to each other by telephone. [You] pointed out that this was a clear violation of the Open Meetings Law. At the same time [you] pointed out that there was no posted notice of the meeting presently in progress and that most of us were alerted to it by neighbors contacted by Mr. Coffman."

Mr. Coffman is a member of the Planning Board.

In this regard, I offer the following comments.

First, it is noted that the Court of Appeals, the State's highest court, has interpreted the definition of "meeting" broadly to include so-called "work sessions" and similar gatherings, even though there may be no intent to take action [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As such, any gathering of a quorum, a majority of the total membership 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 vote or to take action, and irrespective of the manner in which the gathering may be characterized.

If a quorum of the Planning Board discussed Mr. Kefalas' application with him "at the DPW counter", it would appear that such a gathering constituted a "meeting" that should have been conducted in full view of the public.

Second, as a general matter, all meetings must be preceded by notice given in accordance with section 104 of the Open Meetings Law to the news media and by means of posting in one or more designated, conspicuous public locations.

Third, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring by telephone. However, a series of telephone calls among the members which results in a decision, without benefit of a meeting, would in my opinion violate the Law.

It is noted that the definition of "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in section 41 of the General Construction Law, which has been in effect 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 its powers or duties except by means of an affirmative vote of a majority of its total membership taken at 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, i.e., to vote, 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 assembly syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

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

I also 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 by performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

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

In another area, you wrote that minutes of a meeting held by the Planning Board failed to refer to your comments made at the meeting. I do not believe that the minutes were required to include reference to those comments. Section 106 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Section 106(1) pertains to minutes of open meetings and states that:

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

In view of the foregoing, it is clear that minutes need not consist of a verbatim account of or refer to statements made at a meeting. Since your comments were not reflective of the kinds of information that must be included in minutes, the absence of reference to your comments was not, in my opinion, inconsistent with the Open Meetings Law.

Your remaining areas of criticism involve the disclosure of records pursuant to the Freedom of Information Law. You referred to a request for comments submitted by the Nassau County Planning Board to the Village Planning Board, which were apparently denied on the ground that such records constitute "inter-agency" materials.

It is emphasized that the mere characterization of records as "inter-agency" is not determinative of rights of access to those kinds of records. Moreover, the provision that pertains to those records, due to its structure, often requires that inter-agency materials be disclosed. Specifically, section 87(2)(g) of the Freedom of Information Law 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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, final agency policy or determinations or external audits must be made available. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. As such, the contents of inter-agency or intra-agency materials determine the extent to which those materials may be withheld or must be disclosed.

Although I am unfamiliar with the records in question, I point out that, like the Village Planning Board, the County Planning Board is a public body subject to the Open Meetings Law. Consequently, its meetings must generally be conducted open to the public and its actions disclosed by means of minutes. If the "comments" in question were discussed at or were the subject of action taken at an open meeting, it would appear that a record

reflective of those comments would be available. However, without knowledge of the content of the record or the context in which it was forwarded to the Village, I cannot advise with certainly as to rights of access to the record.

Lastly, as I understand the situation relative to your request for the records, following the denial, you appealed. As of the date of your letter sent to this office, you had not received a response. In this regard, section 89(4)(a) of the Freedom of Information Law states in part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within 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: Planning Board, Village of Valley Stream

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1526

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

July 21, 1988

Ms. Nancy K. Cooper
[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. Cooper:

I have received your letter of July 7 in which you raised questions concerning the application of the Open Meetings Law.

Your initial question is whether "a Community Action Agency funded with CSBG monies [is] bound by the Open Meetings Law, specifically the section on executive sessions". Further, assuming that the Open Meetings Law does not apply, you questioned what guidelines apply to such agencies with respect to the subjects that they may discuss behind closed doors.

In this regard, I offer the following comments.

First, it is my understanding that a designated community action agency is a not-for-profit corporation that performs its duties pursuant to a legal relationship with the state or one or more municipalities.

Second, the scope of the Open Meetings Law is determined in part by section 102(2) of the Law, which defines "public body" to mean:

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

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

By means of a review of the language quoted above, as well as the thrust of federal legislation, it appears that a designated community action agency may be considered a "public body" subject to the Open Meetings Law, notwithstanding the fact that it may be a not-for-profit corporation. It is noted, however, that, to the best of my knowledge, there is no judicial decision that deals specifically with the status of a community action agency under the Open Meetings Law.

As a general matter, it is my view that most not-for-profit corporations, which are not governmental entities, fall outside the requirements of the Open Meetings Law. Nevertheless, it has been advised that particular types of not-for-profit corporations, due to their strong nexus with government, such as volunteer fire companies and local development corporations, are subject to the Open Meetings Law. In the case of a designated community action agency, it appears that the relationship between such an agency and government is sufficiently significant to bring a designated community action agency within the require- of the Open Meetings Law.

In terms of the components of the definition of "public body", the board of a community action agency must consist of more than two members. Section 211(b) of the Economic Opportunity Act of 1964, as amended, indicates that the board must have not less than fifteen but not more than fifty-one members.

Section 211(d)(1) indicated that the board may perform its duties by means of a quorum "which shall not be less than fifty percentum of the total membership".

The legislation enacted by Congress indicates that a designated community action agency conducts public business. As stated in Section 201(a), the general purposes of a community action agency are:

> "to stimulate a better focusing of all available local, State, private, and Federal resources upon the goal of enabling low-income families, and low-income individuals of all ages, in rural and urban areas to attain the skills, knowledge, and motiviations and secure the opportunities needed for them to become fully self-sufficient..." [Sec. 201(a)(1)]

and

> "to provide for basic education, health care, vocational training, and employment opportunities in rural America to enable the poor living in rural areas to remain in such areas and become self-sufficient therein..." [Section 201(b)].

In view of the language quoted above, once again, it appears that a community action agency "conducts public business".

Moreover, when a community action agency is designated, section 211 indicates that the community action agencies perform a governmental function for the state or for one or more public corporations. It is noted that a public corporation includes a county, city, town, village, or school district, for example. As such, by means of the designation as community action agencies, those agencies apparently perform their duties for the state or at least one public corporation.

Lastly, section 213 of the enabling legislation expresses an intent to enhance public participation as well as disclosure of information regarding the functions and duties of community action agencies. Specifically, subdivision (a) of section 213 states in relevant part that:

> "[E]ach community action agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. Each community action agency shall also provide for reasonable public access to information, including but not limited to public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible..."

Based upon the clear statement of intent expressed by Congress, I believe that the application of the Open Meetings Law to such boards would be consistent with that intent. Further, as described in the analysis provided in the preceding paragraphs, I believe that each component of the definition of "public body" is present with respect to the board of a community action agency.

If my assumptions and analysis are accurate, the board of community action is subject to the requirements of the Open Meetings Law. Further, if that is so, its authority to conduct executive sessions would be governed by the provisions of section 105(1) of the Open Meetings Law.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 5218
OML-AO- 1527

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

July 22, 1988

Ms. Frances J. Thompson
[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. unless otherwise indicated.

Dear Ms. Thompson:

I have received your letter of July 1, which pertains to a denial of a request for minutes of meetings of the Board of Trustees of the New York City Fire Department Pension Fund.

The denial was rendered by Michael Munns, Records Access Officer for the Fire Department, who wrote that:

> "The minutes of the Pension Board record the deliberative process of the Board members in reaching a decision on pension applications. The minutes also contain the medical reports of an applicant's physical disabilities. The Board refers to these medical reports prior to making a decision of whether to grant ordinary or service-incurred disability pensions. Due to the contents of the Pension minutes, the denial of your request is based upon:
>
> (1) Public Officers Law Section 87(2)(g) - Interagency materials
>
> (2) Public Officers Law Section 89(2)(b) - Unwarranted invasion of personal privacy."

Nevertheless, having reviewed your appeal, a copy of which you enclosed, you expressed the view that the Open Meetings Law requires that meetings of the Board be open and that minutes of the meetings must be disclosed. Further, you wrote that:

> "the members of the Board of Trustees openly discuss 'the medical disabilities' during Board meetings. Now, Mr. Munns would have [you] believe that [you] can not read these medical reports, but if [you] attended the Board meetings [you] could hear about these medical reports" (emphasis yours).

In this regard, I offer the following comments.

First, in an effort to learn more of the situation, I have discussed the matter with Ms. Caryn Hershleifer, Counsel to the Fire Department.

Second, based on my discussion with Ms. Hershleifer, your contentions are based upon mistaken assumptions.

I agree that the Board is a "public body" subject to the requirements of the Open Meetings Law. In brief, that statute requires that meetings of public bodies be conducted open to the public, except to the extent that an "executive session" may be held. An executive session is a portion of an open meeting during which the public may be excluded [see Open Meetings Law, section 102(3)].

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."

In my opinion, it is clear that the Board could discuss an individual's physical disabilities, i.e., the medical history of a particular person, during an executive session. Moreover, Ms. Hershleifer informed me that all meetings during which the Board considers matters involving an individual's physical disabilities are conducted behind closed doors in conjunction with sec-

> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

As such, medical histories and similar records identifiable to individuals may, in my view, be withheld.

In view of the foregoing, it appears that Mr. Munns' response to your request was appropriate.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Caryn Hershleifer, Counsel
Michael Munns, Records Access Officer
Jonathan Fairbanks, Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1528
FOIL-AO-5221

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

July 25, 1988

Alfred Shalkowski
[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. Shalkowski:

I have received your letter of July 14, as well as the correspondence attached to it.

In your capacity as a member of Board of Cooperative Educational Services (BOCES) for Erie-Chautauqua and Cattaraugus Counties, you have raised a question "in the matter of school boards using secret ballots in the election of its officers..." You wrote further that, after raising the issue before the Board, its attorney advised the Board "that they had the options of voting either way, by secret ballot or by open voting". The letters sent by the Board's attorney to the District Superintendent cite various provisions of the Education Law and the Open Meetings Law and indicate, in brief, that "There is no express requirement that any vote be taken in a specified manner", that there are no "reported cases or administrative decisions which specifically address this issue", and that, therefore, "a BOCES Board has the authority to authorize the utilization of a secret ballot in the election of Board officers".

I disagree with the advice offered by the Board's attorney. In this regard, I offer the following comments.

First, although the provisions of the Education Law and the Open Meetings Law do not specify the manner in which a vote must be taken or recorded, another statute, the Freedom of Information Law, provides direction on the matter. Specifically, 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

> 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."

Lastly, in an Appellate Division decision, it was found that "The use of a secret ballot for voting purposes was improper". In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law (section) 87[3][a]; (section) 106[1], [2]" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)].

I hope that I 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: Gary W. Barr, District Superintendent
Roger B. Simon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1529

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

July 29, 1988

Mr. James Nusall
Trustee
Village of Depew
Municipal Building
85 Manitou at Gould
Depew, NY 14043

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. Nusall:

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

According to your letter, the Board of Trustees of the Village of Depew, on which you serve as a member, "held a meeting in the Mayor's office behind closed doors". You added that it was not a regularly scheduled meeting and that notice of the meeting was not given to the public. Further, you wrote that:

> "During this session, matters regarding the appointment of a lieutenant in the Depew Police Department were discussed and a vote was taken. The lieutenant appointment was to have been made at the following Village Board meeting held on July 5, 1988. The Village Board meets regularly 45 minutes before every meeting to review the agenda and the appointment was not listed on that agenda. Approximately 5 minutes before the regular meeting was to begin, the Mayor stated that he wanted the appointment added to the agenda.

> [You] protested the move and asked that the issue be tabled for further discussion. The appointment was never brought up that evening at the meeting.
>
> "The mayor had the appointment added to the next meeting's agenda on July 19, 1988 and after [your] protesting the board voted against [you]."

Although you indicated that certain "personnel matters" may be discussed during an executive session, you expressed the belief that a proper motion should have been made during an open meeting prior to entry into an executive session. You also indicated that no minutes were taken.

You asked for my opinion on the matter. In this regard, I offer the following comments.

First, by way of background, the term "meeting" has been construed expansively by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Further, section 104 of the Open Meetings Law requires that notice be given to the news media and to the public by means of posting prior to every meeting. Further, although it is unclear whether the Board's gathering forty-five minutes prior to each regular meeting is generally open to the public and preceded by notice, that kind of "agenda session" or "pre-meeting" gathering in my view is also a "meeting" subject to 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..."

Therefore, I believe that every meeting must be convened open to the public, followed, where appropriate, by an executive session.

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

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

Third, the subject matter of the executive session pertained to a "personnel matter". Section 105(1)(f), the so-called "personnel" exception, permits a public body to enter into an executive session to discuss:

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

It appears that the subject matter discussed, a matter leading to the appointment of a particular person, could validly have been considered during an executive session. However, judicial decisions indicate that a motion containing a recitation of the language of a ground for executive session as "personnel", for example, without more, fails to comply with the Law. For instance, in its review of minutes that referred to various bases for entry into executive session, it was held in Doolittle, supra, that:

> "We believe that merely identifying the general areas of the subjects to be considered in executive session as 'personnel', 'negotiations', or 'legal problems' without more is insufficient to comply with Public Officers Law 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..." [see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

Therefore, a proper motion should, in my view, include reference to one or more of the topics listed in section 105(1)(f), as well as reference to the fact that the discussion focuses on a particular person. For example, a motion might pertain to "the employment history of a particular person".

Lastly, with respect to minutes, section 106 of the Open Meetings Law provides 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 provision 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, a motion to enter into an executive session must, in my opinion, be referenced in minutes of an open meeting. It is noted that if a public body discusses an issue during an executive session but taken no action, minutes of the executive session need not be prepared. If, however, a vote is taken during an executive session, minutes reflective of the nature of the action taken, the date and the vote must be recorded and made available within one week to the extent required by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1530

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

July 29, 1988

Mr. David Connelly
Managing Editor
The Citizen
25 Dill Street
Auburn, NY 13021

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, unless otherwise indicated.

Dear Mr. Connelly:

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

According to your letter, the "Auburn City Council and Cayuga County Legislature each met in executive session recently to discuss with the district attorney creating and funding an undercover drug enforcement officer position as well as providing money for undercover drug buys." Although both entities agreed "to go along with the District attorney's plan", it is your belief that neither the City Council nor the County Legislature made appropriations. You added further that:

> "No mention was made publicly by an official until this newspaper printed a story July 20, based on executive session leaks, outlining in general terms the district attorney's plans.
>
> "Sources say there is no current, or any specific future drug investigation, which could be damaged by public discussion of the subject.

> "The city attorney, city councilors and none of seven county legislators knew of any specific case. Most say they assumed the district attorney's request related to a future investigation.
>
> "City Attorney Earle Thurston and County Attorney Ray Sant each justified the closed-door sessions by citing the Open Meetings exception for 'information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed.'"

In this regard, I offer the following comments.

First, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies, such as the City Council and the County Legislature, must be conducted open to the public, except to the extent that a discussion may be held during an executive session.

Second, based upon conversations with your reporter, Tamara Aldis, the City Council, prior to its discussion of the matter, cited several grounds for entry into executive session, such as "personnel", "contract negotiations", and "litigation". No mention was apparently made of consideration of funding a drug enforcement officer position; no reference was made to the provision that was later cited by the City and County attorneys, section 105(1)(c). Here I point out that the Open Meetings 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 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 on the foregoing, if either public body intended to rely upon section 105(1)(c) as its basis for entry into executive session, a motion made during an open meeting should have so indicated.

Third, section 105(1)(c) permits a public body to conduct an executive session to discuss:

> "information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed..."

If the discussions by the two public bodies involved the creation or funding of a position, I do not believe that there would have been a basis for entry into an executive session. On the other hand, to the extent that their discussions involved a particular investigation, the methods of detecting crime or the means by which drug trafficking would be investigated, public discussion would likely have "imperiled effective law enforcement", thereby justifying the holding of an executive session. If both of those areas were considered, the former should, in my opinion, have been discussed in public, while the latter could have been discussed during an executive session.

Fourth, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session or, "personnel", "contract negotiations" or "litigation", 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..." [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; please note that the Open Meetings Law was renumbered after Doolittle was decided].

With respect to "negotiations", the only ground for entry into executive session that mentions that term is section 105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, section 105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union. It does not appear that section 105(1)(e) could properly have been asserted to discuss the issues described in the materials.

In terms of a motion to enter into an executive session held pursuant to section 105(1)(e), 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, supra].

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

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

In short, based upon the Open Meetings Law and its judicial interpretation, the kind of motion for entry into executive session that you described was inadequate.

Lastly, although the issue might have involved a "personnel matter", the so-called "personnel exception" for entry into executive session could not, in my opinion, have been asserted. By way of background, under the Open Meetings Law as originally enacted, the "personnel" exception for executive session differed from the language of the analogous 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 that might relate to personnel indirectly or as a group.

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 <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 conducted 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.

I do not believe that a discussion of the creation, funding or duties of a proposed position would have fallen within the scope of section 105(1)(f), for the issue involved matters of policy or perhaps the expenditure of public moneys that did not focus upon or involve a "particular" person.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Auburn City Council
Cayuga County Legislature
Earle Thurston, City Attorney
Raymond Sant, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5240
OML-AO-1531

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

August 18, 1988

Ms. Patricia B. Snyder
Producing Director
Empire State Institute for
Performing Arts
ESIPA at the Egg
Empire State Plaza
Albany, New York 12223

The staff of the Committee on 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. Snyder:

As you are aware, I have received your letter of July 25 and the materials attached to it. Please accept my apologies for the delay in response.

Your inquiry was apparently precipitated by a letter addressed to you by Mr. Barnabas McHenry, Chairman of the Empire State Plaza Performing Arts Center Corporation, which you serve as Secretary. Mr. McHenry suggested that you might have given a reporter "some material to which she was not yet entitled", specifically draft minutes of a meeting of the Corporation's board of directors held late in June. Mr. McHenry added that his "interpretation of the Freedom of Information Law is that the minutes can be obtained when they have been approved by the directors and adopted at the next following meeting".

You have requested my opinion 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. Specifically, section 106 of that statute provides 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. Minutes of executive sessions reflective of action taken, the date and the vote must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. I point out that if a public body conducts an executive session and merely engages in a discussion but takes no action, there is no requirement that minutes of the executive session be prepared.

Second, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. 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 have not been approved, 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.

Third, with respect to the Freedom of Information Law, I point out that the Law makes no distinction between drafts as opposed to "final" documents. The Law pertains to all agency records, and section 86(4) defines the term "record" to mean:

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

Due to the breadth of the language quoted above, once a document exists, it constitutes a "record" subject to rights of access, even if the record is characterized as "draft" or is unapproved. Further, as a general matter, minutes consist of a factual rendition of what transpired at an open meeting. On that basis, I believe that they are accessible [see Freedom of Information Law, section 87(2)(g)(i)]. Additionally, in the case of an open meeting, during which the public may be present and, in fact, may tape record the meeting [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], there would appear to be no valid basis for withholding minutes, whether or not they have been approved.

I hope that I 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: Barnabas McHenry, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1532

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

August 24, 1988

Mr. Robert L. 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, except as otherwise indicated.

Dear Mr. Mann:

I have received your letter of July 20, as well as the materials attached to it. Please accept my apologies for the delay in response.

According to your letter, on July 11, you were informed by the Saugerties Town Clerk that the Town Board meeting scheduled for 5 p.m. was cancelled and that no other meeting was scheduled. Nevertheless, when you drove past the Town Hall, you saw Ms. Joan Feldmann, whom you characterized as a member of the Police Advisory Board, as well as the Supervisor's car. You later returned to Town Hall and found a "gathering" which included all three Police Advisory Board members and "3 of 4" Town Board members. You entered the gathering and remained there. Your letter and the news articles attached to it indicate that Lt. Donald Short of the Town of Ulster Police Department addressed the gathering and described the County's DWI program. Following the gathering, you asked a member of the Police Advisory Board "what the results of their 'meeting' were", and you were informed that there was no meeting.

You also complained that another unannounced "gathering" was held later that week by Town officials.

You have asked whether it is "true Town Officials can have these 'gatherings' and have no minutes and not vote [and] therefore there is no 'meeting'".

In this regard, I offer the following comments.

First, I have contacted the Town to learn more of the situation. From my perspective, it is unclear whether the "gathering" of July 11 constituted a "meeting". As you may be aware, the term "meeting" has been construed broadly by the Courts. In a landmark decision rendered in 1978, it was held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting", irrespective of the manner in which a gathering may be characterized and whether or not there is an intent to take action [see Orange County Publications, Division of Ottoway Newspapers Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

According to John J. Greco, the Town Attorney, "no meeting was held but, rather, a public program was presented by Lieutenant Short to discuss the experience of the Town of Ulster Police Department with the Ulster County DWI Task Force". He added that it is his understanding that, during the program, there was no discussion concerning whether the Police Advisory Board would recommend the DWI Task Force to the Town Board, nor was there discussion by the Town Board as to whether it favored the Task Force. Those issues were apparently discussed at a meeting of the Town Board on July 20. Mr. Greco also pointed out that interested citizens and a reporter were present at the gathering, which was described and announced at the July 7 meeting of the Town Board by Ms. Feldmann, who is a member of the Town Board. Ms. Feldmann is not a police commissioner, but rather is the Board's liaison for police matters.

In view of the foregoing, if the Town officials that you identified attended the gathering as observers, to be educated, and if there was no intent on their part to "conduct public business" as a body, it is unlikely, in my view, that the gathering constituted a "meeting". On the other hand, if there was an intent on the part of the Police Advisory Board or the Town Board to conduct public business, I believe that the gathering would have been a "meeting" subject to the Open Meetings Law. Nevertheless, as indicated earlier, notice of the gathering was given at a Town Board meeting.

With respect to the other "unannounced" gathering, it appears that the gathering in question was outside the scope of the Open Meetings Law. Mr. Greco informed me that he met with members of the Town Board at his office to provide legal advice regarding the content of a proposed stipulation of settlement concerning litigation brought against the Town by Glasco Associates, Ltd.

Section 108(3) of the Open Meetings Law exempts from the Law "any matter made confidential by federal or state law". In this regard, it has been advised that when a public body seeks the legal advice of its attorney, the communications between the attorney and the client (i.e., the Board) may be held in private,

for they fall within the scope of the attorney-client privilege (see Civil Practice Law and Rules, section 4503). Since section 108(3) of the Open Meetings Law exempts from its provisions "any matter made confidential by..state law", and since the communications subject to the attorney-client privilege are confidential, a public body may in my view seek legal advice from its attorney in private and outside the scope of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: John J. Greco, Town Attorney
Joan Feldmann, Town Board Member

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1533

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

August 25, 1988

Kenneth & Jean Tupper
[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. & Ms. Tupper:

As you are aware, I have received your letter of August 3. Please accept my apologies for the delay in response.

Your inquiry pertains to the implementation of open government laws by the Town Pierrepont. Specifically, you wrote that at Town board meetings, the members of the Board are always accompanied at their table by the Town Clerk, the Town Attorney and "another man" who apparently holds a variety of positions. Further, you wrote that "anything that could possibly be controversial is discussed in executive session or after the meeting is over", and you provided examples of some of the issues that were discussed in executive sessions. You also questioned your right to obtain copies of minutes of meetings and "an itemized copy of the monthly bills".

In this regard, I offer the following comments.

It is noted at the outset that both the Freedom of Information Law and the Open Meetings Law are based upon a presumption of openness. Under the Freedom of Information Law, all records are available for inspection and copying, except those records or portions thereof that fall within the scope of one or more grounds for denial listed in the Law. Similarly, the Open Meetings Law requires that meetings be conducted open to the public, unless a topic may justifiably be discussed during an executive session.

With respect to the Open Meetings Law, I point out that the term "meeting" has been expansively interpreted 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 for the purpose of conducting public business constitutes a "meeting" subject to the law, even if there is no intent to take action, and irrespective of the manner in which the gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As such, gatherings of the Town Board after formal meetings have been adjourned that are held to discuss public business likely should be conducted open to the public in accordance with the Open Meetings Law.

Further, the Law requires that a procedure be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

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

Moreover, a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may appropriately be considered during an executive session.

With respect to the examples of executive sessions that you described, the first two could not, in my opinion, have been discussed during executive sessions, for none of the grounds for entry into executive session could have been asserted. The third, which involves the residence of an assessor, might properly have been considered behind closed doors pursuant to section 150(1)(f). That provision permits a public body to conduct an executive session to discuss:

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

If, for example, the discussion involved "matters leading to" the discipline or removal of a "particular person", an executive session would in my opinion have been justified.

Section 106 of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks, whether or not they have been approved. If action is taken during an executive session, minutes reflective of the nature of the action taken, the date and the vote of the members must be prepared and made available within one week to the extent required by the Freedom of Information Law. If a public body enters into an executive session and merely discusses an issue but takes no action, there is no requirement that minutes of the executive session be prepared.

With regard to your desire to obtain "an itemized copy of the monthly bills", I point out that the Freedom of Information Law pertains to existing records. As a general matter, an agency is not required to create or prepare records in response to a request. Therefore, if there is no "itemized" list of bills, the Town would not be required to create such a record on your behalf. Nevertheless, bills, books of account and similar records concerning revenues and expenditures are, in my view, clearly available, for none of the grounds for withholding records would apply. In addition, the Town Law, section 29(4), requires that, unless there is a town comptroller, the Town Supervisor:

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

As such, books of account must be disclosed by the Town Supervisor.

With respect to the seating arrangement at Board meetings and the duties of an individual who apparently performs a variety of functions, I know of no provision concerning the physical arrangement of those who join a town board at meetings. Further, issues involving conflicts of interest are not within the jurisdiction of this office.

Lastly, enforcement of the Freedom of Information and Open Meetings Laws rests on the public. Any person may challenge a denial of access to records in court after exhausting one's administrative remedies; any "aggrieved person" may bring suit under the Open Meetings Law. Both statutes permit a court to award reasonable attorney's fees under certain circumstances. However, I believe that the best method of insuring compliance involves educating public officials regarding their obligations under the law. In an effort to enhance compliance with the law, a copy of this opinion will be sent to the Town Board. Enclosed are copies of the Freedom of Information Law, the Open Meetings Law, "Your Right to Know", which describes both statutes, and a pocket guide that summarizes the two laws. Those materials will also be forwarded to the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Town Board, Town of Pierrepont
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1534

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

August 29, 1988

Mr. John Stemen
WIBX News
P.O. Box 950
Utica, NY 13503

<u>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.</u>

Dear Mr. Stemen:

As you are aware, I have received your letter, which reached this office on August 15. Please accept my apologies for the delay in response.

You have requested a "ruling" concerning a possible violation of the Open Meetings Law by the Utica Board of Education. According to your letter, on the afternoon of July 7:

> "the board was to hold an executive session to discuss possible acquisition of private property which could be used to build a new high school on. Two school board members have confirmed that the discussion was much more far-reaching than that. Topics covered at the meeting, according to board members [you] talked to, included which school buildings could be closed as part of a possible re-configuration of secondary schools, the configuration itself, and buying public land..."

You indicated the two Board members with whom you discussed the matter said that the discussion was conducted in its entirety during an executive session. However, one member said "another board member opened the door and saw no one present". The two with whom you spoke said they "don't remember that happening". In addition, you wrote that, at an ensuing meeting:

> "the board president began reading minutes from the July 7th executive session and began going into details. He was stopped by one of the board members [you] talked to, saying he had 'blown it,' and was presenting details of an illegal meeting. The July 7th executive session ended after two board members said the session was going off the subject. One said he would leave if the discussion continued; the meeting then ended."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Open Meetings Law. The Committee does not have the authority to issue a "ruling" or a binding determination. As such, my remarks should be considered advisory only.

Second, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that their discussions may appropriately be considered during an executive session. It is emphasized 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 subjects that may appropriately be discussed in an executive session.

It is noted, too, that a public body must accomplish a procedure during an open meeting before it may enter into an executive session. Specifically, 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..."

Third, based upon the facts that you provided, there would, in my opinion, have been one possible basis for entry into executive session. However, it is questionable whether that provision could have been appropriately asserted. Moreover, assuming that the Board's discussion was as extensive and far-ranging as you described, much of the discussion should in my view have been conducted in public.

The provision which might have justified the holding of an executive session with respect to a portion of the discussion is section 105(1)(h), which 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."

The proper assertion of section 105(1)(h) is dependent upon factual circumstances. To the extent that the Board was discussing the possible acquisition of real property, the location of which had not been disclosed, it is likely that an executive session would have been proper. In such a situation, disclosure of the site in which the Board is interested, or perhaps the price that Board might be willing to offer, might result in an increase in the value of the property, thereby precluding the Board from reaching in an optimal price or agreement. If, however, the discussion involved sites that were publicly known, or sites already owned by the District, it is unlikely, in my opinion, that section 105(1)(h) would have been applicable as a basis for conducting an executive session. Further, the other issues allegedly discussed by the Board, such as the closing of schools, the configuration of the District, or the purchase of real property considered in general terms (as opposed to focusing a particular parcel or parcels), would not in my view, have fallen within any of the grounds for entry into executive session.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be sent to the Board. In addition, as requested, copies of the Open Meetings Law are enclosed.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Board of Education, City of Utica

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1535

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

August 30, 1988

Mr. Frederick W. Warder
City Attorney
City of Geneva
22 Linden Street
P.O. Box 469
Geneva, NY 14456

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. Warder:

I have received your letter of August 18 addressed to Ms. Kahn of this office. Your inquiry concerns authority of a public body to prohibit the use of videotaping equipment at open meetings.

It is noted at the outset that the Open Meetings Law is silent with respect to the issue, and there is no other law or rule that governs the use of recording devices at meetings. Further, while there are no judicial decisions involving the use of video equipment, several decisions have been rendered concerning the use of tape recorders at meetings.

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, such as village boards of trustees. 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 judicial determination rendered by the Appellate Division, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1536

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

August 31, 1988

Ms. Dorothy Gibson
[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. Gibson:

I have received your letter of August 19, as well as the news articles attached to it.

According to one of the articles, a "special task force" was established by the Department of Environmental Conservation (DEC) "to help speed negotiations on a planned regional garbage agreement between the Towns of Smithtown and Huntington". Having contacted Gerald P. Brezner, who heads the task force and is the Department's regional engineer for hazardous and solid waste, to learn of the times and places of meetings of the task force, you were informed that there is no intent to provide notice of the meetings. Mr. Brezner also indicated that the meetings may be called on short notice and held in a variety of locations. In view of the importance of the issue and the cost of the project, you have asked that I "notify the DEC and other concerned parties that the steamroller, backroom, shortcut tactics employed here to circumvent the participation of the public is illegal and a violation of the State's open government laws."

I have contacted the DEC on your behalf to learn more of the situation. Based upon the information given to me, I do not believe that the Open Meetings Law is applicable to the task force.

The Open Meetings Law pertains to meetings of public bodies, and section 102(2) of the Law defines the phrase "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, the Law generally applies to entities that carry out a governmental function collectively as a body, such as town boards, city councils, other legislative bodies, and the committees that they designate. Those entities deliberate as a body and take action by means of voting.

As I understand the situation, the DEC has designated various members of its staff to assist the Towns of Huntington and Smithtown. From my perspective, when members of staff are directed to carry out a duty or function by their supervisors, the staff would not constitute a "public body". In this instance, the staff persons designated by DEC do not function as a body, they do not vote, they do not act collectively as an "entity" in a manner analogous to a town board, for example. Consequently, based on the facts given to me, the task force does not constitute a public body and, therefore, is not subject to the Open Meetings Law.

Second, if a member or members of the task force convene with a quorum of a town board, which is a public body, such a gathering would constitute a meeting of the town board subject to the Law in all respects.

Lastly, even when the Open Meetings Law is applicable, I point out that the Law is silent with respect to public participation. As such, if a public body wants to permit members of the public to express their views or participate at meetings, it may do so, presumably in accordance with reasonable rules that treat members of the public equally. However, a public body may, in my view, choose not to permit public participation at its meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Gerald P. Brezner
David Ambro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 5279
OML-AO-1537

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

September 8, 1988

Ms. Stephanie M. Whidden
Howard C. St. John & Associates
Attorneys & Counselors at Law
Ulster Savings Building
280 Wall Street
UPO Box 3458
Kingston, New York 12401-0905

<u>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.</u>

Dear Ms. Whidden:

I have received your letter of August 29, which is addressed to the Committee on Public Access to Records, the Committee on Open Government and the State Education Department. Please note that, several years ago, the Committee on Public Access to Records was redesignated as the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

According to your letter, your firm represents the Town of Hardenburgh, and you have been asked for an opinion "concerning the right of the Town Board of Hardenburgh to maintain tapes purchased by the Board to record the Board meetings once the minutes have been completed by the Town Clerk". The Town Clerk has contended "that it is her absolute right to dispose of such tapes upon completion of the minutes, despite the fact that the Board purchased such tapes with its own funds". You added that the "Town Board would like to keep these tapes for record keeping purposes because the minutes are not verbatim or accurate. It would also like the tape recordings to be available to the public on demand."

In this regard, neither the Freedom of Information or the Open Meetings Laws deals specifically with the retention of records. That issue, in my view, can be appropriately determined

by the State Education Department, which houses the State Archives and Records Administration (SARA). I believe that SARA has responsibilities in the areas of records management and records retention.

As your inquiry relates to the Freedom of Information and Open Meetings Laws, I offer the following comments.

First, neither the Open Meetings Law nor any other statute of which I am aware deals directly with the capacity to tape record open meetings of public bodies. However, there are several judicial decisions on the matter.

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."

More 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 judicial determination rendered by the Appellate Division, 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. Moreover, baseed upon the case law, it is clear in my opinion that a member of the Town Board could tape record Board meetings, or that the Board itself could authorize its use of a tape recorder at its meetings (see Town Law, section 63).

Second, with regard to the public's right to obtain copies of tape recordings of meetings, I direct your attention to the Freedom of Information Law.

It is noted initially that the Freedom of Information Law is applicable to records of an agency, such as a town. Further, section 86(4) of the Law defines the term "record" 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."

As such, a tape recording of an open meeting kept by a town is, in my view, clearly a record subject to rights of access. Moreover, the Court of Appeals, the state's highest court, has construed the definition literally and as broadly as its specific language indicates [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980) and Washington Post v. Insurance Department, 61 NY 2d 557 (1984)].

Further, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. Under the circumstances, a tape recording of an open meeting is, in my opinion, available, for none of the grounds for

denial would be applicable. It is noted, too, that it has been determined judicially that a tape recording of an open meeting is accessible under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Sup. Ct., Nassau Cty., October 3, 1983].

Lastly, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Section 106(1) of that statute 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."

As such, minutes need not consist of a verbatim account of all that transpires at a meeting. While a tape recording of a meeting cannot, in my opinion, serve as a substitute for written minutes, I believe that many public bodies routinely or as a matter of policy prepare and maintain tape recordings of their 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
cc: Frederick W. Burgess
Office of Counsel
State Education Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1538

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

September 9, 1988

Ms. Kathleen Maher
[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. Maher:

I have received your letter of August 25, in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, the Skaneateles Board of Education held a "work session" on August 2. You indicated that the only public notice of which you are aware "was a notice on the door of the school the day of the meeting". You wrote that you do not believe that the work session was an "emergency meeting", and that "it was probably planned when the July 12 and August 30 meetings were scheduled".

You have questioned why the work session of August 2 "was not announced in the same way other meetings were". In this regard, I offer the following comments.

First, based upon the language of the Open Meetings Law as well as its judicial interpretation, a "work session" is a "meeting" subject to the Open Meetings Law in all respects. 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)]. The decision dealt specifically with "work sessions" held for the purpose of discussion only and with no intent to vote or take action.

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 characterized as "work sessions" or as regular meetings.

In sum, a "work session" is a meeting. As such, notice must be given prior to work sessions to the news media and by means of posting in the same manner as meetings generally.

I hope that 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: Skaneateles Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1539

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

September 26, 1988

Mr. and Ms. William Fox
[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. and Ms. Fox:

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

According to your letter:

> "On August 30, 1988, the Avoca Central School Board met at 7:30 p.m. in the school auditorium. Following an approximate 15-minute open meeting, the Board President announced to the people they were going into a short executive session meeting. School Superintendent Hugh Langeleir, District Superintendent Rene Bouchard, the school lawyer, two private auditors and citizen Barbara Goodrich. No mention was made of the topics to be discussed nor was there a motion made and seconded to adjourn to an executive session meeting" (emphasis yours).

The executive session lasted for nearly two hours. You enclosed an agenda of the meeting, which includes reference to an "Executive Session for Personnel" and lists various subjects that were to be considered.

You have asked whether the Board complied with the Open Meetings Law. In this regard, I offer the following comments.

First, 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:

> "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 language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session. Based upon the facts as you described them, the Board failed to carry out the procedure as required by section 105(1) of the Open Meetings Law.

Second, since the agenda attached to your letter indicates that an executive session would be held, I point that it has been consistently advised that a public body cannot schedule an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at the meeting during which the executive session is held. When a similar situation was described to a court, it was held that:

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an execu-

> tive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981].

Third, 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 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.

Having reviewed the agenda, some of the topics listed under "Executive Session for Personnel" likely could, in my opinion, have been properly considered during an executive session. For example, if the references to appointments focused upon "particular" persons, section 105(1)(f) could properly have been asserted. However, other matters, such as the approval of clubs or stipends, did not apparently deal with or focus upon a "particular person". If my assumption is accurate, those aspects of the executive session should have been conducted in public.

Lastly, as indicated earlier, prior to entry into an executive session, a motion must be made that indicates the topic to be discussed. Further, there is judicial guidance with respect to such motions. Based upon judicial decisions, 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 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.

As you requested, copies of this opinion will be sent to those designated in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Victor Hammond
Hugh Langeleir
Rene Bouchard
Theodore Beyer
Hon. John R. Kuhl
Hon. Donald Davidsen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5284
OML-AO-1540

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

September 26, 1988

Ms. Lucille V. Fox
[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. Fox:

I have received your letter of September 12 in which you raised a variety of questions pertaining to town government.

You asked first how a motion may be "made from the floor at a town meeting". It is assumed that you are referring to the possibility that a member of the public, rather than a member of the town board, may make a motion. If my interpretation of the question is accurate, I believe that only a member of the town board may introduce a motion. While the Open Meetings Law enables the public to attend meetings, the Law is silent with respect to public participation. Therefore, if a public body chooses to prohibit the public from speaking or otherwise participating at a meeting, I believe that such a prohibition would be valid. On the other hand, a public body may opt to permit public participation. If it chooses to do so, the body should, in my view, adopt reasonable rules that treat members of the public equally.

The second question involves the manner in which "items get on an agenda". In this regard, I am unaware of any statute that requires the preparation of an agenda or which governs how issues are placed on an agenda. Section 63 of the Town Law states in part that a town board "may determine the rules of its procedure". In many towns, the rules enable members of the public to place items on an agenda in conjunction with certain conditions (i.e., that a request be made in writing and submitted a certain number of days prior to a meeting). However, I believe that the method of including items on an agenda is, as a general matter, within the discretion of the board.

Third, you asked how the public may obtain minutes of a meeting. Section 106 of the Open Meetings Law provides that minutes of open meetings must be prepared and made available within two weeks. If action is taken during an executive session, minutes reflective of the nature of the action taken, the date and the vote must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. An agency can accept an oral request, but it may require that a request be made in writing. Further, if copies are requested, the agency may charge up to twenty-five cents per photocopy. An agency cannot charge for the inspection of accessible records.

Next, you asked "What records are available to the public under the Freedom of Information Law". Due to the structure of that statute, the question is unanswerable. However, 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. Most of the exceptions to rights of access are premised upon some harm that would arise as a result of disclosure.

You asked how questions concerning conflicts of interest may be reviewed. I am not an expert on the subject, for those kinds of issues are outside the scope of the Committee's jurisdiction. Nevertheless, section 806 of the General Municipal Law requires that the Town Board should have adopted a code of ethics, which might provide guidance. Opinions concerning conflicts of interest are rendered by the Attorney General and the Comptroller. However, I believe that they prepare opinions only at the request of government officials. In some instances, I believe that the Commission on Government Integrity will investigate allegations of a conflict of interest. The Commission may be reached at (212)321-1350.

Lastly, you asked where people may seek assistance when they are unable to obtain information from a town board. In short, any person may seek an advisory opinion from this office regarding the Freedom of Information Law. Although an opinion is not binding, I like to think that the opinions are educational and persuasive.

Enclosed are copies of the Freedom of Information and Open Meetings Laws, as well as "Your Right to Know", which describes both statutes in detail.

I hope that 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.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5298
OML-AO-1541

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

September 29, 1988

Mr. J. Burford
[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. Burford:

Your inquiry of approximately six weeks ago directed to the Department of Law was recently forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

According to your complaint, you "verbally requested minutes" of meetings of the Nassau County Medical Center's Board of Managers. You were told, however, that the minutes are not available.

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to public bodies, and section 102(2) of that statute defines "public body" to include:

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

According to section 127 of the General Municipal Law, a hospital board of managers is designated by the County Board of Supervisors. As such, I believe that the Nassau County Medical Center's Board of Managers is clearly a "public body" required to comply with the Open Meetings Law.

Similarly, I believe that the records of the Board of Managers, including minutes of its meetings, are subject to the Freedom of Information Law. The Freedom of Information Law is applicable to records of an "agency", which is defined in section 86(3) of that statute to mean:

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

Since the Board of Managers is a governmental entity performing a governmental function for Nassau County, the Board, in my view, is an "agency" and its records fall within the scope of the Freedom of Information Law.

Second, 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 meetings of a 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 to the extent required by the Freedom of Information Law.

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

Lastly, since you indicated that your request was made verbally, I point out that section 89(3) of the Freedom of Information Law states that an agency may require that a request be made in writing. That provision also requires that an applicant "reasonably describe" the records sought in order that agency officials can locate the records. As such, it is suggested that a request for minutes pertain to meetings held within a particular period of time.

In an effort to enhance compliance, a copy of this opinion will be sent to the Board of Managers.

I hope that I 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 Managers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 5300
OML-AO-1542

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

September 29, 1988

Mr. Edward A. Grause
Town Chairman
Town of Hempstead Democratic
Committee
94 Newbridge Road
East Meadow, NY 11554

<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, unless otherwise indicated.</u>

Dear Mr. Grause:

I have received your letter of September 13, as well as the correspondence attached to it.

Your inquiry deals with several requests for records involving the Town of Hempstead. Two of the items of correspondence attached to your letter were directed to Joseph J. Ra, Assistant Town Attorney, and I have contacted him on your behalf in order to learn more of the situation.

Mr. Ra informed me that he has offered to discuss the requests with you in an effort to resolve the issues. He also suggested, that, in the future, requests be made directly to him, rather than to various units of individuals within Town government. With respect to your request for the Annual Report of the Department of Buildings, Mr. Ra informed me that a document was sent to you but that you were dissatisfied with the response. He also indicated that more specificity was needed to ascertain exactly which document you are interested in obtaining. With regard to records related to asbestos, Mr. Ra said that some records were sent to you, and that you were invited to make an appointment to inspect other related documents. With respect to a list of senior citizen clubs, Mr. Ra informed me that the Town does not maintain such a list. I point out that your letter

regarding the list was sent to a county rather than a Town office. Mr. Ra also suggested that the Hempstead Housing Authority, a municipality separate from the Town, might have such a list.

With regard to your general questions, first, you asked whether the Freedom of Information Law requires that requests be made in writing in every instance. Although an agency may accept and respond to an oral request, section 89(3) of the Law states that an agency may require that requests be made in writing. Further, the same provision requires that an applicant "reasonably describe" the records sought in order that agency officials may locate and identify the records.

Second, it was apparently contended by County officials that a list of senior citizen clubs or meeting places could be withheld if it is requested for a "commercial use". As a general matter, the purpose for which a request is made and the intended use of records are irrelevant to rights of access. In short, accessible records should be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976); M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. The only instance in the Law in which the purpose for which a request is made is relevant pertains to the protection of personal privacy. As you may be aware, section 87(2)(b) of the Freedom of Information law provides that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, section 89(2)(b) provides examples of unwarranted invasions of personal privacy, one of which includes:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [section 89(2)(b)(iii)].

Those provisions would not, in my opinion, apply to a list of clubs or meeting places, for they would not contain any personally identifiable information. As such, to the extent that such lists exist, I believe that they should be made available.

Third, you asked whether a taxpayer may request a copy of minutes "immediately following their approval at a town board meeting". It is noted initially that neither the Open Meetings Law nor any other statute of which I am aware requires that minutes be approved. Approval of minutes is generally a matter of practice or policy. Further, section 106 of the Open Meetings Law requires that minutes of open meetings be prepared and made available to the public within two weeks. As such, minutes must be disclosed within two weeks of a meeting, even if they have not been approved. To comply with the Open Meetings Law in a situation in which minutes have not been approved, it has been sug-

gested that minutes be prepared and made available within the requisite time limit, and that they be marked "unapproved", "draft" or "non-final", for example. By doing so, a public body can comply with the Law and concurrently inform recipients of minutes that the minutes are subject to change.

Lastly, you asked whether, "if members of the Town board do not discuss matters...but just vote", it can be assumed that they have engaged in prior discussions, thereby violating the Open Meetings Law. In my view, although there may have been discussions or communications concerning matters prior to meetings during which action is taken, it cannot necessarily be assumed that the Open Meetings Law was violated. Information might have been distributed in writing in preparation for a meeting. Similarly, members constituting less than a quorum might have discussed the issues. In that kind of situation, the Open Meetings Law would not apply. In short, votes taken without discussion would not, in my opinion, necessarily indicate that a prior meeting was held in violation of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Joseph J. Ra

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1543

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

October 3, 1988

Mr. Keith H. Griffin
Town Supervisor
Town of Fort Edward
118 Broadway
P.O. Box 127
Fort Edward, NY 12828-0127

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 Griffin:

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

According to your letter, the Town Board on which you serve consists of five members, and committees of the Board consist of two members. With respect to committees, you raised the following questions: "When a committee meeting is held, does this constitute a meeting requiring public notice? Also, if a committee meeting is considered a meeting, then does one member of that committee constitute a quorum?"

In this regard, I offer the following comments.

First, by way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, 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 those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "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:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1544

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

October 5, 1988

Mr. Bruce L. Konkoski
[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. Konkoski:

I have received your letter of September 14, in which you requested advice concerning the Open Meetings Law.

According to your letter, it has been inferred that you, in your capacity as a member of a board of education, might have violated that Open Meetings Law by "discussing board agenda issues with other board members, either by phone or by chance meeting outside the setting of an officially publicized board meeting". You indicated, however, that you did not request another board member "to vote for or against an issue", and you added that you intend to continue to solicit opinions from board members and express opinions, unless you are "breaking the law".

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 school district offices or elsewhere, I believe that a 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. If less than a quorum is present, the Open Meetings Law would not, in my opinion, be applicable.

Second, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring by telephone. However, a series of telephone calls among the members which results in a decision, without benefit of a meeting, would in my opinion violate that Law. As such, while I believe that Board members may consult with one another by phone, I do not believe that the Board could validly engage in "telephone polling" or make collective determinations by means of telephonic communications.

In sum, a chance meeting would not, in my view, violate the Open Meetings Law. Further, consultations among members constituting less than a quorum and in which no steps are taken toward formal action, would not, in my opinion, constitute a violation of the Open Meetings Law.

The second issue that you raised pertains to the status of "negotiation committees appointed by a majority of the Board of Education". You wrote that negotiation sessions have not been preceded by notice. You have asked for a clarification of the matter.

First, by way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, 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 those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in section 102(2) to include:

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more persons designated or created to serve as a body by the School Board, or any public body, would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

As indicated earlier, 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)]. Therefore, a gathering of a majority of a committee that convenes in its capacity as a committee would constitute a "meeting" subject to the Open Meetings Law.

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 to discuss one or more of the topics of discussion described in section 105(1) of the Law.

Every meeting of a public body, including that of a subcommittee must be convened open to the public, and an executive session may be conducted only after an open meeting has begun. It is noted, too, that a procedure must be accomplished during an open meeting before a public body may enter into an 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

It is assumed that a negotiating committee would be involved in collective bargaining negotiations or discussions of collective bargaining negotiations. If that is so, clearly it could enter into an executive session pursuant to section 105(1)(e). However, such a meeting should be preceded by notice, convened open to the public and then followed by accomplishment of the procedure for entry into executive session. If the only topic of discussion involves collective bargaining negotiations, it is suggested that notice of the meeting should so indicate and that an executive session will likely be held immediately following the beginning of the meeting.

Enclosed is a copy of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1545

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

October 11, 1988

Mr. Vito P. DiCesare, Jr.
Sargent School
445 Wolcott Avenue
Beacon, New York 12508

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. DiCesare:

I have received your letter of September 22, as well as the materials attached to it.

You have asked that I review minutes of executive sessions prepared by the City of Beacon Board of Education. The minutes attached to your letter cover a period of several months, and you indicated that the Board no longer prepares minutes of executive session, but rather "now adjourns 'to discuss possible litigation'."

In this regard, I offer the following comments.

First, having reviewed the minutes, I believe that several aspects of the Board's discussions could legally have been considered during executive sessions. For instance, discussions of collective bargaining negotiations, the appointment of particular staff members and issues pertaining to specific students, would, in my view, have been appropriately held during closed sessions. Nevertheless, I believe that the minutes indicate that a variety of subjects considered during executive sessions should have been discussed during open meetings.

Second, it is unclear on the basis of the materials whether executive sessions have been convened prior to open meetings or after open meetings have begun. For purposes of clarification, I point out that 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 prescribes a procedure that must be accomplished 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..."

As such, an executive session is not separate and distinct from an open meeting, but rather is a part of an open meeting from which the public may be excluded. In addition, it is clear that a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

Having reviewed the minutes of executive sessions that you enclosed, it is unclear what some of the subjects discussed involved, for many items are described with abbreviations or other esoteric notations whose meanings are unknown to me. However, several of the discussions appear to have fallen outside the scope of any of the grounds for entry into executive session. For example, for the meetings held in 1988, the following items should, in my opinion, have been discussed in public: on February 21, 1988, the Town of Fishkill Development; on January 26, 1988, attendance at the "National Convention", the basketball game, student failure, the creation of a new position of clerk of the works, Fishkill Development, the dedication of a new wing, the purchase of computers, a trip to Boston by students, the "Adopting a School Program", a meeting with planning consultants and the "Homestead" program; on January 11, 1988, change orders, the Planning Board, the use of a certain form to evaluate the Superintendent, a survey formulated by the Health Task Force, and the National School Boards Convention. Numerous topics of discussion referenced in earlier meetings held in 1987 should, in my opinion, have been considered in public.

Due to the variety of topics that I believe should have been discussed publicly, it is difficult to focus on any particular area of deficiency. However, I believe that the following points might be useful.

It is noted initially that, under the Open Meetings Law as originally enacted, the so-called "personnel" exception for executive session differed from the language of the analogous 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 that might relate to personnel indirectly or as a group.

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 <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 conducted 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 issues described in the materials that you forwarded could not, in my opinion, have been appropriately discussed under the "personnel" ground for entry into executive session.

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..." [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; please note that the Open Meetings Law was renumbered after Doolittle was decided].

With respect to "negotiations", the only ground for entry into executive session that mentions that term is section 105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, section 105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union. It does not appear that section 105(1)(e) could properly have been asserted to discuss the issues described in the materials.

In terms of a motion to enter into an executive session held pursuant to section 105(1)(e), 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, supra].

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.

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].

In short, the topics that may be discussed during executive sessions are limited. Further, based upon case law, the motions for entry into executive sessions should not be vague.

Lastly, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law 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 2d 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. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session. Further, if no action is taken in an executive session, minutes of the executive session need not be prepared.

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:jm

cc: Beacon Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOML-AO- 1546

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

October 11, 1988

Frank Coccho, Sr.
Alderman, 8th Ward
City of Corning
[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 Alderman Coccho:

I have received your letter of September 21, in which you raised several issues concerning the Open Meetings Law.

You asked initially whether the Open Meetings Law applies "to a committee or commission which performs a governmental function for a city". Further, if the Law is applicable, you asked whether such a committee or commission must provide public notice of the date, time and place of its meetings.

In this regard, by way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, 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 those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in section 102(2) to include:

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more persons designated or created to serve as a body by the City Council, or by any public body, would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Similarly, a committee or commission created by local law, ordinance or by a provision of a charter would, in my view, constitute a public body.

Further, I believe that the same conclusion can be reached by viewing the definition of "public body" in terms of its components.

A committee or commission would generally be an "entity" that consists of "two or more members". Further, although the action that created a committee or commission might not refer to any quorum requirement, I believe that section 41 of the General Construction Law would permit such an entity 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 a committee or commission, are "persons charged with [a] public duty to be performed or exercised by them jointly". 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, supra; 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 a committee or similar body is required to exercise its duty pursuant to the quorum requirements set forth in section 41 of the General Construction Law.

In addition, a committee or commission, under the circumstances you described, in my view, conducts public business and performs a governmental function for a public corporation, a city. Based upon the foregoing, I believe that the committees or commissions, as I understand your inquiry, are "public bodies" subject to the provisions of the Open Meetings Law.

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 of the time and place 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 to discuss one or more of the topics of discussion described in section 105(1) of the Law.

The second area of inquiry concerns the legality of a public body's entry into an executive session "with a potential developer for the purpose of discussing 'real estate'." The example that you gave involved a situation in which a "private entity desires to solicit a consensus from a governmental body, the possibility of purchasing public property for the expansion of an existing facility". You pointed out that "The property has never been publicly offered for sale, no one has ever expressed any interest in purchasing the property and public disclosure of a developer's project shouldn't have any affect on the fair market value of said property."

The only relevant basis for entry into an executive session under the circumstances you described is section 105(1)(h). That provision permits a public body to conduct an executive session to discuss:

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

In my view, the language quoted above indicates that not every issue pertaining to a real estate transaction may be considered during an executive session. Only when "publicity would substantially affect the value" of the property would an execu-

tive session be appropriate. If, as you suggest, public disclosure or discussion would have no affect on the value of real property owned by a municipality, I do not believe that section 105(1)(h) of the Open Meetings Law could validly be asserted as a basis for conducting an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5322
OML-AO-1547

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

October 17, 1988

Ms. Karen Iacovelli
Laranda Farm
P.O. Box 297
North Salem, NY 10560

The staff of the Committee on 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. Iacovelli:

I have received your letter of October 5, as well as the correspondence attached to it.

You wrote that the "Town of North Salem is in violation of the Freedom of Information Law", and you asked that I conduct an "investigation into the matter". By way of background, you indicated that you requested a copy of the minutes of a public hearing conducted by the Town Zoning Board of Appeals. You added that you were "stunned to learn that a transcript was not available, nor any transcripts for all meetings held thereafter" (emphasis yours). However, you were informed that you could listen to tape recordings of the proceedings, which you copied. When the tape recordings were reproduced, you retained Kelly Services to transcribe the tapes at a cost of more than $350. It is apparently your view that a transcript of the proceedings should have been prepared and made available to you. However, the Town rejected your request to be reimbursed for the cost of transcribing the tapes.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Law. This office has neither the authority nor the resources to "investigate".

Second, based on the facts that you provided, the failure to transcribe the proceedings would not, in my opinion, constitute any violation of law. In short, there is nothing in the Freedom of Information Law or the Open Meetings Law that requires that verbatim transcripts of meetings or hearings be prepared.

I point out the Open Meetings Law contains what might be described as minimum requirements concerning the contents of minutes. Specifically, as the Law applies to minutes of open meetings, section 106(1) provides 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 foregoing, it is clear, in my opinion, that minutes need not consist of a verbatim account of what transpired at a meeting. Similarly, the minutes need not include reference to each comment made by Board members or others who may have spoken during the course of the proceedings. As such, there is no requirement that a transcript of meetings be prepared.

It is also noted that the Freedom of Information Law pertains to existing records and that section 89(3) of the Law states in part that, as a general rule, an agency is not required to create a record in response to a request. Therefore, if the Town has not prepared a transcript of a meeting or hearing, I do not believe that it would have been required by the Freedom of Information Law to do so in response to a request. An agency is obliged to make its records available for inspection and copying to the extent that the records are accessible under the Freedom of Information Law. Although there is no requirement that a hearing or meeting must be tape recorded, it appears that the Town complied with the Law by enabling you to reproduce a copy of an existing record, a tape recording of the proceedings. I know of no law that requires the Town to reimburse you for transcribing the tape.

In sum, since there is no requirement that a transcript be prepared, I do not believe that the Town engaged in any violation of the Freedom of Information Law or the Open Meetings Law. Further, once you obtained a copy of the tape recording, I believe that any cost of transcription would properly be borne by you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Bisulca, Town Supervisor
Kevin Dwyer, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5332
OML-AO-1548

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

October 19, 1988

Mr. Allen A. Strasser
Point Peninsula Businessmen's
Association
P.O. Box 625
Three Mile Bay, NY 13693

The staff of the Committee on 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. Strasser:

I have received your letter of October 10, as well as the materials attached to it. In addition, your letter of the same date addressed to the Attorney General has been forwarded to this office.

You have described a series of problems encountered in your attempts to obtain records from the Town of Lyme. According to your letter, various requests have been made in writing, but you have met with resistance and delays in each instance. You asked which agency is authorized to prosecute violations of the Freedom of Information Law, and whether the Committee on Open Government has enforcement or investigative authority.

In this regard, the Committee on Open Government is responsible for advising with respect to the Freedom of Information and Open Meetings Laws. The Committee has no authority to enforce those statutes or to investigate. If an applicant has exhausted his administrative remedies and has been denied access to records, that person's legal recourse would involve the initiation of a legal proceeding under Article 78 of the Civil Practice Law and Rules. I point out that, in such a challenge, if the applicant substantially prevails, the court, in its discretion, may award attorney's fees when certain conditions are present [see Freedom of Information Law, section 89(4)(c)].

Although this office has only the authority to advise, it is my hope that our advice is persuasive and that it serves to educate. As such, I would like to address the issues raised in your letter. Further, in an effort to enhance compliance with the Law, copies of this letter will be sent to the Town Supervisor and the Town Board.

First, by way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate rules and regulations concerning the procedural implementation of the Law (see attached regulations, 21 NYCRR Part 1401). In turn, section 87(1) of the Law requires the governing body of the public corporation, such as the Town Board, to adopt regulations consistent with the Law and the Committee's regulations. The Committee's regulations indicate that "an agency may require that a request be made in writing or make such records available upon oral request" [21 NYCRR 1401.5(a)]. As such, both the Law and the regulations are silent concerning the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice. Nothing in the Law requires that a request be typewritten. It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response to or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law.

Second, the Freedom of Information Law and the regulations prescribe time limits within which agencies must 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

Third, the form used by the Town of Lyme apparently requires that an applicant must provide a reason for requesting the Town's financial records. As you suggested, the Freedom of Information Law does not require that an applicant state the reason for requesting records or the intended use of records. It has been found judicially that the Freedom of Information Law does not distinguish among applicants, and that accessible records should be made available to any person, without regard to status or interest [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)].

Fourth, 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, "financial records" pertaining to the Town, such as books of account, bills, vouchers, checks, contracts and related records are generally available, for none of the grounds for denial could appropriately be asserted.

It is noted, too, that the Town Law requires that certain financial records maintained by the Supervisor must be made available "at all reasonable hours of the day". Section 29, which pertains to the powers and duties of a town supervisor, states in subdivision (4) that the supervisor:

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

Fifth, you indicated that the Town charges a fee of one dollar per photocopy for duplicating its records. As you are aware, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge no more than twenty-five cents per photocopy, unless a statute, an act of the State Legislature, permits the assessment of a higher fee [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. As such, the fees for copies of the records in which you are interested cannot exceed twenty-five cents per photocopy.

Lastly, you wrote that the Town Board "meets regularly in a quorum outside open meetings...". Here I direct your attention to the Open Meetings Law. That statute pertains to meetings of public bodies, such as the Town Board. Further, in a landmark decision rendered some ten years ago, the Court of Appeals, the state's highest court, held that an gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law that must be preceded by notice and convened open to the public, even if there is no intent to take action [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Once again, in an effort to encourage compliance with the Freedom of Information and Open Meetings Laws, copies of this opinion will be sent to Town officials.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Town Board, Town of Lyme
Marcus Nellis, Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5334
OML-AO-1549

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

October 20, 1988

Mr. Edwin W. Wilcox
[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. Wilcox:

I have received your letter of October 10, as well as the materials attached to it.

You have raised a series of questions concerning the implementation of the Freedom of Information and Open Meetings Laws by the Gates Fire District Board of Fire Commissioners. Your inquiries focus upon a meeting of the Board held on August 22. Both your letter and the minutes of the meeting indicate that the meeting was held to prepare the District's preliminary budget. During the course of the meeting, despite your objection, an executive session was held "for the purpose of discussing the employees payroll and benefit package". Following the meeting, you requested copies of minutes of the open meeting and the executive session. Although minutes of the open meeting were subsequently made available, your request for minutes of the executive session was denied by Daniel Lincoln Miller, the attorney for the District. Mr. Miller wrote that:

> "Since certain financial matters as well as personnel matters were discussed during this executive session, no Minutes were taken.
>
> "For your further information, even if such Minutes were prepared because of the subject matter, both financial and personnel, the Commission would not be obligated to furnish you with copies of the Minutes."

> "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 meetings 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, with respect to open meetings, minutes must, at a minimum, consist of a record or summary of all motions, proposals, resolutions and any other matters upon which votes are taken. Minutes of open meetings are, in my view, available in their entirety. With respect to action taken in an executive session, a record or summary of the final determination of action must be prepared and made available to the extent required by the Freedom of Information Law. If no action is taken during an executive session, minutes of the executive session need not be prepared.

With regard to Mr. Miller's comments, I agree that, if the Board did not vote during the executive session, there was no requirement that minutes be created. However, if his comments are intended to suggest that minutes of executive sessions are never available, I disagree. If, for example, the Board discussed the performance of a particular employee, a proper subject for consideration in an executive session, and voted to increase that person's salary, a record reflective of its action would have to be prepared, and minutes indicating the action, the date and the vote of the members would, in my view, clearly be accessible under the Freedom of Information Law. In short, if a matter is the subject of a vote during an executive session, minutes of the executive session would, in most instances, be available under the Freedom of Information Law.

In a related vein, a public body must accomplish a procedure during an open meeting before it may conduct an 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..."

As such, a motion to enter into an executive session must be introduced and carried by a majority vote of the total membership. Further, as indicated earlier, motions made during open meetings must be memorialized in minutes. Here I point out that the Freedom of Information Law, since its enactment in 1974, has contained what may be viewed as an open meetings or open vote requirement. 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..."

Since the District is an "agency", the minutes, in my opinion, should include reference to each motion made during a meeting, as well as reference to each member's vote as affirmative or negative.

With respect to the propriety of the executive session, two of the grounds for entry into executive session may have been relevant.

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

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

The provision quoted above pertains to collective bargaining negotiations conducted under the Taylor Law between a public employee union and a public employer. Therefore, if the District's employees are not members of a public employee union or if the District was not involved in collective bargaining

Therefore, if the discussion involved personnel generally and did not focus on a "particular person", section 105(1)(f) likely would not have justified the holding of an executive session. If, however, the Board reviewed the performance of a particular employee to determine, for example, whether the employee merited an increase, to that extent, an executive session would in my view have been appropriate.

Lastly, you asked whether the District forwarded to this office copies of your appeal and the determination thereon as required by section 89(4)(a) of the Freedom of Information Law. Having reviewed our files, I do not believe that those materials were sent. Further, since Mr. Miller responded to both your initial request and your appeal, I point out that the regulations promulgated under the Freedom of Information Law indicate that the records access officer and the appeals officer cannot be the same person [see 21 NYCRR section 1401.7(b)].

In an effort to enhance compliance with the Freedom of Information and Open Meetings Laws, copies of this opinion will be sent to the Board of Commissioners and its attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Fire Commissioners, Gates Fire District
Daniel Lincoln Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1550

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

October 20, 1988

Mr. Vince Tedone
[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, except as otherwise indicate.

Dear Mr. Tedone:

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

Your inquiry concerns the public's right to attend meetings to review the budget "conducted by a committee of three appointed by the Supervisor" of the Town of Poughkeepsie. You informed me by phone that the members of the committee are members of the Town Board, which consists of seven. Having attempted to attend a meeting of the committee on October 12, a statement was given to the chairman by the town attorney "stating that committee meetings of this nature need not be open to the public or media, that they were considered to be investigatory in nature, and need not be held at town hall as policy". Subsequently, you were asked to leave the room. You added that you were a member of the Town Board until 1987 and that you served as budget review chairman, but that you were never informed that meetings of committees should be conducted in private.

You have requested my views on the matter and asked that I "state clearly that [you should] not be excluded from any succeeding budget review meetings".

In this regard, it is emphasized that the authority of the Committee and its staff is advisory. While it is my hope that an advisory opinion is persuasive and educational, I could not compel a public body to permit you to attend its meetings.

With respect to the substance of the matter, first, I believe that the committee in question was designated pursuant to the authority conferred upon the Town Supervisor by the Town Law. Specifically, the last sentence of section 63 of the Town Law provides in part that "the supervisor may, from time to time, appoint one or more committees, consisting of members of the board, to aid and assist the board in the performance of its duties". As such, the existence and creation of the committee are apparently based upon statutory authority.

Second, 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."

As indicated above, the definition of "public body" includes not only governing bodies, such as the Town Board, but also committees, subcommittees and similar bodies. Since the committee in question was created pursuant to a grant of statutory authority conferred upon the Supervisor, I believe that it would constitute a public body subject to the Open Meetings Law.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, 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 those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body" to its current form. Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies".

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more persons designated or created to serve as a body by a public body, or in this instance, pursuant to the authority conferred by law upon the Supervisor, would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Further, I believe that the same conclusion can be reached by viewing the definition of "public body" in terms of its components.

The committee is an "entity" that consists of "two or more members". Further, although the action that created the committee might 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 "aid and assist the board in the performance of its duties". 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, supra; 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 is required to 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, a town. Based upon the foregoing, I believe that the committee meets the definition of "public body" and is, therefore, subject to the provisions of the Open Meetings Law.

It is noted, too, that two decisions rendered by Supreme Court, Dutchess County, have held that advisory bodies are subject to the Open Meetings [see Matter of Poughkeepsie Newspaper, Supreme Court, Dutchess County, NYLJ, June 12, 1987 and Goodman Todman Enterprises, Inc. v. Town Board of Milan, Supreme Court, Dutchess County, October 5, 1988].

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 to discuss one or more of the topics of discussion described in section 105(1) of the Law.

Every meeting of a public body, including the committee, must be convened open to the public. However, as you may be aware, the Open Meetings Law permits a public body to conduct closed or "executive" sessions to discuss certain topics. Those topics are specified in paragraphs (a) through (h) of section 105(1) of the Law. Although some aspects of the meeting might, depending on the nature of a discussion, be conducted during an executive session, a review of the budget could not, in my opinion, be characterized as "investigatory" as that term is generally used.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Supervisor, Town of Poughkeepsie
Town Board, Town of Poughkeepsie

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1551

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

October 21, 1988

Mr. David McKay Wilson
The Standard Star
92 North Avenue
New Rochelle, NY 10802

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, except as otherwise indicated.

Dear Mr. Wilson:

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

Your inquiry pertains to an executive session held by the New Rochelle City Council on October 11. At the meeting, according to your letter:

> "a request was made by the president of a non-profit agency to meet with the council in executive session to discuss 'possible' litigation concerning the sale of a public housing project to the non-profit agency. The city would contribute funds to purchase the building."

You objected, contending that "possible" litigation was not a proper basis for conducting an executive session, "at which point they said they were meeting to discuss 'proposed' litigation". You then asked that they "identify the case". The Council "refused, saying they were not mandated to do so, and it would tip off the proposed litigant". You informed me by phone that it was unclear whether the City was an actual or potential litigant, although it was apparently inferred that the City would be sued. In addition, you wrote that, during the executive session, the Council:

> "discussed the funding for the project, including how much the city would contribute to the contingency fund for the project. One councilman said the discussion was only 'incidental' to the discussion of the litigation while the city manager said they only read a memo that was available to the public."

You have requested my views on the matter. In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law is based upon a presumption of openness. The Law requires that meetings of public bodies be conducted open to the public, except to the extent that a topic of 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) of the Law. Therefore, even if there was a proper basis for entry into an executive session to discuss "litigation", it appears that the remainder of the discussion concerning funding for the project and the City's contribution to the contingency fund for the project should have been conducted during an open meeting.

Second, with respect to the substance of the discussion in executive session and the Council's characterization of the subject matter, I point out that 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 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, a motion to enter into an executive session must include reference to the subject to be considered behind closed doors.

The provision in the Open Meetings Law concerning "litigation" is 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 foregoing, 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. 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 possibility of litigation. Further, if the City was neither a "possible" nor a "proposed" litigant in a proceeding, section 105(1)(d) could not, in my opinion, have appropriately been asserted.

Lastly, with regard to the sufficiency of a motion to discuss "proposed 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].

When a public body seeks to initiate litigation, there may be instances in which the identification of the party to be sued would "tip off" that party and potentially enable the party to evade an action, as in the case of law enforcement, for example. However, if the City felt that it would be sued, it is unlikely, in my opinion, that the identification of the litigant would adversely affect the City's position. If that is so, I believe that the motion should have indicated the party or parties to a lawsuit.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of New Rochelle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1552

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

October 24, 1988

Harold W. Conway, Commissioner
Hawthorne Fire District
Town of Mount Pleasant
P.O. Box 211
Hawthorne, NY 10532-0211

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. Conway:

I have received your letter of October 14 concerning the Open Meetings Law.

Specifically, you asked whether the meetings of a volunteer fire department benevolent association are subject to the Open Meetings Law and whether any taxpayer or member of such an association has the right to attend meetings of an association's board of directors.

In this regard, I offer the following comments.

The Open Meetings Law is applicable to meetings of public bodies, and section 102(2) of the Law defines the phrase "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, the Open Meetings Law generally applies to entities that serve government, such as a town board, a city council or a board of fire commissioners. I believe that a board of volunteer fire department would also constitute a public body.

However, based upon my understanding of the nature of a volunteer fire department benevolent association, it is unlikely, in my view, that the board of such an association would constitute a public body subject to the Open Meetings Law. Since I know little about such associations, I contacted an attorney associated with the Division of Fire Prevention and Control. I was informed that each such association is created by a special act of the State Legislature as a not-for-profit corporation. Further, those associations generally are created to provide assistance and relief to indigent or needy firefighters and their families. Consequently, based on my knowledge of such associations, the meetings of their boards would likely be subject to the requirements of the Not-for-Profit Corporation Law, rather than the Open Meetings Law. It is noted that the Not-for-Profit Corporation Law distinguishes between meetings of members (see section 603), and meetings of board of directors (see sections 707 and 708). The by-laws of such associations may provide additional guidance concerning attendance at meetings.

In sum, as I understand the nature of volunteer fire department benevolent associations, the meetings of their boards would not be required to be open to the public, for the Open Meetings Law would apparently be inapplicable.

I hope that I 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-1553

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

October 25, 1988

Mr. Daniel L. Betterton
Codes Enforcement Officer
Office of the Building Inspector
Town of North Salem
Town House
North Salem, New York 10560

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. Betterton:

I have received your letter of October 18, as well as the materials attached to it.

In your capacity as Codes Enforcement Officer for the Town of North Salem, you have raised a series of issues relating to a meeting of the Town Planning Board. Specifically, according to your letter:

> "On October 5, 1988, the Planning Board of the Town of North Salem conducted an executive session. A motion was regularly made and seconded to 'go into executive session, Personnel to discuss T. Eng. W / ME', which [you] interpret to mean Town Engineer with Manuel Emanuel, the Town's Planning Consultant / Planner. The Town does not have a Town Engineer as such, but employs various professional engineers on a consulting basis. The typewritten minutes of the regular meeting do not indicate that Mr. Emanuel was a participant."

The minutes of the meeting, insofar as they deal with the issued described above, indicate that Ms. Cynthia Curtis, Chair of the Planning Board, "noted that it was necessary to go into Executive Session and that it would be brief". The minutes also indicate that a motion was made to enter into an executive session "in order to discuss personnel, Engineer". The motion was carried unanimously.

On the day after the meeting, Ms. Curtis sent a memorandum to the Town Board, the Planning Board and the Town Attorney marked "Personal and Confidential". The memorandum alleges that a memorandum you had prepared in August was "doctored", in that you had corrected certain statements. She then described the manner in which Planning Board files were maintained and wrote that "we will return to the policy of locking all the metal filing cabinets" and explained a new policy concerning access to the files. At the bottom of the memorandum, it was written that: "The above policy of the Planning Board was discussed an agreed to at an executive session on 10/5/88". No reference to the adoption of policy is referenced in the minutes.

You also referred to another memorandum sent by members of the Planning Board to the Zoning Board of Appeals and other Town officials. That memorandum recommended that the Zoning Board of Appeals, in dealing with a particular application "act on the use variance application first and make site plan approval conditional". Although that memorandum is dated October 3, a "note" at the bottom of the memo states that "This was discussed in Executive Session of the Planning Board on October 5, 1988". You attached a copy of another memorandum dated October 5 which contains the same text in substance as the memorandum of October 3. However, no reference to discussion of the matter in executive session appears.

Having reviewed the Open Meetings Law, it is your opinion that there was no authority for the Board's actions in executive session. You added that you are:

> "not part of the Planning Board's personnel, and no other reference in the motion could possibly be construed as appropriate Notice of the Planning Board's intent to digress from the pseudo subject of 'Town Engineer', and to issue memoranda concerning extraneous discussions had in that Executive Session."

Based on the foregoing, 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.

Further, a public body cannot conduct an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

Based on the minutes of the meeting, the motion for entry into executive session made no reference to the Planning Board's record-keeping or disclosure policies, nor do the minutes refer to the recommendation that the Zoning Board of Appeals follow a certain course of action. Further, those subjects should not, in my opinion, have been discussed in executive session, for they fell outside the scope of the topics that may properly be considered during an executive session.

Third, with respect to a discussion of "personnel", I point out that the term "personnel" appears nowhere in the Open Meetings Law. It is also noted that 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.

In the context of your letter and the materials, it is unclear what, if any, personnel matter might have been discussed during the executive session. If the Board considered whether to hire an engineer, but if the discussion did not focus upon a "particular person" to carry out that function, I do not believe that section 105(1)(f) could justifiably have been asserted as a

basis for entry into executive session. On the other hand, if, for example, the Board was reviewing the qualifications of specific engineers for the purpose of determining which should be retained, to that extent, the executive session was, in my view, permissible. Further, although you may not be an employee of the Planning Board, a discussion of your employment history or a matter leading to disciplinary action, for instance, could, in my opinion, have been considered during an executive session. Again, the Law does not refer to personnel; rather, it permits the holding of an executive session to discuss certain topics pertaining to a "particular person".

Fourth, 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 matters" would not in my view be sufficient to comply with the statute.

Lastly, when a public body engages in certain actions, such as motions or votes, those actions must be memorialized by means of minutes. With respect to minutes, section 106 of the Open Meetings Law provides 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 meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

If indeed the Planning Board took the actions described earlier during an executive session (which apparently should have been discussed and taken during the open portion of the meeting), minutes reflective of any such actions, the date and vote of the members, should in my opinion be referenced in minutes accessible to the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board
Kevin Dwyer, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1554

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

October 31, 1988

Mr. Dennis J. Brancato
[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. Brancato:

I have received your letter of October 20 in which you requested advice concerning the Open Meetings Law as it pertains to a board of education.

You have raised the following questions:

"1) Must a motion be made during an open meeting to enter executive session?

2) Must the motion identify the general area or areas of the subject or subjects to be discussed?

3) Must the motion be carried by a majority of the total membership of the board? In other words, must all seven members of a seven member board be present for the vote to convene executive session?

4) Does the law limit the subject matter that may appropriately be discussed in executive session to eight specific topics? Would "Work Sessions" purpose being to discuss district-wide goals, issues, and programs not related to any of the eight areas to be considered proper discussion for executive discussion?"

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, including boards of education.

Second, several of your questions may be answered by means of the language of a particular provision of the Open Meetings Law. I direct your attention to section 105(1), which prescribes a procedure that must be accomplished by a public body, during an open meeting, before it may enter into an executive session. Specifically, the introductory language of the provision cited above 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..."

As such, a motion to enter into an executive session must be made during an open meeting, and the motion must identify, in general terms, the area or areas of the subject or subjects to be discussed.

With respect to your third question, if a board consists of seven members, all seven need not be present to the vote to conduct an executive session. To carry any motion, including a vote to enter into an executive session, there must be an affirmative vote of a majority of a public body's total membership, notwithstanding vacancies, absences or an incapacity to vote. Therefore, in the case of a seven member board, a motion must be carried with a minimum of four affirmative votes, irrespective of the number who may be present. If five members of a seven person board are present, four of the five must cast affirmative votes to enter into an executive session, or to act on any matter.

Third, as you suggested, paragraphs (a) through (h) specify and limit the topics that may appropriately be considered during an executive session. Consequently, a public body may not conduct an executive session to discuss the subject of its choice. On the contrary, meetings of public bodies must be conducted open to the public unless and until a topic arises that may appropriately be considered in an executive session.

Lastly, a "work session", according to the courts, is a "meeting" subject to the Open Meetings Law. In a landmark decision rendered in 1978, it was held that the term "meeting" includes any gathering of a quorum of a public body, a gathering of a majority of its total membership, for the purpose of discussing public business, even if there is no 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)]. As such, a public body conducting a work session has the same obligation to conduct such a gathering open to the public and the same capacity to enter into an executive session as in the case of a "formal" meeting. Further, a work session held to discuss the kinds of topics you described, "district-wide goals, issues, and programs not related to any of the eight areas" for which executive sessions may be held, would, in my view, be required to be discussed 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-1555

162 Washington Avenue, Albany, New York 12231
Tel (518) 474-2518

November 3, 1988

Mr. Thomas D. Mahar, Jr.
Town Attorney
Town of Poughkeepsie
Dutchess Turnpike
Poughkeepsie, NY 12603

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. Mahar:

I have received your letter of October 25, which pertains to an advisory opinion prepared on October 20 concerning the status us of a budget committee under the Open Meetings Law designated by the Supervisor of the Town of Poughkeepsie.

You asked why no reference was made in the opinion to the decision rendered in Buffalo Evening New, Inc. v. Buffalo Municipal Housing Authority 134 Misc. 2d 155, 510 NYS 2d 422 (1986). That decision was not discussed because, in my view, it is irrelevant, for it deals with an issue different from that r
aised in the opinion of October 20. Buffalo Evening News involved gatherings of a public authority's board during which less than a quorum of the board was present. The court, in my
opinion, appropriately held that: "Whether there is a violation of the Open Meetings Law is determined by the attendance of a sufficient number of the members of the Board to make a quorum. Lacking a quorum there is no violation" (id. at 424).

I agree with the determination. Nevertheless, the issue and the facts presented in Buffalo Evening News differ from those considered in the October 20 opinion. The former involved the coverage of the Open Meetings Law relative to the board of a public authority. The latter dealt with a committee, rather than the Town Board itself.

Once again, the Open Meetings Law is applicable to meetings of public bodies, and section 102(2) of the Law defines the phrase "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 my opinion, the definition clearly includes within its scope not only a governing body, such as the Town Board, but also committees, subcommittees and similar bodies, such as those designated pursuant to section 63 of the Town Law. If the committee in question is not considered to be a public body, the reference in the definition to committees would have no meaning. Further, as indicated in the earlier opinion, the legislative history of the definition in my view indicates an intent that a committee, such as the one at issue, is intended to constitute a public body.

With regard to quorum requirements, based upon section 41 of the General Construction Law, which was cited in the earlier opinion, a quorum of the Town Board would be four; a quorum of a three member committee would be two.

In sum, the Buffalo decision was not cited because it dealt with a quorum of the governing body of the authority. The October 20 opinion did not deal with the Town Board, but rather with a committee designated under the authority of the Town Law. From my perspective, the facts in the Buffalo case were simply not analogous to those presented with respect to the Committee in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5346
OML-AO-1556

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

November 4, 1988

Ms. A. Marie Bennekin
Secretary
City of Albany
Office of Equal Opportunity
& Fair Housing
Room 254M City Hall
Albany, New York 12207

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. Bennekin:

As you are aware, I have received your letter of October 19, in which you raised questions concerning the City of Albany's Community/Police Relations Board. I have also received a copy of the Board's constitution and by-laws.

By way of background, you wrote that:

> "The Community/Police Relations Board was established in June, 1986 for the purpose of developing and maintaining an atmosphere of mutual trust and respect between the Community and it's police; to provide a structure of continued communications between the Community (i.e. Albany residents), and the Police department and serve as an added assurance that the rights of citizens have been protected through the review process.
>
> "As part of the system residents' complaints about police conduct are generally received by various Community agencies, and forwarded to the Internal

> Affairs Unit of the Police Department for investigation and, as part of the process, report to the Community/Police Relations Board.
>
> "Board members have felt discouraged by the procedure of providing them with the barest information in these reports which always took a statistical format.
>
> "As a result of representation to Mayor Whalen it was decided that the Unit Chief of the Internal Affairs Unit would attend meetings at the request of the Board with the express purpose of providing details and facts of the investigations of these complaints. It was also decided that this should transpire only during executive session of the Board"
>
> "Some Board members have argued against the necessity for these measures as it is felt that the Board constitutes a public body falling under the Open Meetings Law - hence such sessions should be made public."

In view of the foregoing, you have raised the following questions:

> "1. Does the Community/Police Relations Board have the authority to require the Deputy Chief of Police (Internal Affairs) or any other representative of the Albany Police Department, to provide complete information, including the names of Police officers under discussion, to the Board during the conduct of executive sessions to discuss the police department's investigations of civilian complaints?
>
> 2. Must the Community/Police Relations Board conduct an executive session at all in order to discuss civilian complaints against Albany Police Officers, as required by Mayor Whalen as a condition of the Police Department's disclosure of any information relating to

> an internal investigation when the Police Department's representative routinely withhold the identity of subject law enforcement agents in executive sessions?"

Attached to your letter is a memorandum in which Vincent J. McArdle, Corporation Counsel, wrote that:

> "...the Board having no subpoena power, is without authority to require a Police Department representative or any other individual to provide specific information on civilian complaint investigations, including the names of the police officers involved."

Mr. McArdle added that:

> "...it is proper for a public body to conduct an executive session upon discussion of personnel matters of a particular person (Open Meetings Law, Section 105(1)(f)). While a general discussion of personnel matters does not warrant an executive session, an executive session is proper when discussions involve a particular investigation or individual, notwithstanding the fact that specific names are not revealed. Discussions concerning specific unnamed individuals are likely to disclose information which could identify the particular person involved, thus warranting a closed session."

In this regard, I offer the following comments.

Although it appears to be agreed that the Board is subject to the Open Meetings Law, for purposes of dealing with issues raised, I point out that the Open Meetings Law pertains to meetings of public bodies. Section 102(2) of the Open Meetings Law defines the phrase "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 good faith, it is noted that the status of advisory bodies designated by an executive, such as mayor, is unclear, for the courts have not provided consistent direction [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982); Matter of Poughkeepsie Newspaper, Supreme Court, Dutchess County, NYLJ, June 12, 1987; NYPIRG v. Governor's Advisory Commission, 507 NYS 2d 798]. Nevertheless, based upon the Board's constitution and by-laws, which you described as the "agreed upon" document prepared when the Board was established, I believe that it is a "public body" subject to the Open Meetings Law, particularly in view of the definition of "public body" when it is considered by means of its components.

The Board is an entity that consists of "two or more members", for the materials that you sent indicate that is has fifteen members. The by-laws refer to a quorum requirement which is consistent with section 41 of the General Construction Law. That provision states, in brief, that an entity consisting of three or more public officers, or three or more persons, charged with a public duty to be carried out collectively, as a body, may carry out such a duty only by means of the presence of quorum, and only by means of an affirmative vote of a majority of its total membership. The by-laws and constitution indicate that the Board "conducts public business" and "performs a governmental function" for a public corporation, the City of Albany. In terms of its functions, the Board accepts and monitors complaints of citizens alleging misconduct on the part of Police Department personnel. The Police Department in turn is required to provide the board with a variety of information relative to such complaints. The Board reviews results of certain internal investigations. It makes recommendations and forwards information to the Mayor, and it is required to submit reports semiannually to the Mayor.

In short, based upon the by-laws and constitution, I believe that the Board bears each of the characteristics necessary to conclude that it is a "public body" subject to the Open Meetings Law.

With respect to your first area of inquiry, it does not appear that the Board generally has the authority to require a representative of the Police Department to provide "complete" information, including the names of police officers under discussion, to the Board during the Board's executive sessions

held to consider investigations of complaints. As Mr. McArdle explained in his memorandum, the Board does not have the power to compel officials of the Police Department to disclose "complete" or specific information. Further, the by-laws and constitution do not require disclosure to the Board of detailed or complete information.

Here I direct your attention to the Freedom of Information Law. As a general matter, the Freedom of Information Law is based on 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.

Several of the grounds for denial may be relevant to the kinds of records in which the Board may be interested. However, the Freedom of Information Law might require the disclosure of certain of those records or perhaps portions of them. For instance, if a citizen submits a complaint resulting in an allegation of misconduct on the part of a named police officer, the City could likely withhold from that record identifying details pertaining to both the complainant and the officer on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)]. Nevertheless, the remainder of the complaint might be available.

Records prepared internally by the Police Department would constitute "intra-agency materials" subject to section 87(2)(g) of the Freedom of Information Law. That provision states 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;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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, final agency policy or determinations or ex-

ternal audits must be made available, unless a different ground for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Factual information found within internal documents, for example, might be available to the Board, again, after the deletion of identifying details to protect privacy.

Another ground for denial of potential significance is section 87(2)(e), which permits an agency to 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."

Some of the records in which the Board may be interested might be characterized as having been compiled for law enforcement purposes. However, the authority to withhold under section 87(2)(e) is dependent upon the effects of disclosure, i.e., the extent to which disclosure of records compiled for law enforcement purposes would interfere with an investigation.

I point out, too, that in a situation in which an allegation has resulted in the issuance of a written reprimand, disciplinary action, or a finding that an officer has engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [Powhida v. City of Albany, Supreme Court, Albany County, May 20, 1988; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25 1981; Sincropi v. County of Nassau 76 Ad 2d 838 (1980)].

In short, while the Board cannot compel the Police Department to disclose "complete information" relative to complaints, it is likely that certain records, or perhaps portions of records, would be accessible to the Board pursuant to the Freedom of Information Law.

Further, the Freedom of Information Law is permissive; although an agency may withhold records in conjunction with the grounds for denial listed in section 87(2) of the Law, there is no requirement that records must be withheld. As stated by the Court of Appeals, "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)]. As such, the Police Department may disclose records to the Board, acting in the performance of its official duties, even though the records might justifiably be withheld from the public under the Freedom of Information Law.

Your second area of inquiry pertains to the Open Meetings Law. It is noted initially that, like the Freedom of Information Law, the Open Meetings Law is permissive. A public body may, under certain circumstances, exclude the public from its meetings by conducting an executive session; however, a public body is not required to hold an executive session even when it has the authority to do so. In addition, prior to entry into an executive session, a public body must accomplish a procedure during an open meeting. 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 of areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys."

Consequently, a motion to enter into an executive sessions must be carried by a majority vote of the Board's total membership, i.e., eight affirmative votes among the fifteen members of the Board.

With respect to the authority to conduct an executive session, I agree with Mr. McArdle's contention that executive sessions could appropriately be held to discuss complaints against police officers. 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, promo-

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

From my perspective and as inferred by Mr. McArdle, section 105(1)(f) is generally intended to protect personal privacy and to enable members of public bodies to speak freely and in private about a public employee, for example, so as not to infringe upon the employee's privacy or unnecessarily interfere with the deliberative process.

If the goal is to protect privacy, and if the Board obtains information without personally identifiable details, there may be no harm that would arise as a result of public discussion. Nevertheless, the Board could, in my view, conduct an executive session, even if the information it receives does not include identifying details.

As I understand your questions, as a condition of disclosure of "any information relating to an internal investigation", the Board has been informed that it "must" hold an executive session. As indicated earlier, under the Open Meetings Law, a public body may hold an executive session to the extent permitted by section 105(1). Nevertheless, a public body is not obligated to do so. However, in the context of your question, while the by-laws and constitution "agreed upon" by the City and the Freedom of Information Law might require that some information be disclosed to the Board, complete or detailed information is not required to be made available under the agreement, and many aspects of the records could likely be withheld under the Freedom of Information Law. As such, although the Board is not required by the Open Meetings Law to conduct executive sessions, the holding of closed sessions might, under the circumstances, serve as the only means by which the Board can obtain information sufficient to carry out its duties.

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: Vincent J. McArdle, Jr., Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1557

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

November 4, 1988

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

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 Mrs. Lavoie:

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

According to your letter, at a recent meeting of the Dover Town Board, the Board entered into an executive session "to discuss personnel matters". You added that you were "told the matters discussed while the board was in executive session were the comments made by planning board member/s during meetings regarding the master plan update insofar as those comments would result in legal action against the town board. Also discussed was the turning over of the proposed updated master plan to the planning board for their review".

You have questioned the propriety of the executive session and asked "what the public's recourse is to the conduct of improper executive sessions". In this regard, I offer the following comments.

First, 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:

> "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 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.

Second, it is noted that 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. Therefore, only to the extent that a discussion focuses upon a "particular person" in conjunction with one or more of the topics listed in section 105(1)(f) would an executive session be properly held under that provision. A discussion of forwarding a proposed matter plan to the Planning Board would not, in my view, constitute an appropriate subject for discussion in an executive session.

Further, 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.

Third, 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 bearing its strategy to its adversary through mandatory public meetings" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983); 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)].

In view of the foregoing, I believe that an executive session held pursuant to section 105(1) is restricted to discussions of litigation strategy.

Lastly, in terms of recourse, section 107(1) of the Open Meetings 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."

In my opinion, preferable to a lawsuit would be an increased familiarity with the Open Meetings Law on the part of members of public bodies. With better knowledge of the Law, compliance can be enhanced.

I hope that 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 Dover
Margay Ferguson
Peter Forman, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1558

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

December 2, 1988

Frederic Johnson, Alderman
City of Little Falls
Common Council
659 E. Main Street
Little Falls, NY 13365

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 Alderman Johnson:

I have received your letter of November 10 in which you raised questions concerning the Open Meetings Law.

You wrote that "the City of Little Falls has a one-party Council and a Mayor of the same political party". Your questions are whether "that group [may] meet as a political caucus to discuss anything they wish and is this group also allowed to meet at City Hall?"

In this regard, since its enactment, the Open Meetings Law has exempted political caucuses from its coverage. Further, based upon an amendment to the Law enacted in 1985, 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, the City Council and the Mayor could in my view conduct a closed political caucus to discuss the subjects of its choice. Moreover, I know of no provision that would preclude a political caucus from being held in a city hall.

It is noted that, prior to the 1985 amendment, several courts held that the exemption concerning political caucuses applied only to discussions of political party business and that a gathering of a majority of a legislative body to discuss public business constituted a meeting subject to the general requirements of the Open Meetings Law, even if those in attendance represented a single political party [see e.g., Sciolino v. Ryan, 431 NYS 2d 664, aff'd 81 AD 2d 475 (1981)]. Further, despite the capacity to hold political caucuses in private authorized by the 1985 amendment, many legislative bodies have acted to revoke their authority to discuss public business in private political caucuses.

I hope that I 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-1559

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

December 5, 1988

Hon. Ronald E. Wilson, Mayor
Hon. Andrea Seamans, Clerk
The Village of Port Byron
Port Byron, NY 13140

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 Wilson and Clerk Seamans:

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

You have raised a series of issues relating to the Code of Ethics adopted by the Town of Mentz, as well as its Board of Ethics. It is noted in this regard that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law and the Open Meetings Law. While some aspects of the issues raised involve those statutes, others are outside their scope.

The first area of inquiry concerns the sufficiency of the Town's Code of Ethics, and the propriety of the Town Supervisor serving on the Board of Ethics. While I have neither the authority nor the expertise to assess the sufficiency of the Code, as you may be aware, Article 18 of the General Municipal Law (sections 800-809) pertains to conflicts of interests of municipal officers and employees. Section 808, which deals specifically with boards of ethics, indicates that at least one member of the board of ethics must be an elected or appointed officer of the municipality. As such, it would apparently be proper for a town supervisor to serve as a member of a town board of ethics.

Second, you asked whether meetings of a board of ethics are subject to the Open Meetings Law. In my view, a board of ethics is a public body required to comply with the Open Meetings Law. The scope of the Open Meetings Law is determined in part by section 102(2), which defines "public body" to mean:

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

A town board of ethics in my view is subject to the Law, for it is created by a town board, it consists of at least two members, it may conduct its business only by means of a quorum (see General Construction Law, section 41), and it conducts public business and performs a governmental function for a public corporation, a town. Further, the definition makes specific reference to committees, subcommittees and "similar" bodies.

Second, although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally be conducted open to the public, section 105(1) of the Law lists eight grounds for entry for entry into executive session.

Relevant to your inquiry is section 105(1)(f) of the Law, which permits a public body to enter into an executive session to discuss:

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

If the issue before a board of ethics involves a particular person in conjunction with one or more of the subjects listed in section 105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, section 105(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

Further, the Law prescribes a procedure that must be accomplished by a public body during an open meeting before conducting 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..."

While a motion for entry into an executive session must describe the subject to be discussed, I do not believe that there is a requirement that the motion specify the issues with particularity or identify the individual who might have raised an issue before the board.

In a related area, "if the person being discussed wishes to have the questions and investigation public", you asked whether a board of ethics must honor such request. Despite the wishes of the subject of an inquiry, if a public body has the authority to enter into an executive session, I believe that it may do so. However, it is noted that public body may choose to discuss an issue in public, even when it has the authority to enter into an executive session.

Lastly, it appears that an issue before the Board of Ethics involved the Town Supervisor, who serves on the Board. A letter to the Board submitted on behalf of the Concerned Citizens for a Better Government suggests that the Supervisor's participation was, under the circumstances, improper, for "He cannot be his own judge". While that issue is outside the scope of the Committee's jurisdiction, I have been informed that similar situations may be described in opinions prepared by the Attorney General. To obtain those opinions, it is suggested that you contact Mr. James Cole, Department of Law, Opinions Bureau, The Capitol, Albany, NY 12224. Mr. Cole can be reached by phone at (518) 474-3429.

I hope that I 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 Ethics, Town of Mentz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1560

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

December 7, 1988

Carol A. Philippi, Councilwoman
Elizabeth E. Heller, Councilwoman
Town of Sand Lake
Box 273
Sand Lake, New York 12153

Ms. Catherine E. Bradley
[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, unless otherwise indicated.

Dear Councilwomen Philippi and Heller, and Ms. Bradley:

I have received your letters, each of which deals with a gathering during which three members of the Sand Lake Town Board met with the owner of a parcel of real property to discuss the possible sale of the property to the Town.

Ms. Philippi has objected to the gathering because she and another member of the Town Board were not given prior notice of the gathering, which occurred at the home of a person she charcterized as the "Planner/Developer". Further, Ms. Philippi contended that, during the meeting, the owner of the property "received an offer...from those Town officials in attendance and made a commitment to take the property off the market for several weeks". Based upon the foregoing, she has contended that "the meeting in question was illegal and the outcome of such a session is therefore not legally binding."

Ms. Heller disputed the facts described by Ms. Philippi and wrote that "The alleged 'meeting' was actually an informal get together at the invitation of a disinterested third party, (the planner-developer) which resulted in the exchange of ideas and information concerning a piece of property and its potential use..." by the Town. She added that "No business was transacted nor was any commitment made...".

Ms. Bradley, the person described as the "Developer/ Planner", indicated that she is not a professional developer, that she has no interest in the parcel in question and that her "only interest was to see the town obtain a parcel to be set aside for the future benefits of the Town...". Ms. Bradley added that "there was no clandestine meeting, nothing more than a gathering, not even a meeting, to present as idea that might be an alternative site for such an important activity, senior citizen housing for the community."

Based upon the letters, 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 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

Third, viewing the situation from a somewhat different vantage point, it is questionable in my opinion whether the Board could have voted or otherwise taken action during the gathering in question, even if such a vote represented a majority of the Board, without first informing all of the 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. Although a majority of the membership of the Town Board was present at the gathering in question, 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 reason-

able 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 might effectively preclude other members from participating in the body's deliberative process, thereby negating the capacity of those members to offer their points of view.

Based upon the letters sent by Ms. Heller and Ms. Bradley, no offer was made and no action was taken. If that is so, there would be nothing to be invalidated. Nevertheless, as I understand the situation, the gathering should, in my opinion, have been conducted in accordance with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5371
OML-AO-1561

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

December 8, 1988

Mr. Vernon P. Husek
[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. Husek:

I have received your letters of November 14, both of which pertain to the Town of Rensselaerville and its Planning Board.

The first letter pertains to a request for copies of minutes of meetings of the Planning Board. Although copies were made available, you were charged a fee of one dollar per photocopy. Further, following a discussion of the matter with Ms. Claire Leber, Chairperson of the Board, she "refused to refund any portion of the overcharge...for the reason that the supervisor advised her against so doing". In the other letter, you wrote that the Planning Board has prohibited the use of cassette tape recorders and cameras at its meeting.

You have requested advice concerning those issues and asked that I share that information with Ms. Leber. In this regard, I offer the following comments.

First, with respect to fees for copies, section 87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation, for instance, establishing a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would permit the assessment of a fee higher than twenty-five cents per photocopy, or a fee that exceeds the actual cost of reproducing records that cannot be photocopied. Moreover, a recent decision confirmed that a fee of more than twenty-five cents per photocopy may be assessed only pursuant to authority conferred by a statute, an act of the State Legislature [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Consequently, unless an act of the State Legislature authorizes the fee in question, the Town, in my opinion, cannot charge more than twenty-five cents per photocopy.

Second, with regard to the use of tape recorders and video equipment at open meetings, it is noted by way of background that 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."

More 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 judicial determination rendered by the Appellate Division, 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.

In an effort to enhance compliance, copies of this opinion will be sent to Ms. Leber and the Town Supervisor.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Claire Leber, Chairperson, Planning Board
Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5385
OML-AO-1562

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

December 14, 1988

Mr. Jerry Wishner
[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. Wishner:

I have received your letter of November 28 in which you complained about a denial of access to minutes of a meeting.

Specifically, you wrote that:

> "At a Pleasantville Public School Board meeting of November 15, 1988, [you] requested the opportunity to inspect school board minutes of November 1, 1988 after they had been introduced as a resolution and passed without modification. [Your] request to inspect this public record was denied."

In this regard, I offer the following comments.

First, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, section 106 of that statute provides 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.

As a general matter, if action is taken during an executive session, minutes reflective of the action, that 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 2d 626 (1982)]. Further, if a public body merely discusses an issue during an executive session but takes no action, there is no requirement that minutes of the executive session must be prepared.

Second, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. 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 have not been approved, 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, I point out that section 89(1)(b) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, section 87(1) requires the governing body of a public corporation, i.e., a school board, to adopt rules and regulations consistent with the Freedom of Information Law and the Committee's regulations. The Committee's regulations include reference to the hours for public inspection and state in relevant part that: "Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business" [21 NYCRR section 1401.4(a)]. Assuming that the District's regulations adopted under the Freedom of Information Law are consistent with those promulgated by the Committee, a request must be accepted during regular business hours. Although the minutes were required to have been prepared and made available by the date that you made your request, it is possible that the Board was not equipped to permit access to the minutes at the time of the meeting, particularly if the meeting was held during the evening, after regular business hours. Nevertheless, I believe that the minutes would have been available for inspection during the day on which the meeting was 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: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1563

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

December 15, 1988

Ms. Dora W. Wittmann
[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. Wittman:

I have received your letter of November 30, which focuses upon a county budget hearing.

According to your letter, Allegany County held a hearing on its tentative budget on the afternoon before Thanksgiving. You wrote that members of the public "were allowed to make comments, but people still wanted some answers. The Budget chairman, finally shut [you] off, calling the meeting to a close, told [you] he had company and was going home, the rest of [you] could talk all night if [you] wanted". You added that, following the hearing, a "Public Works Committee" meeting was held "unannounced".

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Open Meetings Law. Here I point out that the Open Meetings Law does not necessarily apply to a hearing, and that there is a distinction between a meeting and a hearing. A meeting generally involves a situation in which a quorum of a public body convenes for the purpose of deliberating as a body and/or to take action. A public hearing, on the other hand, generally pertains to a situation in which the public is given an opportunity to express its views concerning a particular issue, such as a zoning matter, a local law or, as in this case, a budget proposal.

Since the Open Meetings Law does not directly pertain to a public hearing, I contacted the Office of Local Government Services at the Department of State to learn more about the requirements concerning those hearings. I was informed that, although the public may express its views, there is no requirement that the officials conducting a hearing must answer questions. Further, as a general matter, the courts have held that a reasonable opportunity to be heard must be given to interested members of the public present at a public hearing [see Lamb v. Town of East Hampton, 162 NYS 2d 94, 96 (1957); Rod v. Monserrat, 312 NYS 2d 377, 380 (1970)]. If the hearing was conducted unreasonably, or if persons present were not given an oppor- tunity to offer new information or commentary that had not been expressed by others, it would appear that the adequacy or legality of the hearing could be challenged by means of a proceeding brought under Article 78 of the Civil Practice Law and Rules.

Second, with respect to the meeting of the Public Works Committee, I point out that the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines the phrase "public body" to mean:

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

As such, a governing body such as a county legislature is a public body. In addition, a committee of the county legislature, such as the Public Works Committee, would also constitute a public body required to comply with the Open Meetings Law in all respects.

Further, section 104 of the Open Meetings Law requires that notice of meetings of public bodies, including the Committee in question, must be given to the news media and to the public by means of posting in one or more designated public locations.

As requested, enclosed are brochures dealing with the Freedom of Information Law and the Personal Privacy Protection 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.

cc: Allegany County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5390
OML-AO-1564

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

December 19, 1988

Thomas W. Crucet, Esq.
[redacted]

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

Dear Mr. Crucet:

I have received three letters from you dated December 7. Each deals with the Town of Shandaken, and you have requested an advisory opinion in each.

In the first letter, you wrote that the "Shandaken Town Board, prior to each Town Board Meeting, meets 'informally' downstairs. Such pre-meeting meetings are conducted behind closed doors and the public and the press have been excluded therefrom".

In this regard, I have contacted the Town on your behalf to learn more of the situation. I was informed that the gatherings that you described are not "meetings". Rather, the room downstairs is apparently used by the members "to hang up their coats", and to obtain and individually review materials in preparation for a meeting. If that is so, the "pre-meeting meetings" that you described would not in my opinion be subject to the Open Meetings Law, for they are apparently not held by the members of the Board as a body for the purpose of conducting public business.

I also point out, however, the definition of "meeting" [see 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)]. It is noted, 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. Therefore, if indeed a quorum of the Board convenes for the purpose of discussing public business collectively, as a body, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law in all respects.

The second letter contains an allegation that the Supervisor has failed to respond to a request made on October 21 "for salary information regarding the Town Attorney".

Here I direct your attention to the Freedom of Information Law. With respect to salary information, section 87(3)(b) of the Law requires that each agency shall maintain:

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

As such, the Town is required to prepare and disclose a list that identifies all Town employees and indicates their salaries. Moreover, with respect to payments to legal counsel, I point out that, while the Town may engage in an attorney-client relationship with its attorney, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. If, however, portions of the time sheets, bills or related records contain information that is confidential under the attorney-client privilege, those portions could in my view be deleted under section 87(2)(a) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute" (see Civil Practice Law and Rules, section 4503). Therefore, while some identifying details or descriptions of services rendered in payment records might justifiably be withheld, numbers indicating the amounts expended are in my view accessible under the Freedom of Information Law.

It is also noted that decisions have been rendered under the Freedom of Information Law in which it was held that records indicating payment by a municipality to its attorney are available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., Aug. 20, 1981; Young v. Virginia R. Smith, Mayor of the Village of Ticonderoga, Sup. Ct., Essex Cty., January 9, 1987].

With respect to the alleged failure to respond, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, prescribe time limits within which agencies must 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 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, sections 1401.5(d) and 1401.7(c)].

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)].

In your third letter, you wrote that:

> "The Town Supervisor, at a public hearing concerning the Town's annual budget, required that members of the press wait to ask questions until all the 'public' had first had their opportunity to ask questions and make comments regarding the budget."

The issue does not deal directly with the Open Meetings Law or the Freedom of Information Law. However, I am unaware of any statute that determines the order in which persons are permitted to speak at a public hearing. Further, although members of the public are permitted to express their views at a public hearing, I do not believe that there is any requirement that members of a public body must respond to questions.

I hope that I 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: R. Wayne Gutmann, Town Supervisor
Town Board, Town of Shandaken

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5397
OML-AO-1565

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

December 21, 1988

Thomas W. Crucet, Esq.
[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, unless otherwise indicated.

Dear Mr. Crucet:

I have received four letters from you dated December 9. You have requested an advisory opinion with respect to each. The circumstances described in your letters appear to pertain to the Town of Shandaken.

In the first letter, you asked whether a town board may "conduct unannounced 'executive session meetings' where there was no formal motion or vote to conduct such 'executive session meetings'". In this regard, 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. As such, an executive session is not separate and distinct from an open meeting, but rather is a part of an open meeting. Section 105(1) of the Law prescribes a procedure that must be accomplished by a public body, during an open meeting, before it may enter into an executive session. Specifically, 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..."

The ensuing provision specify and limit the topics that may appropriately be discussed during an executive session. As such, a public body may not enter into an executive session to discuss the subject of its choice; on the contrary, unless the subject matter falls within one or more of the topics listed in paragraphs (a) through (h) of section 105(1) of the Law, a public body would not have the authority to conduct an executive session.

The second letter also involves the Open Meetings Law. Specifically, you asked whether it is "proper for a Town Board to terminate their official Town Board Meeting, close the minutes, and intentionally go 'off the record' before permitting questions and comments by the public". I have contacted the Town to elicit additional information on the matter and have learned that the Supervisor generally announces at the beginning of a meeting that the Board will complete discussion and/or action based upon its agenda and thereafter permit public participation. As such, an opportunity to speak is offered following the completion of matters scheduled on the agenda.

With respect to being "off the record", I point out that the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. With respect to minutes of open meetings, section 106(1) of the Open Meetings Law states that:

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

As such, it is clear that minutes need not consist of a verbatim account of statements made during meetings. Similarly, the minutes need not include reference to comments made by the public at the end of meetings. Therefore, if the notion of going "off the record" means that minutes are not taken when questions and comments are made by the public, I do not believe that the minutes are required to include reference to those matters.

It is noted, too, that the Open Meetings Law is silent concerning the authority of the public to speak or otherwise participate at meetings. Therefore, while a public body may permit public participation during meetings, there is no requirement that it must.

In your third letter, you wrote that the Town Supervisor has failed to respond to your request for the names and addresses of members of the Town Board, the Planning Board and the Zoning Board of Appeals. While records identifying the members of those boards are clearly public, section 89(7) of the Freedom of Infor-

mation Law provides in part that nothing in that statute requires the disclosure of the home address of a public officer or employee. However, since members of the Town Board are elected (rather than appointed, as in the case of the other boards), I believe that their home addresses would be available through election records, and that, therefore, there may be no reasonable basis for the Town to withhold their home addresses.

In your last letter, you asked whether the Town Supervisor, in his capacity as budget officer, may "fail to file a copy of a tentative budget and/or purported preliminary budget with the Town Clerk until the very day of the required Public Hearing...". In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws, and the question does not pertain to those statutes. I believe, however, that sections 106 through 109 of the Town Law deal with the town budget process.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Supervisor Gutmann

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5401
OML-AO-1566

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

December 28, 1988

Councilman Gary L. Rhodes
Town of Henderson
RR 1 Box 668
Henderson, NY 13650-9715

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 Councilman Rhodes:

I have received your letter of December 8, as well as the materials attached to it, and tape recordings of the proceedings of the Henderson Town Board.

According to your letter, in your capacity as a member of the Town Board, you have experienced difficulty in obtaining reports from the Supervisor that are sent to the Town. You also wrote that the Supervisor "has a habit of having meetings in the afternoon which while a notice may or may not be posted on the town hall door, few people are actually aware of the meeting unless they go to the town hall". You added that, as a consequence, "much business is transpired that the taxpayers have little knowledge of and little notice to attend".

In this regard, I offer the following comments.

With respect to access to records, based upon your letter and the tape recordings, the issue pertains tangentially to the Freedom of Information Law. As I understand the situation, it is your desire to be informed with regard to matters in which the Town is or may be informed. To obtain that information, you are attempting to obtain records, as a member of the Board, that come into the possession of the Town and the Town Supervisor. The Freedom of Information Law is the vehicle under which members of the public seek to inspect and copy government records. Although the Law provides brought rights of access to the public, it includes various grounds for withholding [see Freedom of Information Law, section 87(2)]. In this instance, you are not seeking records under the Freedom of Information Law as a member of the

public who might assert a right to know. On the contrary, you are seeking records in your capacity as a member of the Town Board who has a need to know in order to carry out your official duties. In one aspect of the tape, you stated that you do not necessarily know of or when records come into the possession of the Town or its Supervisor. In the same exchange, the Supervisor said that you "get what's pertinent".

From my perspective, resolution of the issue may be reached based upon the provisions of the Town Law rather than the Freedom of Information Law. While I am not an expert with respect to the Town Law, I point out that section 29 describes the powers and duties of the Supervisor. Also relevant is section 30, which states in part that the Town Clerk "Shall have the custody of all the records, books and papers of the town". Therefore, in my view, the Clerk is the legal custodian of Town records. Further, section 64 of the Town Law describes the powers of town boards. Subdivision (3) states that the Board as a whole, not the Supervisor individually, "Shall have the management, custody and control of all...property of the Town". In short, on the basis of the Town Law, it appears that you and other board members have the same general rights of access to Town records as the Supervisor.

With respect to meetings and notice of meetings, the Town Supervisor, if I heard the tape correctly, stated that notice should be posted "and/or given to the news media". In my opinion, the Open Meetings Law requires that notice be posted, and in addition, it must be given to the news media prior to meetings. Specifically, section 104 of the Open Meetings Law 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."

Reference was made in the tape to special meetings. In this regard, the section of the Town Law dealing with special meetings deals with notice to the members of the Town Board; those requirements are different from and unrelated to the notice requirements imposed by the Open Meetings Law. Section 62 states in relevant part that:

> "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to members of the board of the time and the place where the meeting is to be held."

In view of the foregoing, it is reiterated that notice requirements concerning special meetings pertain to members of town boards. Separate are the requirements of the Open Meetings Law, which directs that notice be given to the news media and to the public by means of posting prior to meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Henderson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1567

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

December 28, 1988

Ms. Irene Mosvold
[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. Mosvold:

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

The beginning of your correspondence consists of a transcription of a portion of a meeting of the Cobleskill Board of Education. The transcription appears to indicate the end of a public comment period, which was followed immediately by a motion to enter into an executive session. The motion was made "for the purpose of the discussion of personnel". Although you suggested that the motion was insufficient, it was carried. You have asked that I "address the manner in which this Board goes into executive session".

In this regard, I offer the following comments.

I point out initially that 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 prescribes a procedure that must be accomplished 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..."

As such, an executive session is not separate and distinct from an open meeting, but rather is a part of an open meeting from which the public may be excluded. In addition, it is clear that a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

Further, under the Open Meetings Law as originally enacted, the so-called "personnel" exception for executive session differed from the language of the analogous 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 that might relate to personnel indirectly or as a group.

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 <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 conducted 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.

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..." [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; please note that the Open Meetings Law was renumbered after Doolittle was decided].

Based on the foregoing, it has been advised that a motion to enter into executive session under section 105(1)(f) should indicate that the discussion will involve a particular person in conjunction with one or more of the topics listed in that provision. As such, a proper motion might be: "I move to enter into executive session to discuss the employment history of a particular person" (without naming the person).

In terms of a motion to enter into an executive session held pursuant to section 105(1)(e), which pertains to collective bargaining 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, supra].

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.

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].

The next aspect of your correspondence refers to what appears to be the text of a statement that you read or intended to read at a Board meeting. In that letter, you referred to a conversation with a Mr. Shevat, who contacted you "to meet with some Bd members informally...not publicly". In this regard, as a general matter, it has been held that a gathering of a quorum of a public body for the purpose of conducting public business

constitutes a meeting subject to the Open Meetings Law, even if it is characterized as "informal", and irrespective of an absence of intent to take action [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NYS 2d 947 (1978)]. Any such meeting must be preceded by notice and convened open to the public. If a topic arises that may properly be considered during an executive session, a motion to enter into an executive session may be made at that time. If less than a quorum of a public body is present, the Open Meetings Law would not be applicable.

Lastly, you wrote that you "have been scolded for the use of the tape recorder". Although neither the Open Meetings Law nor any other statute deals specifically with the issue, judicial decisions indicate that a public body cannot prohibit the use of hand held tape recorders at open meetings [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985) and People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 509 (1979)].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education