STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5410
OML-AO-1568

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January 3, 1989

Ms. Dorothy F. Crawford

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. Crawford:

I have received your letter of December 14 and the material attached to it.

Your inquiry focuses on a resolution adopted by the Town Board of Schuyler Falls in which the Board resolved "that the Town Clerk will not make copies of the taped recordings of Town Board meetings unless specifically ordered to do so by the Courts".

You have questioned the propriety of the resolution and raised a series of related questions. In this regard, I offer the following comments.

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)].

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.). If an individual seeks to listen to or make a copy of a tape recording with his or her own tape recorder, I do not believe that a fee could be charged.

Second, you indicated that meetings are recorded "on a special tape recorder...which records at a lower speed than normal...". As such, you wrote that: "This makes it difficult for a resident to even listen to one of the Town Board meetings on tape unless the Town tape recorder is also used". You pointed out further that, due to the use of the special tape recorder, "tapes can not be played on a regular tape recorder". In conjunction with those factors, you asked whether the records access officer should enable people to listen to a tape by using the "special town tape recorder". In my opinion, the Freedom of Information Law is intended to ensure meaningful access to records. If the use of the Town tape recorder represents the only method of providing meaningful access, the records access officer should, in my opinion, permit its use.

Third, assuming that the resolution conflicts with the Freedom of Information Law, you asked for advice concerning "the appropriate manner in which to address this matter". In this regard, in an effort to advise, educate and persuade, copies of advisory opinions are sent to agencies involved in issues arising under the Freedom of Information Law. To attempt to do so, a copy of this opinion will be sent to the Town Board. If the Board remains unconvinced by the foregoing, a proceeding under Article 78 of the Civil Practice Law and Rules could be initiated.

However, there may be another solution to the problem. Although the Open Meetings Law is silent concerning the use of tape recorders at meetings, the courts have held that members of the public may use their own tape recorders to record open meetings of public bodies.

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.

In my opinion, since the Board uses a tape recorder at meetings, it could not effectively be contended that the use of portable cassette recorders by others would affect the deliberative 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
Executive Director

RJF:jm

cc: Town Board, Town of Schuyler Falls

STATE OF NEW YORK
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OML-AO-1569

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 3, 1989

Ms. Debra Albright
Coordinator
Kingston Urban Cultural Park
Visitors Center
308 Clinton Avenue
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. Albright:

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

Your inquiry concerns the authority of the City of Kingston Urban Cultural Park Commission to conduct executive sessions in conjunction with certain circumstances, which you have described as follows:

> "- Kingston is in line for monies from the Environmental Quality Bond Act, for the development of an Urban Cultural Park Visitor Center in the historic Rondouut area.
> - The Urban Cultural Park Commission is currently investigating both parcels of land and existing structures as possible sites for the proposed Visitor Center.
> - The Commission will be holding meetings in the next several months, in-order to discuss the the proposed acquisition or sale of real property, for this particular project.

> - The Commission believes that publicity could affect the value of certain properties, and therefore believes that holding "executive sessions" are appropriate."

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 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."

Assuming that the Urban Cultural Park Commission was created by the City Charter or by means of an enactment of the City Council, for example, I believe that it would constitute a "public body" subject to the requirements of the Open Meetings Law.

Second, every meeting of a public body must be preceded by notice given to the news media and to the public by means of posting (see Open Meetings Law, section 104). Further, the Open Meetings Law is based upon a presumption of openness; meetings must be conducted open to the public, except when the subject matter under consideration may be discussed during an executive session. An executive session is defined in section 102(3) of the Law to mean a portion of an open meeting during when the public may be excluded. It is noted, too, that a public body must accomplish a procedure, during an open meeting, before it 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..."

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 4, 1989

Mr. Gerard J. Snyder
Sullivan & Snyder
8 South Main Street
P.O. Box 146
Dolgeville, NY 13329

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. Snyder:

As you are aware, I have received your lengthy and thoughtful letter of December 23, as well as the news articles attached to it.

Your letter pertains to a meeting held by the Town Board of the Town of Oppenheim on December 20 and the report of the meeting published in the Gloversville Leader-Herald the following day. The meeting was scheduled to begin at 7 p.m. to discuss various "personnel problems" concerning the Town's elected Superintendent of Highways, as well as "the auditing of town books". At approximately 7 p.m., all of the members of the Town Board, the Highway Superintendent and his attorney were present. You arrived approximately five minutes later. You wrote that:

> "According to the Supervisor, prior to the opening of the meeting, one Wilma Stowell, wife of the Superintendent of Highways, and her sister-in-law, Audrey Stowell, entered the Town Board's regular meeting room, pulled out a couple of chairs and sat down for the meeting. The Supervisor approached these two town residents and politely informed them that the general purpose of the meeting was to discuss personnel matters (Charles B. Stowell) which was noticed extensively at prior board meetings and in legal notices appearing

> in the local newspapers. As a practical matter, the Board would be resolving to go into Executive Session almost immediately after calling the meeting open. As a result, both Wilma Stowell and Audrey Stowell were encouraged to wait outside and they did so. In fact, the Supervisor noticed the beginning of the meeting as an anticipated Executive Session to discuss personnel matters so that the public would be aware of same and would not have to wait outside in the cold for the Executive Session to conclude."

You pointed out that, when you arrived, two others were present, a resident of the Town and a reporter for the Evening Times.

When you entered the meeting room, the Supervisor requested that a motion be made to enter into executive session to discuss the personnel issues involving the Superintendent. In this regard, you wrote that:

> "At this time [you were] thinking whether or not the public was aware that they had the right to be present for the initial portion of the meeting to hear the resolution calling for the Executive Session. Having seen no attempt by any resident to gain entry into the Town Hall...[you] presumed that the public was aware that they were welcome to be present for this short and brief portion of the public meeting. [You], therefore, did not interrupt the Town Board to inquire as to whether or not the public had been denied access to this portion of the meeting."

You indicated further that:

> "Upon information and belief, some time after the Board moved to go into Executive Session, the Town Clerk posted a sign on the inside of the glass door (entry into the Town meeting room) indicating that there was an Executive Meeting in session. In view of the length of the anticipated Executive Session, which in fact, lasted two and a half hours, more or less, and the number of parties involved, the Town

> Board made a decision to hold the Executive Session in the regular meeting room portion of the Town Hall where there was a table and chairs available and sufficient lighting rather than the traditional Executive Session meeting room which is in the boiler room in the back of the regular meeting room hall. That traditional Executive Session meeting room is quite cramped, dark, has no table or chairs and is quite noisy when the boiler kicks on. [You] believe the Town Board's decision to conduct its Executive Session in the regular town meeting room was appropriate under the circumstances."

Following the executive session, the Board resolved the personnel matter by voting in public to reinstate the Superintendent at the salary level previously budgeted and appropriated.

Two days after the meeting, the Town Supervisor contacted you concerning an article critical of the Board's compliance with the Open Meetings Law that appeared in the Leader-Herald. According to your letter, the wife of the Superintendent of Highways and her sister-in-law made a complaint to a Leader-Herald reporter, Ms. Jennifer R. Wilson. Ms. Wilson, who later contacted me, was apparently told by Mrs. Stowell that "she and 20 Town residents were denied access to the Town meeting room prior to the Board's decision to go into Executive Session". You indicated that Ms. Wilson was not present for that portion of the meeting and that, upon information and belief, "only relied upon what Mrs. Stowell had informed her in a telephone conversation the following day". You also wrote that Ms. Wilson apparently "chose not to contact the Supervisor to attempt to clarify the matter".

The news article, which questioned the legality of the meeting, was in your opinion based upon a "misunderstanding and misinformation" provided to the author of the article. As a consequence, the "credibility" of the Town Board has been "jeopardized", despite its intent to comply with the Open Meetings Law.

You have requested my opinion concerning the legality of the meeting.

In this regard, I offer the following comments.

First, I hope that you and others recognize that my comments, whether made in response to an inquiry by a reporter, a government official or a member of the public, are offered in good faith based upon the facts provided to me. In this instance, I responded to a series of questions raised by Ms. Wilson concerning the meeting.

Second, as suggested by the facts as you described them and the versions of the same event described in newspaper articles, it is difficult to know what occurred at a meeting unless a person is actually present at the meeting. Depending upon one's presence at a meeting, or perhaps even the perceptions of those who might have attended, there may be a variety of versions of what may be characterized as "facts".

Based upon your version of the facts, it appears that any inconsistencies with the Open Meetings Law likely occurred inadvertently and as a result of unusual circumstances.

With respect to the requirements of the Open Meetings Law, as you are aware, the Law requires that meetings be convened open to the public. Further, prior to entry into an executive session, the Law requires that a procedure be accomplished during an open meeting. 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..."

Based upon the foregoing, it has been advised that, in a technical sense, a public body cannot "schedule" an executive session in advance of meeting, for a motion to conduct an executive session must be made and carried during an open meeting. Nevertheless, I believe that, as you suggested, a public body that is familiar with its agenda may "anticipate" that an executive session will likely be held. In terms of the rationale for the procedural requirements of section 105(1), I believe that they are intended to ensure that executive sessions are not separate and distinct from open meetings and that such sessions are not secretly held; the procedure, in my view, is also intended to inform the public that an executive session will be held for a reason consistent with the permissible grounds for entry into executive session listed in paragraphs (a) through (h) of section 105(1).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jennifer Wilson, Gloversville Leader-Herald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5416
OML-AO-1571

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 6, 1989

Ms. Beatrice Parker

The staff of the Committee on 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. Parker:

I have received your letter of December 21, as well as the materials attached to it.

Your letter focuses upon the inability of the public to gain access to various records maintained by the Town of Gardiner Planning Board. You indicated that minutes of meetings of the Planning Board are often not approved for months and that tape recordings of meetings are destroyed "as they are transcribed". It is your view, however, "that tapes should be kept available to the public in lieu of minutes, when the latter are so long delayed". In addition, one of the enclosures is a letter addressed to Town personnel by Ken Tenedini, Chairman of the Planning Board, in which he indicated that the Planning Board "has determined that [its] files will only be available to the public through the Recording Secretary". He also wrote that: "An appointment may be made at the convenience of both parties to review the files, at which time only one folder at a time will be present."

In this regard, I offer the following comments.

First, with respect to minutes, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, section 106 of the Open Meetings Law pertains to minutes and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear that minutes need not consist of a verbatim transcript of the entire discussion at a meeting, but rather only "a record or summary" of "motions, proposals, resolutions and any other matter formally voted upon..." Therefore, when 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 reflect the nature of the discussion. Further, minutes of executive sessions are required to be prepared only when action is taken during an executive session.

It is also clear that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Although many public bodies, as a matter of practice or policy, approve their minutes, there is no requirement that minutes must be approved. In those situation in which a public body seeks to approve its minutes, but cannot do so within two weeks, to comply with law, it has consistently been advised that minutes be prepared and made available within the appropriate time period and that they be marked "unapproved", "non-final" or "draft", for example. By so doing, the public can learn generally what transpired at a meeting; concurrently, notice is effectively given that the minutes are subject to change.

Second, while a tape recording would likely contain the elements of minutes, I believe that minutes should be reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, the Town might need a permanent written record readily accessible to Town officials who must refer to or rely upon the minutes in the performance of their duties. Moreover, in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280). As such, I do not believe that tape recordings of meetings constitute a valid substitute for written minutes.

Third, with regard to access to tape recordings, I direct your attention to the Freedom of Information Law, which is applicable to all agency records. Section 86(4) of the Law defines the term "record" expansively to include:

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

Since the tape recordings are produced by and for the Town, I believe that they constitute "records" subject to rights of access.

With respect to rights of access, 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 my view, a tape recording of an open meeting is accessible, for none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, October 3, 1983].

It is noted, too, that there are laws and rules dealing with the retention of records. Specifically, pursuant to section 57.25 of the Arts and Cultural Affairs Law, the Commissioner of Education is authorized to adopt regulations that include reference to minimum periods of time that records must be retained by local governments. That provision also specifies that a local government cannot "destroy, sell or otherwise dispose of" records, except in conjunction with a retention schedule adopted by the Commissioner, or without the Commissioner's consent. Having contacted the Education Department on your behalf, I was informed that tape recordings of meetings must be retained for a period of four months after transcription and/or approval of minutes.

Lastly, I do not believe that the Planning Board has the authority to adopt a directive or rules concerning access to its records. Section 87(1) of the Freedom of Information Law indicates that the governing body of a public corporation, in this instance, the Town Board, is required to adopt uniform rules and regulations applicable to all agencies of the Town, including the Planning Board, to implement the procedural requirements of the Freedom of Information Law. Further, those procedures must be consistent with the Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401).

In a related area, although the Recording Secretary of the Planning Board may have physical possession of certain records, section 30(1) of the Town Law states in part that the town clerk: "Shall have the custody of all the records, books and papers of the town". Therefore, while the Recording Secretary may have physical custody of Planning Board records, I believe that the Town Clerk maintains legal custody of all such records.

Additionally, the regulations promulgated by the Committee on Open Government describe the duties of the designated records access officer, who is apparently the Town Clerk. Specifically, section 1401.2 of the regulations provides in relevant part 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 personas as records access officer by name or by specific job title and business address, who shall have t he 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 promptly available for inspection; or
(ii) deny access to the records in whole or in part and explain in writing the reasons therefore.

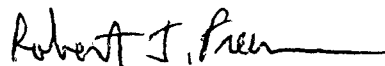
(4) Upon request for copies of records:

(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the request to copy those records..."

In view of the foregoing, the Town Board is responsible for ensuring compliance with the Law, and the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests. Therefore, in the Clerk's capacity as records access officer and custodian of Town records, I believe that he or she has the duty of ensuring that responses to requests are made in accordance with the law, irrespective of who maintains physical custody of the records sought. Stated differently, even though the Planning Board's Recording Secretary physically possesses the records, the town clerk, as records access officer, must, in my view, when necessary to do so, obtain the requested records from the recording secretary or ensure that the recording secretary provides records in order to comply with a request. I point out that it has been held judicially that there is no requirement that town records must be kept in town offices, so long as provisions are made to guarantee that the records are accessible to the public as required by the Freedom of Information Law [see Town of Northumberland v. Eastman, 493 NYS 2d 93, (1985)].

I hope that I 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 Gardiner
Ken Tenedini, Chairman, Planning Board

STATE OF NEW YORK
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 10, 1989

Mr. Timothy Atseff
Managing Editor
Syracuse Herald-Journal/
Herald American
Clinton Square
P.O. Box 4915
Syracuse, NY 13221-4915

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. Atseff:

I have received your letter of December 21, as well as the materials attached to it.

Your inquiry concerns a gathering of the Onondaga County Ethics Committee. The Committee consists of five members of the County Legislature and was designated by the County Legislature. You wrote that the Committee was scheduled to meet at 8:30 on the morning of December 14. Although some members arrived earlier, soon after 8:30, it was clear that three of the five members were present and were conferring behind closed doors. A reporter knocked on the door, which was opened on "a crack", and asked "something like, 'is this a caucus'?" In response, the "legislator behind the door shrugged and then closed the door again". Soon thereafter, you knocked on the door, stating that there was a quorum, and asked whether "it was a caucus or a meeting". You were told that it was an "organizational meeting". You apparently contended that the Ethics Committee could not hold an executive session without first convening an open meeting. During the time described, the two minority members of the Committee "stood outside and complained about the closed-door meeting".

After legislators were in the room for approximately 20 minutes, you were told that they wanted to discuss the issue of a possible conflict of interest on the part of one of the Committee members to lead the Committee. One of the legislators "explained it away as a discussion of 'possible litigation'".

In this regard, I offer the following comments.

First, a committee of a county legislature is, in my view, clearly a public body that is required to comply with the Open Meetings Law. 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 on the foregoing, the Open Meetings Law is applicable not only to a governing body such as the County Legislature, but also to committees or subcommittees of the County Legislature, such as the Ethics Committee.

Second, the term "meeting" has been construed broadly by the courts. In a landmark decision rendered some 10 years ago, the Court of Appeals confirmed 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, 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, 45 NYS 2d 947 (1978)].

Third, every meeting must be preceded by notice of the time and place of a meeting. Subdivision (1) of section 104 of the Open Meetings Law pertains to meetings scheduled at least a week in advance and requires that notice of such meetings must be given to the news media (at least two) and posted in one or more designated public locations not less than 72 hours prior to those meetings. Subdivision (2) of section 104 pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and posted in the same manner described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. The usual method of compliance with the notice requirements for meetings that must be convened quickly involves contacting the news media by phone and posting notice in one or more of the locations designated for posting.

Further, every meeting must be convened as an open meeting. It is emphasized 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. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings 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) 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 of section 105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

With regard to "possible litigation", the provision concerning the "litigation" exception for executive session is section 105(1)(d) of the Open Meetings Law. 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.

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].

Lastly, I do not believe that the situation that you described could have been characterized as a "caucus", or that the provision in the Open Meetings Law pertaining to political caucuss would have applied. As you are aware, section 108(2) of the Open Meetings Law exempts "deliberations of political committees, conferences and caucuses" from the Law. If a matter is exempt from the Law, none of the requirements discussed previously, i.e., regarding notice or the procedural requirements for entry into an executive session, would apply. However, section 108(2)(b) states in relevant part that:

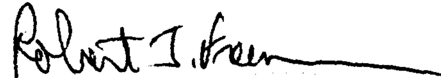
> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York

> or the legislative body of a county, city, town or village, who are members or adherents to the same political party..."

In my view, the exemption concerning political caucuses applies to "the legislative body" of a county, i.e., the County Legislature. The language of section 108 does not refer to a committee of a legislative body, such as the Ethics Committee. Since section 108 is inapplicable, I do not believe that the Ethics Committee could have conducted a closed political caucus, irrespective of the political party affiliation of those who were present at the gathering in question. On the contrary, since the gathering was scheduled for 8:30, once a quorum, three of its five members, were present, I believe that the gathering constituted a meeting subject to the Open Meetings Law in all respects.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Onondaga County Ethics Committee

STATE OF NEW YORK
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FOIL-AO-5427
OML-AO-1573

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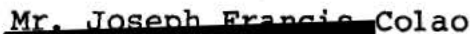
January 17, 1989

Mr. Joseph Francis Colao



<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. Colao:

I have received your letter of December 26 in which you allege that the Board of Trustees of the Village of Pine Valley has disregarded the provisions of open government laws.

In good faith, it is noted that I have received a letter concerning your correspondence from Mr. Steven M. Schapiro, special counsel to the Village. According to his letter, your letter represents and effort "to set forth political grievances" that you have regarding the Board. Further, Mr. Schapiro wrote that, to the best of his knowledge, none of your allegations "have any factual basis".

Obviously, without having been present at the Board's meetings, I have no personal knowledge of the manner in which the Board has carried out the requirements of the Open Meeting and Freedom of Information Laws. As such, I offer the following general comments for purposes of clarification and education.

First, 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 <u>Orange County</u>

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 cited above dealt with so-called "work sessions" and held that those sessions are "meetings" subject to the same requirements as those gatherings that might be characterized as "formal" or "official", for example.

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. There is nothing in the Open Meetings Law pertaining to the scheduling of a meeting on a holiday or a Sunday.

Third, the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, section 105(1) of the Open Meetings Law states in relevant part that:

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

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

With regard to minutes of a meeting, section 106 of the Open Meetings Law 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."

In view of the foregoing, if action is taken during an executive session, minutes indicating the nature of the action and the vote, by member, must be prepared within one week of the executive session. Further, they are accessible to the public to the extent required by the Freedom of Information Law. However, if a public body discusses an issue or issues during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

Although the Open Meetings Law is silent with respect to the use of tape recorders, judicial decisions indicate that any person may use a portable cassette tape recorder at an open meeting of a public body [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985); People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979)].

Mr. Schapiro referred to your recent complaint to the effect that you were instructed not to interfere with discussions by Board members during meetings. Here I point out that, although the Open Meetings Law permits any person to attend a

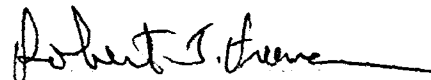
meeting and listen to a public body's discussions and deliberations, nothing in the Law confers a right upon members of the public in attendance to speak or otherwise participate. As such, it has consistently been advised that a public body need not permit the public to speak at meetings or work sessions. If a public body chooses to permit public participation, it may do so, presumably based on reasonable rules that treat members of the public equally.

Lastly, you wrote that the Board has "refused to provide the names of those individuals who are 'working on the village master plan and zoning ordinances'". Here I direct your attention to the Freedom of Information Law. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

If a record exists containing the information in question, I believe that it should be available, for none of the grounds for denial would apparently apply. However, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law provides in part that, as a general rule, an agency need not create a record in response to a request. Therefore, if the information sought does not exist in the form of a record or records, the Village would not be obliged to prepare a new record in response to a request.

I hope that the foregoing serves to provide clarification. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Steven Schapiro
Hon. Mary Petraszewski, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-1574

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 17, 1989

Hon. Harold Sheprow
Mayor
Village of Port Jefferson
121 West Broadway
Port Jefferson, NY 11777

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 Sheprow:

As you are aware, your letter of December 30 addressed to the Office of the State Comptroller has been forwarded to the Committee on Open Government. The Committee is authorized by law to advise with respect to the Open Meetings Law.

According to your letter, you and the Board of Trustees of the Village of Port Jefferson "held a meeting with and at the request of the owner of the Village's designated official newspaper". The owner of the newspaper and his attorney attended the meeting. In conjunction with those facts, you raised the following question:

> "...does the fact that the Board approved the request of the owner of the newspaper constitute notification of a special meeting, as required in the open meetings law?"

In this regard, I offer the following comments.

First, the Open Meetings Law pertains to meetings generally, and there is no provision in the Law that refers to "special meetings".

Second, in terms of notice requirements, the Open Meetings Law distinguishes between meetings scheduled at least a week in advance and those scheduled less than a week in advance. Specifically, section 104(1) pertains to meetings scheduled at least a week in advance and states that:

> "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."

Section 104(2) concerns "every other meeting", i.e., a meeting scheduled less than a week in advance and states that:

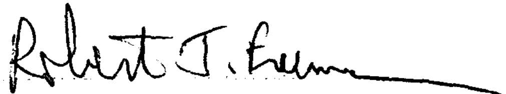
> "Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonably time prior thereto."

Based upon the foregoing, it is emphasized that, in addition to notice to the news media, both provisions require that notice must be "conspicuously posted in one or more designated public locations" prior to meetings. Therefore, in my opinion, if notice of the meeting in question was not posted, the Board would not have fully complied with the Open Meetings Law.

Enclosed for your consideration are copies of the Open Meetings Law and a descriptive 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:jm

Encs.

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 19, 1989

Mr. Dominic P. Tom, Jr.
Schenectady Gazette
332 State Street
P.O. Box 1090
Schenectady, NY 12301-1090

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. Tom:

I have received your letter of January 6, as well as the materials attached to it.

Your inquiry concerns the propriety of executive sessions held by the City of Schenectady's "Board of Residency". The Board was created by local law and exists as part of the City's Code of Ordinances. It consists of three members and has the authority to grant waivers of residency requirements based on the following criteria:

> "(a) the degree of specialization and professionalism required in any given field of employment;
>
> (b) the existence of hardship such as may be determined by the Board".

You have requested an advisory opinion:

> "on the validity of an executive session since the board actually hears the appeals of potential or current employees to having to move into the city as a means of being hired or getting a promotion."

You also asked whether the Board has:

> "the right to meet behind closed doors when they're actually considering a residency waiver of a person, regardless whether they are current or potential employees?"

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 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, since the Board was created by local law, it clearly constitutes a "public body" required to comply with the Open Meetings Law. Viewing the definition of "public body" in terms of its components, the Board is an entity consisting of three members. Section 41 of the General Construction Law, which pertains to quorum requirements applicable to entities consisting of three or more persons or public officers charged with a public duty to be carried out collectively, as a body, would permit the Board to conduct its business only by means of a quorum. Further, the Board clearly conducts public business and performs a governmental function for a public corporation, the City of Schenectady.

Second, the Open Meetings Law requires that all meetings of public bodies be convened open to the public. It is noted, too, that the phrase "executive session" is defined 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; rather it is a portion of an open meeting that may be closed under appropriate circumstances. Moreover, the Law requires that a procedure be accomplished during an open meeting before an executive session may be conducted. 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, with respect to the substance of your inquiry, section 105(1)(f) of the Law permits a public body to enter into an executive session to discuss:

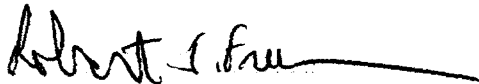
> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Based upon the language quoted above, it appears that the Board may conduct executive sessions to discuss the issues that you described, so long as those issues focus upon a "particular person". In each such instance, it would appear that the Board would consider a "matter leading to the appointment, employment, promotion..." or perhaps the "dismissal or removal of a particular person".

Lastly, in view of the first criterion for authorizing a waiver of the residency requirement, it is possible that the Board might consider such a waiver with respect to a class of employees. If, for example, the Board discusses the granting of a waiver with respect to all persons in a particular job title due to the "degree of specialization and professionalism required" in that field, such a consideration would not focus upon a "particular person", but rather upon any person who might hold such a position. In those instances, I do not believe that there would be a basis for entry into an executive session.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Corporation Counsel, City of Schenectady

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OML-AO-1576

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 24, 1989

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 January 9, as well as the materials attached to it.

Your inquiry deals with a meeting held by the Town Board on January 4 and the discussion of an advisory opinion that I prepared and sent to you on December 28 concerning the Board's implementation of the Open Meetings and Freedom of Information Laws. According to your letter, the Town Supervisor read the opinion silently and then expressed a desire to enter into an executive session "since this deals with personnel". Thereafter, a motion was made, seconded and carried.

You have asked whether, in my view, discussion of the opinion constituted "a legitimate reason to go into executive session". In this regard, I offer the following comments.

First, as you are aware, paragraphs (a) through (h) of section 105(1) of the Open Meetings specify and limit the topics that may appropriately be discussed during an executive session.

Second, the so-called "personnel" exception, section 105(1)(f), permits a public body to enter into an executive session to discuss:

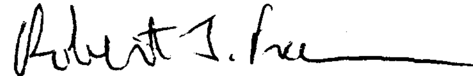
> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employ-

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

Not having been present at the executive session, I have no specific knowledge of what may have been discussed. Nevertheless, assuming that the opinion was the subject of the Board's discussion, I do not believe that a discussion of that letter would have fallen within the scope of section 105(1)(f) or any of the other grounds for entry into executive session.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 24, 1989

Mr. Tim Diltz

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. Diltz:

I have received your letter of January 10, which pertains to the implementation of the Open Meetings Law by the Town Board of the Town of Chester.

According to your letter, the Board held a meeting at 6:30 p.m. on January 3 "to go over the agenda for the regular monthly town meeting held the same night at 7:30 PM". Although the 7:30 meeting "was posted, the 6:30 meeting was not". Upon questioning the Supervisor regarding the posting of notice, he informed you that notice of the earlier gathering was posted, but that "he had taken it down and thrown it away". Nevertheless, you wrote that you were at the Town Hall earlier in the day and saw no notice. You also questioned the propriety of an executive session held during the earlier meeting. Although a motion was made to conduct an executive session, you wrote that no vote was taken. The executive session was apparently held to discuss "salaries". In addition, you referred to another meeting held on January 9 to discuss "personnel". You wrote that notice of the meeting was not posted and that the Town Attorney "tried to tell [you] that it was an informal meeting that [you were] not entitled to attend".

In this regard, I offer the following comments.

First, it is emphasized that the definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open

to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

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

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

Based upon the direction given by the courts, if a quorum of the Town Board convenes to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Second, every meeting of a public body must be preceded by notice of the time and place of the meeting. Section 104(1) of the Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 104(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in section 104(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is reiterated that notice must be provided prior to all meetings, regardless of whether the meetings are considered formal or otherwise.

Third, it is noted that the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, section 105(1) of the Open Meetings Law states in relevant part that:

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

In view of the foregoing, it is clear in my view that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting during which the public may be excluded. It is also clear that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss a subject listed in the Open Meetings Law as appropriate for discussion behind closed doors. Under the circumstances, even if there was a basis for entry into an executive session, the meetings, in my view, should have been preceded by notice and convened open to the public, followed by a motion to go into executive session, indicating the reason and carried by a majority vote of the Board.

Lastly, with respect to discussions of "salaries" and "personnel", section 105(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

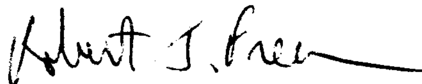
> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

In my opinion, based upon the language quoted above, section 105(1)(f) may be asserted only when the discussion focuses upon a "particular" person or corporation in conjunction with one or more of the subject enumerated in that provision.

As you requested, a copy of this opinion will be sent to the Town Board.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Chester

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1578

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 24, 1989

Mr. John Wright

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 January 6, which pertains to the Zoning Board of Appeals of the Town of Ticonderoga.

According to your letter, the Board consists of five members, one of whom had been designated by the Town Board as chairman. On December 8, the Chairman resigned, but the Town Board "took no action to appoint a replacement Chairman, an Acting Chairman or a replacement Chairman to bring the said Board to full membership". The Board thereafter held hearings on January 3, but the four members "refused to act claiming they had no Chairman or Acting Chairman".

Your question is whether the Zoning Board of Appeals was "required [to] act being they met with a quorum present". In this regard, I offer the following comments.

First, section 267 of the Town Law provides in part that a town board shall appoint the members of a zoning board of appeals and "shall designate its chairman". The same provision states that "Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses". There is no specific reference in the statute to the designation of an acting chairman, nor is there any indication that a zoning board of appeals is precluded from acting in the absence of a chairman.

Second, with respect to the Board's authority to act in the context of a meeting, I direct your attention to section 41 of the General Construction Law, which pertains to quorum requirements. That provision states that:

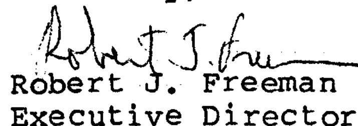
> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time 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, I believe that a public body can carry out its powers or duties 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, such as a zoning board of appeals, has the capacity to act, i.e., to vote, during duly convened meetings attended by a quorum and by means of an affirmative vote of a majority of its total membership.

Lastly, although I believe that the Zoning Board of Appeals could have acted under the circumstances you described, I am unaware of any requirement that would have compelled the Board to act.

I hope that I 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, Town of Ticonderoga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1579

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 23, 1989

Mr. Patrick E. Poleto

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. Poleto:

As you are aware, I have received your letter of January 6. Your inquiry concerns your right to videotape a town board meeting.

During our telephone conversation, I indicated 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:

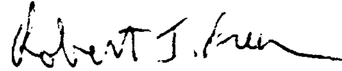
> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court 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-1580

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 23, 1989

Mr. Mark A. Fowler
Satterlee, Stephens, Burke
& Burke
230 Park Avenue
New York, NY 10169-0079

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. Fowler:

I have received your recent letter as well as the materials attached to it.

Your inquiry concerns the status of a hearing to be conducted by the Board of Supervisors of the Town of Briarcliff Manor regarding charges against a police officer. The hearing, according to your letter, is being conducted pursuant to section 5711-q of the Unconsolidated Laws. Subdivision (9) of that provision, entitled "Discipline and charges", states in relevant part that:

> "The board of trustees or municipal board shall have power and is authorized to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police force, but no member or members of such police force shall be fined, reprimanded, removed or dismissed until written charges shall have been made and preferred against him or them, nor until such charges have been investigated, examined, heard and determined by such board of trustees or municipal board in such manner, procedure, practice, examination and investigation as such board

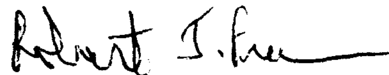
> may by such rules and regulations from time to time prescribe, except that the trial of such charges shall not be delegated and must be heard before the full board of trustees or full municipal board, or a majority of the members of either of such boards, and the affirmative vote of a majority of such members shall be necessary to a conviction on any such charges."

From my perspective, the hearing would not likely be subject to the Open Meetings Law, for section 108(1) of that statute exempts from its coverage quasi-judicial proceedings. Based upon generally accepted definitions of what constitutes a quasi-judicial proceeding [see e.g., Black's Law Dictionary, Revised 4th Edition], since the Town Board is involved in hearing, investigating and determining charges preferred against a member of the Town police force, I believe that the hearing could be characterized as a quasi-judicial proceeding that is outside the scope of the Open Meetings Law.

While the Open Meetings Law is apparently inapplicable, I point out that in Herald Company, Inc. v. Weisenberg [59 NY 2d 378 (1983)], it was held by the Court of Appeals that administrative and quasi-judicial proceedings are presumptively open to the press and the public. The holding in that decision may be relevant to the authority to close the proceeding 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:jm

cc: Kevin Plunkett, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1581

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 26, 1989

Ms. Susan Newman

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. Newman:

I have received your letter of January 8, as well as the correspondence related to it.

Having reviewed those materials, the nature of the controversy is unclear. It appears that you are questioning the means by which the City of Middletown Board of Education adjourned a meeting held on September 15. It is noted that I attempted to obtain additional information from Patricia T. Cournoyer, the School District Clerk, with whom you corresponded concerning the matter. I learned, however, that Ms. Cournoyer recently retired. As such, the issue was discussed with Ms. Irene Wall, the Deputy Clerk. To the extent that Ms. Wall was able to reconstruct the events occurring at the meeting, the Board of Education apparently was discussing an issue during an executive session. Following the executive session, the Board returned to the open meeting for the purpose of adjourning. Ms. Wall mentioned that one of the Board members apparently left the meeting through a side door. It is unclear whether that is relevant to your inquiry. With respect to your letter, it appears that you have inferred that no formal announcement was made to the effect that the Board was adjourning the meeting.

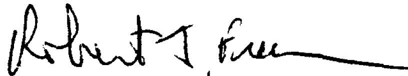
In this regard, I offer the following comments. My remarks are intended to provide general guidance. Again, the facts of the controversy are unclear.

First, as you may be aware, a public body is authorized to enter into executive sessions to discuss certain topics specified in section 105(1) of the Law. It is noted that section 102(3) defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from an open meeting; rather, it is a portion of an open meeting.

Second, I believe that there are essentially two methods of adjourning a meeting. One would involve a motion to adjourn. From my perspective, such a motion should be made by a board of education during an open meeting. I point out that various judicial interpretations of the Education Law indicate that, while a board of education may discuss certain topics during executive sessions, a board is generally required to vote during open meetings, except in unusual circumstances were there is specific statutory authority to take action behind closed doors. The other means of adjourning would involve a situation in which a sufficient number of members of a public body depart from a meeting so that the number remaining constitutes less than a quorum. For instance, if a public body consists of five members, a majority of its total membership would constitute a quorum. If four members are present at the meeting and two depart, there is no longer a quorum and the meeting would automatically be adjourned. While the facts are unclear, it is possible that the departure of members might have resulted in less than a quorum being present, thereby resulting in adjournment of the meeting.

I hope that the foregoing serves to clarify the matter. If I can be of further assistance, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Irene Wall, Deputy Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1582

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 30, 1989

Ms. June Maxam
Editor-Publisher
North Country Gazette
Box 408
Chestertown, NY 12817

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. Maxam:

I have received your letter of January 17, in which you questioned the legality of an executive session recently held by the Town Board of the Town of Schroon.

By way of background, you wrote that a developer is proposing to build a resort complex on privately owned land. Part of the financing for the complex includes the issuance of bond anticipation notes by the Town, as well as various other government grants and loans. On November 28, the Town Board and the project developer met in executive session "reportedly to discuss financial and lease agreements". You added that:

> "Supervisor John Kelley said the meeting was the direct result of questions raised during a previous open town board meeting concerning lease agreements and security of the town against default by the developer. It is also known that during this executive session, more was discussed than what the public was led to believe in that the developer presented a revised plan of the project which includes 124 condos. The plan had already been submitted to the Adirondack Park Agency."

You also pointed out that:

> "The Town of Schroon has no control over developer's acquisition of the property and is trying to enter into a contract for the lease of privately owned recreational facilities for use at no charge by its residents IF $4 million in BAN's is provided for the project by the town."

You have requested an opinion "on the question if the executive session was legal for the purpose called of simply "negotiations". In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be convened to discuss one or more of the topics described in paragraphs (a) through (h) of section 105(1) of the Law.

Second, it is noted that the term "negotiations" appears in the Open Meetings Law only in section 105(1)(e). That provision permits a public body to enter into an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14 is commonly known as the "Taylor Law", and it involves the relationship between a public employer and a public employee union. As such, section 105(1) deals with executive sessions held to discuss collective bargaining negotiations involving a public employee union. It is obvious that any "negotiations" occurring at the meeting in question were unrelated to collective bargaining and that section 105(1)(e) would not have constituted a proper basis for entry into an executive session.

While section 105(1)(h) pertains to certain discussions relating to real property, I do not believe that it would have been applicable under the circumstances that you described. The cited provision permits a public body to enter into an executive session to discuss:

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

Based on the facts, the public has been aware of the location of the real property to be developed, the parties involved and the general nature of the project. Consequently, publicity would not, in my view, have "substantially" affected the value of the property. If my assumptions are accurate, section 105(1)(h) could not have been asserted to conduct an executive session.

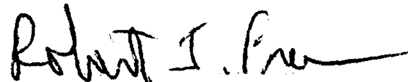
The only other provision which might have constituted a basis for entry into an executive session is section 105(1)(f), which authorizes the holding of an executive session to discuss:

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

It is possible that a portion of the discussion might have involved the consideration of the "financial or credit history of a particular...corporation". For instance, the Town Board might have questioned the developer in terms of the firm's financial reliability in conjunction with the possibility of default. To the extent that the discussion involved that kind of issue, it appears that the executive session was appropriately held. However, other aspects of the executive session, such as the review of a revised plan, should, in my view, have been conducted in public, for none of the grounds for closure would have apparently applied.

I hope that I 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 Schroon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5449
OML-AO-1583

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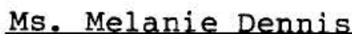
ROBERT J. FREEMAN

February 3, 1989

Ms. Melanie Dennis



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

Dear Ms. Dennis:

I have received your letter of February 1, as well as the correspondence attached to it.

You have requested an advisory opinion with respect to the implementation of the Freedom of Information Law and the Open Meetings Law by the Village of Canastota. You raised issues concerning the timeliness of response to requests for records, the propriety of executive sessions and notice of meetings.

In this regard, I offer the following comments.

First, with respect to requests for records, I point out that section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law [21 NYCRR Part 1401]. In turn, section 87(1) states that the governing body of a public corporation, such as the Board of Trustees of the Village, is required to adopt its own regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee.

The Law and the Committee's regulations prescribe time limits within which an agency is required to 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)].

Having contacted Ms. Sena Clarke, Village Clerk, I was informed that she is attempting to comply with your requests. She indicated that one of the reasons for the delay is due to the recent death of the deputy clerk.

Second, based upon copies of minutes of "executive meetings" that you sent, it appears that the Board of Trustees may be acting in a manner inconsistent with the requirements of the Open Meetings Law.

By way of background, 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". It is noted that the Court of Appeals, the State's highest court, has interpreted the definition 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, held for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law that must be convened open to the public, 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.

With regard to executive sessions, I point out that the phrase "executive session" is defined in section 102(3) of the Law to mean a portion of an open meeting during which the public may be excluded. 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 provisions 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. Enclosed are copies of the Open Meetings Law and "Your Right to Know", an explanatory brochure. Both list the grounds for entry into an executive session.

The minutes of one "executive meeting" in my opinion indicate a proper subject for a closed door discussion, for the topic involved a matter leading to the appointment of a particular person [see Open Meetings Law, section 105(1)(f), and minutes of the meeting of December 29, 1988]. However, the minutes of a different executive session held on July 13 suggest that there was no basis for conducting the discussion during an executive session. The topics involved the payment of a bill and bonding, neither of which appear to have fallen within the grounds for entry into an executive session.

Third, section 104 of the Open Meetings Law requires that every meeting be preceded by notice of the time and place of the meeting. 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 and to the public by means of posting "to the extent practicable" at a reasonable time prior to such meetings.

Lastly, section 106 of the Open Meetings Law pertains to minutes of meetings. Subdivision (1) deals with minutes of open meetings; subdivision (2) deals with minutes of executive sessions, which must be prepared only if action is taken during an executive session. Subdivision (3) states that:

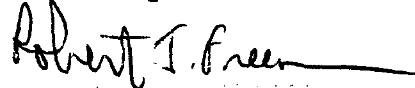
> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week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

Therefore, minutes of open meetings must be prepared and made available within two weeks of such meetings; minutes of action taken in an executive session must be prepared and made available within one week of the executive session. If it is the practice of the Board to approve minutes, but the Board does not meet within two weeks to vote its approval, to comply with the Law, it has been suggested that the clerk or the person who prepares minutes should do so and make them available within the appropriate time. If they have not been approved, when disclosed, they may be marked as "unapproved", "draft" or "non-final". By so doing, the public can generally learn what transpired at the meeting; at the same time, notification is effectively given that the minutes are subject to change.

In an effort to enhance compliance with law, copies of this opinion will be sent to the Village.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Board of Trustees, Village of Canastota
Sena C. Clarke, Clerk
Leo F. Kane, II, Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1584

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 8, 1989

Mr. Douglas A. Olenick
Chanry Communications
425 Smith Street
Farmingdale, NY 11735

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. Olenick:

I have received your letter of January 26, which pertains to a closed session held by the Town Board of the Town of Huntington.

According to your letter:

> "The meeting concerned a possible settlement between the town and the developers of a vacant farm. The town attorney, Arlene Lindsay, and several town councilmembers wanted the discussions to take place in closed session. She cited attorney-client secrecy privilege, the fact that a subject currently under litigation would be discussed and public knowledge of the proceedings would change the value of the property."

You added that:

> "Town Councilman William Rebolini disagreed with these reasons because the party that the town was in court with would be in attendance at the meeting negating the need for secrecy."

In this regard, I offer the following comments.

First, the Open Meetings Law provides two vehicles by means of 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 your inquiry is section 108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law".

When an attorney-client relationship has been invoked, it is considered confidential under section 4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

In a judicial determination that described the parameters of the attorney-client relationship and the conditions precedent to its initiation, it was held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime

> or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

Under the circumstances that you described, I do not believe that the attorney-client privilege could have been asserted, for the developer's attorney, a person other than the "client", i.e., the Town Board, was present. Due to the presence of a person other than the client, the privilege, in my opinion, was waived.

Second, and in a related vein, section 105(1)(d) of the Open Meetings Law states that an executive session may be convened for "discussions regarding proposed, pending or current litigation". 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)]. As such, based upon judicial decisions, the presence of the Town's adversary in litigation would, in my view, have negated the Town Board's authority to conduct an executive session pursuant to section 105(1)(d).

Third, since it was asserted that "public knowledge of the proceedings would change the value of the property", I point out that section 105(1)(h) 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."

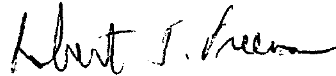
From my perspective, the appropriate assertion of section 105(1)(h) is dependent upon the facts. It is unclear, for example, whether publicity would "substantially affect" the value of the property. Further, I believe that section 105(1)(h) is applicable only when a public body is involved in the "acquisition, sale or lease of real property". If the transaction did not involve those activities on the part of the Town, but rather pertained to a transaction between private parties, section 105(1)(h) would not, in my opinion, have applied.

Lastly, with respect to minutes of executive sessions, the Open Meetings Law requires the preparation of minutes only when action is taken during an executive session [see Open Meetings Law, section 106(2). Therefore, if a public body discusses an issue during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

In an effort to enhance compliance with the Open Meetings Law, 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
Executive Director

RJF:jm

cc: Town Board
Arlene Lindsay, Town Attorney

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 8, 1989

Hon. William B. Rebolini
Councilman
Town of Huntington
Town Hall
100 Main Street
Huntington, NY 11743-6990

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

Dear Councilman Rebolini:

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

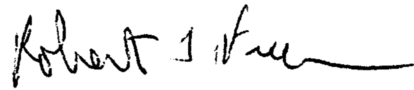
It is your view that, "[w]ith respect to litigation matters, meetings should only be closed to the public for the express purpose of discussing litigation strategy". Nevertheless, you wrote that the Town Attorney and members of the Town Board contend "that it is legally permissible to discuss litigation matters with opposing counsel in closed session".

In this regard, I offer the following comments.

As you are aware, section 105(1)(d) of the Open Meetings Law permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In interpreting the intent of the quoted language, it has been held that the purpose of section 105(1)(d) is "to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" [Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Board, 83 AD 2d 612, 613, appeal dismissed, 54 NY 2d957 (1981)]. The same language was also used by the Appellate Division in Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)]. Based upon those decisions, a public body could not in my view justify an executive session to discuss pending litigation with its adversary. It is noted that both decisions cited above were rendered by the Appellate Division, Second Department.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

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DEPARTMENT OF STATE
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 14, 1989

Ms. Virginia Hammer
Vice-President
Albany Citizens for Education
52 S. Allen Street
Albany, NY 12208

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. Hammer:

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

Your inquiry involves: "what constitutes a legitimate item for discussion at an executive session rather than at an open meeting of the Albany Board of Education." Specifically, you wrote that:

> "The issue pertains to the procedure that the Board will follow to hire a new superintendent of schools. The procedure was announced at the Board meeting in January, but had not been discussed in public. When queried by a member of the public as to when the Board had decided on its course of action, [you] were told that the Board had discussed the issue at an executive session. According to Board minutes, in addition to the regular Board meeting in December, two separate meetings were held for the purpose of discussing personnel matters. When questioned about the appropriateness

> of discussing the hiring procedure at an executive session, Board members as well as the Board's attorney, Stephen Herrick, claimed that this was a personnel matter and could be discussed in private."

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. All meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted that in a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Every meeting must be convened open to the public and preceded by notice given in accordance with section 104 of the Open Meetings Law.

If a quorum of the Board attended the "two separate meetings...held for the purpose of discussing personnel matters", those gatherings, in my view, should have been preceded by notice, convened open to the public, and conducted open to the public to the extent required by 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 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.

Third, with respect to a discussion of "personnel matters", 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

In my opinion, a discussion by the Board of its hiring procedure would not have focused upon a "particular person". If the discussion involved the procedure to be followed for hiring a new superintendent, I do not believe that any of the grounds for entry into an executive session could justifiably have been asserted.

Fourth, 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

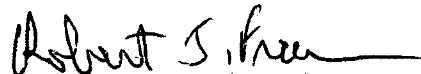
> privacy rather than shield matters of policy under the guise of privacy... Therefore, it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person. When entering into executive 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 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.

To attempt to enhance compliance with the Open Meetings Law, copies of this opinion will be sent to the President of the Board and the Board's 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: Regina Chicorelli, President, Albany Board of Education
Stephen Herrick, Attorney

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 15, 1989

Ms. Mary B. Vedder

The staff of the Committee on 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. Vedder:

I have received your letter of February 6, as well as the materials attached to it.

According to the correspondence, you requested from the Horseheads Central School District minutes of meetings of the Board of Education held on particular dates. You indicated that you were especially interested in obtaining minutes involving the Board's decision to terminate your employment, including minutes of executive sessions. In response to the request, Dr. Kenneth Galbraith, Director of Human Resources, forwarded minutes of the open meetings held on the dates specified. He also wrote in an ensuing letter that "no formal action was taken in an executive session on any matter and specifically the Board of Education took no action in executive session regarding the termination of your service". Dr. Galbraith added that "there are no minutes of the Executive Session", and that the Board's action concerning your termination was taken in "open session".

You have requested my assistance in obtaining additional information on the matter. In this regard, I offer the following comments.

First, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law section 105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to section 106(2). 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 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)]. More importantly under the circumstances, if no action is taken in an executive session, the Open Meetings Law does not require that minutes of the executive session be prepared.

In sum, since the Board took no action concerning your termination during an executive session, there would be no requirement that minutes of the executive session be prepared. Therefore, Dr. Galbraith's response indicating that there are no minutes of the executive session is, in my view, appropriate and consistent with law.

Second, with respect to access to records, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create or prepare a record in response to a request. Since no minutes of the executive sessions in question exist, I do not believe that school district officials would be obliged to prepare new records in response to a request made under the Freedom of Information Law. Similarly, if no records exist reflective of the reasons for your dismissal, the District would not be required by the Freedom of Information Law to create records reflective of those reasons.

Third, with regard to other records that may exist relating to the issue, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Assuming that any such records exist, several provisions may be relevant.

Perhaps most significant would be communications among or between members of the staff of the District and the Board. Those records would fall within the scope of section 87(2)(g) of the Freedom of Information Law, which states that an agency may withhold records that:

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

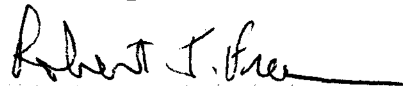
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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. Based upon section 87(2)(g), it has been held that "predecisional materials" consisting of opinions or recommendations may be withheld [see e.g., McAulay v. Board of Education, City of New York, 61 AD 2d 1048 (1978), aff'd 48 NY 2d 659 (aff'd w/no opinion); Kheel v. Ravitch, 62 NY 2d 1 (1984); Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979)].

Since I am unaware of the nature or content of any records that might exist in relation to the issue, I cannot provide more specific guidance.

I hope that the foregoing has served to clarify the matter and that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Kenneth Galbraith

STATE OF NEW YORK
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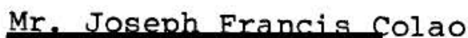
February 22, 1989

Mr. Joseph Francis Colao


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. Colao:

I have received your letter of February 6 in which you requested an advisory opinion concerning the Open Meetings Law.

Your inquiry concerns a gathering "set by" Deputy Mayor Alan Perkowski of the Village of Pine Valley. Mr. Perkowski apparently requested that the Village Clerk and one trustee to be present at 7 p.m.; he asked a different trustee to be present at 8 p.m. Although it is unclear from your letter whether the gathering was open, you wrote that Mr. Perkowski said that "this is not a public meeting and notification is not required", for there would be no quorum present at any time.

In this regard, if indeed there was no quorum of the Board of Trustees present, I do not believe that the Open Meetings Law would have applied. As indicated in previous correspondence, the Open Meetings Law applies to meetings of a public body. A "meeting" generally includes the convening of a quorum of a public body, a majority of its total membership, for the purpose of conducting public business. It would appear that the Deputy Mayor sought to discuss certain issues with individual members of the Board of Trustees. Further, the facts suggest that at no time during the evening in question was there a quorum of the Board present, or an intent to have a quorum of the Board present. If the Deputy Mayor met with certain trustees individually, and if no quorum of the Board was present at any time during the course of the gatherings, I do not believe that the

Open Meetings Law would have been applicable, for there was no quorum and, consequently, no "meeting" subject to the Open Meetings Law. If the gathering did not constitute a "meeting", there would have been no requirement that notice be given. Similarly, as I understand the facts, the public would not have had the right to be present.

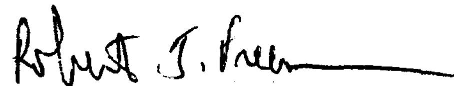
Lastly, you wrote that the discussion involved interviewing a planner. Notwithstanding my previous remarks, if the gathering had been a "meeting" subject to the Open Meetings Law, it appears that an interview could have been conducted during an executive session. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

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

It would appear that the discussion involved the "employment history" or perhaps a matter leading to the appointment or employment of a particular person. If that was so, and even if the gathering had been a meeting subject to the Open Meetings Law, an executive session could, in my opinion, have properly been held.

I hope that the foregoing serves to clarify the scope of the Open Meetings Law. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Alan Perkowski, Deputy Mayor
Maryanne Soika, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1589

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ROBERT J. FREEMAN

February 22, 1989

Mr. John L. Barbarite

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. Barbarite:

I have received your letter of February 7, as well as the materials attached to it. Your correspondence reached this office on February 13.

You have raised a series of issues concerning compliance with the Open Meetings Law by the Board of Trustees of the Village of Monticello. They deal with the propriety of executive sessions held by the Board, the procedure for entry into executive sessions, and whether the Board and the Village Manager may "meet in the manager's office as a group, behind closed doors, prior to and/or after Board meetings".

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. All meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted that in a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Every meeting must be convened open to the public and preceded by notice given in accordance with section 104 of the Open Meetings Law.

Assuming that a quorum of the Board attends the gatherings in the Village Manager's office that are held prior to and/or after Board meetings for the purpose of discussing or conducting public business, it would appear that those gatherings constitute "meetings" subject to the requirements 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 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.

Third, the minutes indicate that the Board has held executive sessions to discuss "personnel matters". Here 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

Moreover, 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].

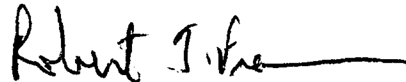
In view of the foregoing, it has been advised that a motion to enter into executive session to discuss "personnel", or "personnel matters", without additional description, is inadequate. Where section 105(1)(f) may be asserted, I believe that a motion for entry into an executive session should contain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

In the context of your questions, a discussion concerning the adoption of "a policy of not appointing husbands and wives to the same committees" should, in my opinion, have been considered in public. Presumably, the policy would be applicable to any married persons who might serve on a committee. If that was so, the issue, in terms of policy considerations, would not have involved or focused upon a "particular person" or persons.

Lastly, I cannot advise with respect to the propriety of the executive session held to discuss a contract with the Kubota America Corporation, for there is insufficient information regarding the session. It is possible, however, that some aspects of the discussion might have involved the financial or credit history of a particular corporation, which could appropriately have been considered during an executive session pursuant to section 105(1)(f), which was quoted earlier.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Monticello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1590

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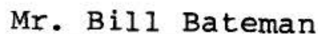
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 24, 1989

Mr. Bill Bateman


Dear Mr. Bateman:

I have received your thoughtful letter of February 9.

Your letter pertains to the lack of responsiveness by officials of Allegany County. Specifically, at a public hearing concerning the County's proposed budget held on November 23, the day before Thanksgiving, several members of the public asked questions that County officials apparently refused to answer. For instance, after a question was raised concerning "the pending contract for tipping fees relative to garbage disposal", no answer was given. Nevertheless, on the next day that the local newspaper was published, an article indicated that the tipping fee would be $51.75 per ton. The article also stated that no contract had yet been signed.

Based on the foregoing, you questioned the purpose of a public hearing. In addition, you asked that I "challenge" and "consider investigating" the hearing.

In this regard, I offer the following comments.

First, as indicated in earlier correspondence, although a public hearing offers members of the public an opportunity to express their views concerning an issue, I am unaware of any requirement that public officials who conduct a hearing must respond to questions that may be raised.

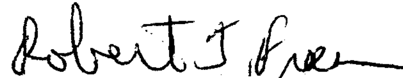
Second, the Committee on Open Government is authorized to advise with respect to the Open Meetings Law, which pertains to meetings of public bodies. In my view, there is a distinction between a meeting and a hearing. A meeting generally involves a situation in which a quorum of a public body convenes to deliberate and to conduct public business collectively as a body. I do

not believe that a hearing necessarily requires the presence of a quorum. Further, it is held not for the purpose of deliberating or acting, but rather to enable the public to speak. It is also noted that the Committee has no authority to bring suit or to investigate.

Lastly, with respect to the information given to the reporter, I can only conjecture as to how she might have obtained it. It might have been acquired in response to a question answered by a county official, perhaps an official who was not present at the hearing. It is possible, too, that she might have requested and obtained records pursuant to a request made under the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Allegany County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO - 1591

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 27, 1989

Ms. Claire Sieling
Taxpayers Association of
Town of Day
Star Route Box 164
Hadley, NY 12853

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. Sieling:

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

Your inquiry concerns the implementation of the Open Meetings Law by the Town Board of the Town of Day. Your questions pertain to notice of meetings and the propriety of executive sessions. You wrote that notice is generally published in the local newspaper on the days that a meeting is to be held, but that notice is not posted in a public place. You also indicated that the Planning Board "never" publicizes its meetings. Further, copies of minutes of meetings refer to executive sessions held to discuss "personnel" and "possible litigation". You also wrote that an executive session was held to discuss "the purchase of a parcel of land to be used by the Town for sand mining", but that none of the grounds for entry into executive session would, in your view, have applied.

In this regard, I offer the following comments.

First, with regard to notice of meetings, 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 reasonably time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as 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 prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations. I point out that when notice is given to a newspaper, for example, there is nothing in the Law that requires that the newspaper publish the notice. Similarly, there is no direction concerning the date on which a newspaper publishes a notice of a meeting. It is noted that section 104 applies to all public bodies, including a planning board.

Second, in terms of the procedure for entry into an executive session, a motion for entry into an executive session must indicate the topic or topics to be discussed. As stated in section 105(1) of the Law, which in part describes the procedure for entry into executive session:

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

Based upon the language quoted above, it is reiterated that a motion to enter into an executive session must include, in general terms, reference to the subject or subjects to be considered behind closed doors.

Third, 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 judicial interpretation of section 105(1)(d), 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.

Further, 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 pro-

> posed, 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].

Similarly, there is both legislative history and judicial precedent concerning the so-called "personnel" exception for entry into executive session, which 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, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

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

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

> deal with any particular person. When entering into executive session to discuss personnel matters of a particular individual, the Board should not be required to reveal the identity of the person but should make it clear that the reason for the executive session is because their discussion involves a 'particular' person..." [Doolittle v. Board of Education, Sup. Ct., Chemung Cty., Oct. 20, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

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

Lastly, you referred to section 105(1)(h) in conjunction with the possible purchase of real property. That provision permits a public body to enter into an executive session to discuss:

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

Based upon the language quoted above, not every issue concerning a real estate transaction may be considered during an executive session. Only when "publicity would substantially affect the value" of the property in conjunction with a discussion of the acquisition, sale or lease of real property would section 105(1)(h) justify the holding of an executive session. As such, the propriety of an executive session held under section 105 (1)(h) would be dependent upon specific facts and circumstances.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Day

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1592

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 28, 1989

Hon. Audrey G. Hochberg
Westchester County Board
of Legislators
800 Michaelian Office Building
148 Martine Avenue
White Plains, NY 10601

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. Hochberg:

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

According to your letter:

> "All of Westchester County's contracts are let by the Board of Acquisition and Contract (A and C), which is established by the County Charter. There are three voting members of A and C: the County Executive, who chairs A and C; the Commissioner of Public Works; and the Chairman of the County Board of Legislators.
>
> "The Deputy County Executive chairs the meetings and votes in place of the County Executive in his absence. A section head from the Department of Public Works is designated to vote in place of the Commissioner of Public Works when the Commissioner is absent. The Vice Chairman of the Board of Legislators acts in the place of the Chairman of the Board of Legislators in his absence."

You added that "formal" A and C meetings are conducted in public and that its meetings are attended by various department heads and support staff.

Having frequently attended those meetings, you learned that "a so-called 'Pre-Board' session is held to discuss the agenda". You wrote that you have been informed that the Deputy County Executive chairs the "Pre-Board" sessions, that the department heads and staff who attend the public meetings also attend those sessions, and that the Commissioner of Public Works does not attend, "but the designated section head, who is a voting member of A and C when the Commissioner is not present, attends in his place". Further, although neither the Chairman nor the Vice Chairman of the Board of Legislators attends the Pre-Board sessions, non-voting staff of the Board of Legislators attend the sessions.

Based on the foregoing, you have asked whether the Pre-Board sessions are meetings subject to the Open Meetings Law, "given the fact that a quorum of two persons with the authority to vote are present at those Pre-Board meetings". In addition, "given the fact that members of the staff of the County Board of Legislators attend Pre-Board" sessions, you asked whether you, as a County Legislator, can be refused permission to attend the Pre-Board sessions. You raised that question because the County Executive claimed "that Pre-Board was not subject to the Open Meetings Law and was open only to selected members of the Executive Branch".

In this regard, I offer the following comments.

First, I believe that A and C constitutes a public body subject to the requirements of the Open Meetings Law. Section 102(2) of that statute 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."

A and C, which was established in the County Charter, consists of three members. It is in my view required to conduct public business by means of a quorum pursuant to section 41 of the General Construction Law. Since it determines the County's contractual relations, I believe that it clearly performs a governmental function for a public corporation, Westchester

County.

Second, it is assumed that each of the three members of the A and C has the power to delegate his authority to vote and carry out other duties inherent in his role on the A and C to a person acting in his stead. You indicated in your letter and confirmed by phone that delegates of the three members, such as the Deputy County Executive, the Vice Chairman of the Board of Legislators, and a section head designated by the Commissioner of Public Works, have voted at the A and C's formal public meetings.

Third, the voting delegates of two of the members of the A and C, according to your letter, attend the Pre-Board meetings to discuss the agenda of upcoming meetings that will be held two days later. Although the County Executive has contended that those gatherings are open only to "selected members of the Executive Branch", you indicated that notice of those sessions is effectively given to the Board of Legislators, for the Board "is represented by some of its staff members". If that is so, if the sessions are attended by representatives of both the executive and legislative branches, I believe that the Pre-Board sessions are "meetings" subject to the Open Meetings Law.

A quorum of the A and C, two of its three members would be present. Further, since they attend the session to review or determine the agenda, (i.e., the subjects to be considered at the ensuing formal meeting), the two members apparently conduct the Pre-Board sesions in their capacities as members of the A and C.

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).

The court also referred specifically to the kind of a gathering that is the subject of your inquiry, stating that:

> "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).

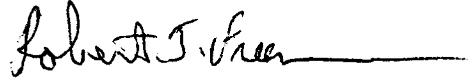
In addition, in its consideration of the characterization of meetings as "informal", the court found that:

> "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. at 415).

Based upon the foregoing, when two of the three members or their designees attend "Pre-Board" sessions for the purpose of conducting the business of the A and C, including the consideration of an agenda for ensuing formal meetings, I believe that those sessions constitute "meetings" that fall within the scope of the Open Meetings Law. Moreover, if my contention is accurate, you, in your capacity as a county legislator, as well as the general public, would have the right to attend those sessions, except to the extent that an executive session could appropriately be convened.

I hope that I 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. Andrew O'Rourke, County Executive

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5482
OML-AO-1593

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 1, 1989

Mr. Charles Gombosi

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

Dear Mr. Gombosi:

I have received your letter of February 14, as well as the materials attached to it.

You have raised a series of issues concerning your dealings with the Planning Board of the Town of Walton. It is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. Much of your commentary pertains to compliance with land use laws and regulations that fall outside the scope of the jurisdiction or expertise of the office. To the extent that your correspondence pertains to the Freedom of Information Law or the Open Meetings Law, I offer the following comments.

First, one aspect of your inquiry involves a request for minutes of a Planning Board meeting. You were advised by the Board's secretary that you are "free to review" the minutes, but that a copy would not be made "because we have turned down such requests in the past and cannot discriminate". In this regard, section 106(3) of the Open Meetings Law states in relevant part that: "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting...". The Freedom of Information Law, section 87(2), states that accessible records must be made available for inspection and copying. Further, when a record is accessible under the Law, section 89(3) states that "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record...". Based on the foregoing, I believe that the Town is required to prepare a photocopy of an accessible record upon payment of the appropriate fee, irrespective of its past

practice, which in my opinion is inconsistent with the Freedom of Information Law. I point out, too, that an agency cannot generally charge in excess of twenty-five cents per photocopy [see Freedom of Information Law, section 87(1)(b)(iii)].

Second, in view of the chronology of events that you described, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) 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)].

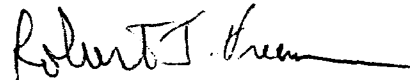
Third, the Freedom of Information Law pertains to existing records; it does not require agency officials to answer questions or prepare new records in response to a request for information [see Freedom of Information Law, section 89(3)]. Therefore, although the Planning Board or the Town Board could have responded to your questions, they would not be required to do so to comply with the Law.

Insofar as records exist, 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.

Enclosed are copies of the Freedom of Information Law, the Open Meetings Law and an explanatory brochure pertaining to both statutes.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Christine M. Sholes, Secretary
Planning Board
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1594

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 2, 1989

Ms. Theresa C. Lonergan

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. Lonergan:

I have received your letter of February 17, in which you raised a series of questions concerning the Open Meetings Law.

Your first area of inquiry involves notice requirements. In this regard, section 104 of the Open Meetings Law states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonably time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as 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 prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

As indicated above, I believe that "news media" is plural and that notice must be given to two or more representatives of the news media. The Law does not specify which members of the news media must be notified of a meeting. However, I believe that notice should be given to those news media outlets that would be most likely to serve citizens in the vicinity of a meeting. It would be unreasonable, in my view, to give notice of a meeting to be held in Ticonderoga to the New York Times; it would likely be reasonable, however, to provide notice to a daily newspaper, a weekly newspaper or a radio station serving the Ticonderoga.

In terms of the content of a notice, the Law requires that it include the time and place of a meeting. A public body may provide additional information, such as an agenda, but it is not required to do so.

Throughout your letter, you referred to notice being "published". The Open Meetings Law does not require that a public body pay to publish a notice of a meeting; it merely requires that notice of meetings be given. Further, once in receipt of notice, a newspaper or radio station is not required by the Open Meetings Law to print or publicize the fact that a public body has scheduled a meeting. As such, a public body might comply with the Open Meetings Law by providing notice to the news media, but the news media might not "publish" the notice.

You asked that I define "public body" and indicate whether notice should be given with respect to a "village board, town board, school board, planning board, zoning boards of appeal, subcommittees, advisory committees, workshops, work sessions, informational meetings of these various boards". The Open Meetings Law, section 102(2) 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

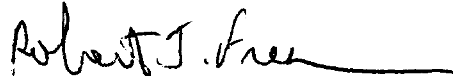
> or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Therefore, the specific boards to which you referred, as well as any committees or subcommittees designated by those boards would constitute "public bodies" subject to the Open Meetings Law. All of those public bodies must comply with the notice requirements discussed earlier.

With respect to workshops, work sessions and similar gatherings, section 102(1) of the Open Meetings Law defines the term "meeting" as "the official convening of a public body for the purpose of conducting public business". The state's highest court construed the term "meeting" broadly and has held that any convening of a quorum of the members of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and 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)]. Therefore, if a quorum of a public body convenes to conduct public business, that kind of gathering would, in my view, represent a "meeting", even if it is characterized as a workshop or work session, for instance. Moreover, every such meeting must be preceded by notice given in accordance with section 104 of the Open Meetings Law.

I hope that the foregoing serves to clarify the requirements of the Open Meetings Law. 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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 6, 1989

Ms. F.J. Thompson

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. Thompson:

I have received your letter of February 23, as well as the correspondence attached to it.

Your letter pertains to a request for minutes of a meeting of the Board of Trustees of the New York City Teachers' Retirement System. The meeting was held on January 19. However, as of the date of your letter, the minutes were apparently not yet available. You added that a reporting service was hired to "record the minutes of the Board's meetings".

In this regard, I offer the following comments.

First, the Open Meetings Law contains what may be characterized as minimum requirements concerning the contents of minutes. Although it appears that a reporting service has been engaged to prepare a transcript of the proceedings, the Law does not require that minutes be so expansive. Specifically, 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."

Based on the foregoing, a public body may choose to prepare a verbatim account of what transpired at a meeting. However, at a minimum, minutes must include reference to all motions, proposals, resolutions, other matters for which votes were taken, and the votes of the members.

Second, section 106(3) of the Law states in relevant part that:

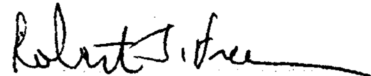
> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings..."

If minutes have not been approved, or, as in this case, if a transcript has not yet been prepared, 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 or fully transcribed, draft minutes should be prepared and 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.

As you requested, a copy of this opinion will be sent to Mr. Jay M. Cohen.

I hope that I 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: Jay M. Cohen, Director

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OML-AO-1596

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 6, 1989

Ms. Elizabeth Kraus

Ms. Helen T. Bajakian

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. Kraus and Ms. Bajakian:

As you are aware, I have received your letter of February 23 and the materials attached to it.

The focal point of your letter involves the termination by the Town Board of the Town of Hunter of its Chief of Police at a meeting held on February 21. According to your letter, after the meeting had begun, an executive session was convened. The Chief of Police as well as officials of another municipality joined the executive session. Following a presentation made by the Chief of Police, he was to leave the executive session. After a continuation of the discussion in executive session, the Board returned to the open meeting and voted to terminate the Chief. You added that:

> "It appeared that a secret discussion had taken place among most of the council excluding one member (the member who voted nay) regarding the direction that Board was going to take prior to the Feb. 21st 1989 meeting".

You wrote further that:

> "Nothing as far as the newspapers or media was acknowledged of this meeting. No public notice of the issue at all prior to meeting and no open meeting had been scheduled."

You also indicated that:

> "Police Chief Gordon had a letter to present to the board to request open meeting regarding the chief's position and the department in general. He was not allowed to continue his executive meeting to present this or even ask to come back into executive session to participate in discussion. Chief was not aware of the nature of the discussion taking place or that termination of his employment was imminent."

In this regard, it is unclear whether your reference to the absence of notice pertained to the meeting of February 21 or the prior "secret discussion" that allegedly occurred. In either event, I offer the following comments.

First, the Open Meetings Law pertains to meetings of public bodies, and the courts have construed the term "meeting" broadly. In brief, any convening of a quorum of a public body, a majority of its total membership, held for the purpose of conducting public business, constitutes a "meeting" subject to the Open Meetings Law, even if there is no intent to take action, and irrespective of the manner in which a gathering is characterized. If a quorum of the Town Board met to discuss the issue of the termination of the Chief of Police, it would appear that such a gathering constituted a "meeting" that fell within the requirements of the Open Meetings Law.

Second, every meeting must be preceded by notice of the time and place pursuant to section 104 of the Law. Subdivision (1) of section 104 pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Subdivision (2) of section 104 pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as described in subdivision (1), "to the extent practicable", at a reasonable time prior to such meetings.

I point out that the notice required by section 104 must refer to the time and place of a meeting. Nothing in the Open Meetings Law requires that the notice include an agenda or an indication of the subjects to be discussed at a meeting.

Third, all meetings must be conducted open to the public, except to the extent that a topic falls within one or more among eight grounds for entry into an executive session. It is noted 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 from an open meeting, but rather is a part of such a meeting. Further, prior to entry into an executive session, a procedure must be carried out 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 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 extracts of the minutes of the meeting of February 21 attached to your letter do not include reference to a motion to enter into executive session. As such, it is unclear whether the procedure prescribed by section 105(1) was followed by the Board.

With respect to attendance at an executive session, section 105(2) of the Law provides that:

> "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body."

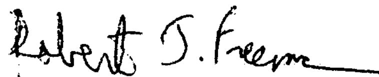
Based on the foregoing, only the members of a public body conducting an executive session have the right to be present at an executive session. However, a public body may authorize others to attend. As such, although the Chief of Police was permitted to attend a portion of the executive session, I do not believe that he had a right to attend the entire executive session. Similarly, when there is a proper basis for conducting an executive session, the subject of the discussion, i.e., the Chief of Police, would not, in my opinion, have had the right to require that the discussion occur in public.

Lastly, to the extent that the matter involved the termination of the Chief of Police, I believe that an executive session could properly have been held. 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..."

I hope that the preceding comments have served to clarify the provisions of the Open Meetings Law. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Hunter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1597

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 22, 1989

William C. Prattella, Ph.D.
Superintendent of Schools
Mount Vernon Public Schools
165 North Columbus Avenue
Mount Vernon, NY 10553

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 Dr. Prattella:

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

According to your letter, the Board of Education of the Mount Vernon School District consists of nine members. You referred to an article and a letter prepared by David Lewis of the Westchester Rockland Newspapers concerning a "cottage meeting" held at a private home. In attendance were approximately 35 parents and five members of the Board. However, one of the Board members left the gathering, resulting in less than a quorum of the Board in order "to preserve the legality of the meeting". In his letter to Board members, Mr. Lewis indicated that the Open Meetings Law includes within its scope "committee and subcommittee meetings of public bodies, even if the committee membership does not constitute a quorum of the body as a whole". He also alluded to my comments to the effect that a quorum of a committee of three, for example, would be two. You indicated, however, that the Board members who attended the cottage meeting "were not members of any particular sub-committee".

You have requested a "clarification" concerning the issues. In this regard, I offer the following comments.

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 committees, which had no capacity to take final action and which consisted of less than a quorum of the entire board, 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 a committee consisting of two or more persons designated or created to serve as a body by the School Board, 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)]. Therefore, if, for example, the Board created a subcommittee consisting of three members, that subcommittee would, in my opinion, constitute a public body and its quorum would be two.

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 subcommittee would generally be an "entity" that consists of "two or more members". Further, although the action that created a committee or subcommittee 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 subcommittee, 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)]. Therefore, 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 subcommittee designated by the School Board would conduct public business and perform a governmental function for a public corporation, a school district.

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.

Lastly, assuming that the four members who were present at the gathering in question are not members of a committee or a subcommittee designated by the Board, it appears that the Open Meetings Law would not have applied, for there would not have been a quorum of a public body. However, a fifth member left the gathering. In this regard, there is a decision that, in my opinion, inferred that a deliberate effort to ensure that no quorum is present might constitute a violation of the Open Meetings Law. In Tri-Village Publishers, Inc. v. St. Johnsville Board of Education, the Court stated that:

> "a series of less-than-quorum meetings on a particular subject which together involve at least a quorum of the public body could be used by the public body to thwart the purpose of the Open Meetings Law...However, as noted by the Special Term, the record in this case contains no evidence that the members of respondent engaged in any attempt to evade the requirements of the Open Meetings Law" [110 Ad 2d 932, 934 (1985)].

Based on the decision cited above, although no violation of the Open Meetings Law was found, I believe that it was inferred that an attempt to circumvent the Law by ensuring that less than a quorum is present at what otherwise would be a meeting might constitute a violation of law.

I hope that the foregoing provides the clarification that you request. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Lewis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1598

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 23, 1989

Ms. Doris M. Greene
Town Clerk
Town of Newburgh
20-26 Union Avenue Extension
Newburgh, NY 12550

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. Greene:

I have received your letter of March 14 and appreciate your interest in complying with the Open Meetings Law.

According to your letter:

> "Work sessions of the Town Board of the Town of Newburgh are also considered to be official meetings at which votes on business of the Town can and are being taken.
>
> "Notification of the status of these sessions of the Town Board has been placed in our official bulletin board area at Town Hall and notices have been sent to all representatives of the local media."

In conjunction with the foregoing, you raised the following question: "Is the above legal and in accordance with the F.O.I.L. and Open Meetings Law?".

In this regard, I offer the following comments.

First, in my view, the issues arising with respect to the foregoing relate to the Open Meetings Law. The Freedom of Information Law, which pertains to access to records, is not directly relevant to those issues.

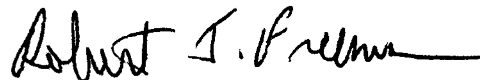
Second, based upon the language of the Open Meetings Law as well as its judicial interpretation, a "work session" is a "meeting" subject to the Law in all respects. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public 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 so-called "work sessions", which, according to the facts of that case, were held for the purpose of discussion only and with no intent to vote or take action. It is noted that there is nothing in the Open Meetings Law that refers to voting at work sessions. Therefore, if there is no rule or policy adopted by the Town Board that precludes the Board from voting at "work sessions", I believe that the Board may vote at those sessions. Further, since there is no legal distinction between a "meeting" and a "work session", it has been suggested that all such gatherings be characterized or denominated as "meetings".

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 characterized as "work sessions" or as regular meetings.

Based upon your description of work sessions held by the Town Board and the steps taken to provide notice of those sessions, I believe that the Town's treatment of those gatherings is fully consistent with the requirements of the Open Meetings Law.

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

Sincerely,



Robert J. Freeman
Executive Director

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COMMITTEE ON OPEN GOVERNMENT

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OML-AO-1599

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March 27, 1989

Ms. Theresa C. Lonergan

The staff of the Committee on 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. Lonergan:

I have received your letters of March 12 and 13.

Your initial inquiry concerns a "hypothetical question" concerning minutes of meetings. Under your description of the facts, a public body meets on the first day of the month, the clerk prepares the appropriate minutes and discloses the minutes within the proper time. The minutes are then approved or modified at the next regular meeting, which is held on the first day of the following month. You have asked whether the minutes made available prior to their approval must be signed or certified by the clerk.

In this regard, there is nothing in the Open Meetings Law that requires that minutes of meetings, approved or otherwise, must be signed or certified by a clerk or any other official. Further, 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. If minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes of open meetings be prepared and made available within two weeks as required be section 106(3) of the Law, and that if they 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.

The second issue involves fees for copies of records. According to your letter, in response to a request for a copy of neighboring town's ordinance, which consisted of three pages, you were informed that the town "requires a fee of $5.00 for a copy of any law or ordinance". You wrote that a fee of $5.00 "would be a bargain if that law or ordinance was 20 sheets or more" but that "$5.00 is no bargain for 3 8 1/2 x 11 sheets".

In this regard, by way of background, 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 in my view 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 fees in question, a town, in my opinion, cannot charge more than twenty-five cents per photocopy.

Under the circumstances that you described, a town could, in my opinion, assess a fee of $5.00 for copies of laws or ordinances that are 20 or more pages. However, the fee for photocopying a local law or ordinance of less than 20 pages could not, in my view, exceed twenty-five cents per photocopy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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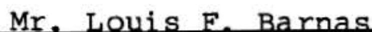
ROBERT J. FREEMAN

March 28, 1989

Mr. Louis F. Barnas



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. Barnas:

I have received your letter of March 16 in which you raised questions concerning minutes of meetings of a board of assessment review.

You asked whether minutes are required to be taken at those meetings, whether any such minutes must be available for public inspection, and what the minutes must include. You added that you have been informed that "the minutes contain nothing more than the name of the complainant, the property SBC number, the challenged assessment amount, and the final decision of the board. In your view, minutes of that nature are incomplete.

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 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."

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...". Similarly, minutes do not have to refer to those who may have spoken during a discussion or the nature of their comments. Further, minutes of executive sessions are required to be prepared only when action is taken during an executive session. If a public body discusses an issue during an executive session, but takes no action, there is no requirement that minutes of the executive session be prepared.

Second, minutes of meetings must be made available pursuant to subdivision (3) of section 106 of the Open Meetings Law. That provision states that:

> 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, minutes reflective of determinations of a board of assessment review must be prepared and made available for inspection and copying.

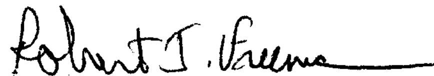
Lastly, I point out that, in addition to the Open Meetings Law, the Freedom of Information Law has, since its enactment in 1974, contained what may be considered an "open vote" provision. Section 87(3) states in relevant part that:

> "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 a board of assessment review, a record, presumably minutes, 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:jm

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ROBERT J. FREEMAN

April 4, 1989

Mr. Jeffrey H. Brainard
Reporter
The Times Herald Record
232 Main Street
New Paltz, NY 12561

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. Brainard:

I have received your letter of March 22 in which you requested an advisory opinion concerning the Open Meetings Law.

The issue involves the propriety of an executive session held by the board of the Ulster County Resource Recovery Agency to discuss "amending a contract between itself and... a...consulting firm it has retained to perform a solid-waste siting study". The board's attorney, Mr. Stephen Wing, informed you that the amendment involves an unspecified "claim" for compensation for services rendered that were not required by the existing contract. You indicated that the board also "talked about the prospect of renegotiating the entire contract to reflect the fact that it has asked the consultants to shift the focus of the study to more information about recycling". Mr. Wing expressed the view that the executive session was proper, for the board was "discussing its negotiating position on these 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. Meetings of public bodies must be conducted open to the public, except to the extent that it discusses a matter that may appropriately be considered during an executive session. Section 105(1) of the Law specifies and limits the topics that may appropriately be considered during an executive session.

Second, it is noted that not all contract negotiations or discussions of negotiating positions may be discussed during executive sessions. The only provision in the Open Meetings Law that deals directly with negotiations is section 105(1)(e), which permits a public body to enter into an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law, commonly known as the "Taylor Law", pertains to the relationship between a public employer and a public employee union. As such, section 105(1)(e) generally permits a public body to conduct an executive session to discuss collective bargaining negotiations involving a public employee union. That provision, under the circumstances, would not in my view have been applicable as a basis for entry into an executive session.

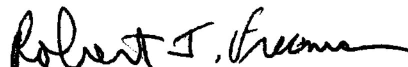
Third, based upon your description of the facts, there appears to have been no other ground for entry into executive session that could properly have been asserted. In some instances, depending upon the focus of a discussion, section 105(1)(f) would permit the holding of an executive session to discuss certain matters leading to or abridging a contractual relationship. The cited provision enables a public body to enter into an executive session to discuss:

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

Based upon your description of the facts, it does not appear that section 105(1)(f), or any other ground for entry into executive session, would have justified the holding of the executive session 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:jm

cc: Ulster County Resource Recovery Agency

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ROBERT J. FREEMAN

April 5, 1989

Hon. Richard Gokey
Mayor Elect
Village of Malone

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 Elect Gokey:

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

According to your letter, as Mayor Elect of the Village of Malone, you "wish to appoint a Citizens Committee to study alternative forms of government". You indicated that the "committee would be a fact finding committee only". Your question is whether such a committee would fall within the scope of 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 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."

As such, a village board of trustees, for example, would clearly constitute a "public body". Similarly, any committee or subcommittee designated by a public body, such as the Board of Trustees, would, in my view, also constitute a public body subject to the Open Meetings Law.

However, it does not appear that the kind of committee that you described, and which you would designate independently and without the authority or approval of the Board of Trustees, would be public body. Section 4-401 of the Village Law, which describes the authority of a mayor, does not appear to provide a mayor with the authority to create a committee for or on behalf of a village or its government. Absent that authority, I do not believe that a mayor could unilaterally create or designate a public body that performs a governmental function for a village.

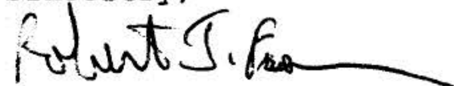
I point out that in a recent decision dealing with the status of an advisory body designated by the Mayor of New York City, it was found by the Appellate Division, Second Department, that the Open Meetings Law was inapplicable (see attached, Matter of Poughkeepsie Newspapers v. The Mayor's Intergovernmental Task Force, ___ AD 2d ___, February 6, 1989). After discussing several cases relevant to the issue, the Court found that:

> "The unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies]' subject to the Open Meetings Law, while those that do exercise sovereign power may be subject to that law" (id., p.4).

Based upon the foregoing, it does not appear that the kind of committee that you described would constitute a public body. If that is so, the Open Meetings Law would not be applicable to its meetings.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
Enc.

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 10, 1989

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

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

Dear Ms. Garlock:

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

By way of background, the Auburn City Council recently agreed to settle a substantial personal injury claim against the City. You indicated that on March 27, the City Manager released an agenda for an upcoming Council meeting, "along with a claims list detailing the bills the council would be asked to approve". On the list was an entry concerning a settlement in the amount of $60,000. When you asked for legal papers relating to the judgment or settlement, you were referred to the City's assistant corporation counsel, who said that "he would not likely ever release papers concerning the case, claiming 'attorney-client privilege'". The assistant corporation counsel admitted that the City Council did vote to approve the settlement. Thereafter, you asked for copies of minutes of executive sessions during which the City Council discussed the settlement, and you were told that the Council "has no minutes of an executive sessions - ever - though the council meets behind closed doors each week". You added that "Even after the council's approval of the settlement, Mr. McKeon [the assistant corporation counsel] told [you] that he would not likely release any of the legal papers, including the summons and complaint, again because of 'attorney-client privilege'."

In view of the foregoing, you have requested my opinion concerning the following items:

" - Is the city obligated to keep minutes of any actions taken in executive session?...

- Is the city obligated to release notices of claims and summons and complaints regarding any lawsuits?

- Is the city obligated to release depositions and correspondence in relation to lawsuits after they have been settled?

- To what extent may the city's counsel claim 'attorney-client' privilege? What may he keep secret under that label?

- Just who is the city attorney's client?"

You asked that I describe the authority to offer opinions and the "weight" the opinions carry.

In this regard, I offer the following comments.

First, with respect to the Committee's authority to advise, section 89(1)(b)(ii) of the Public Officers Law states that the Committee on Open Government "shall...furnish to any person advisory opinions or other appropriate information regarding..." the Freedom of Information Law. Section 109 of the Public Officers Law provides that the Committee "shall issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the open meetings law". Further, as indicated at the beginning of this letter, the staff of the Committee has been authorized to advise on behalf of the Committee. There is nothing in either statute that pertains to the weight of an advisory opinion prepared by the Committee, and a recipient of an advisory opinion may ignore it. Nevertheless, advisory opinions have been cited often in judicial decisions, and some courts have suggested that advisory opinions rendered by the Committee on Open Government should be upheld if not irrational [see e.g., Sheehan v. City of Binghamton, 59 Ad 2d 808 (1977); Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979)].

Second, with regard to the obligation to maintain minutes of executive sessions, section 106(2) of the Open Meetings Law 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."

Based on the foregoing, when an issue is discussed during an executive session but no action is taken, there is no requirement that minutes of the executive session be prepared. However, if, for example, the City Council votes to approve a settlement during an executive session, I believe that the Law requires that minutes must be prepared indicating the nature of its action, the date and the vote of its members. It is noted, too, that a record must exist, ordinarily in the form of minutes, that identifies Council members who voted and the manner in which they cast their votes. Specifically, section 87(3)(a) of the Freedom of Information Law states that each agency, which includes a city council, shall maintain "a record of the final vote of each member in every proceeding in which the member votes".

Third, your questions relating to access to notices of claim, summonses and complaints and the attorney-client privilege are, in my view, related.

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

The first basis for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". For nearly a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 753 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under section 4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also been found that records may be withheld when the attorney-client privilege can

appropriately be asserted when the attorney-client privilege is read in conjunction with section 87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)].

Nevertheless, the provision embodying the attorney-client privilege, section 4503 of the Civil Practice Law and Rules, is in my view, limited and specific. That provision states in relevant part that:

> "Unless the client waves the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof."

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assis-

> tance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been waived, and that records consist of legal advice provided by counsel to the client, the records would be confidential pursuant to section 4503 of the Civil Practice Law and Rules and, therefore, section 87(2)(a) of the Freedom of Information Law. I point out, however, that a recent decision stressed that the attorney-client privilege should be narrowly applied. Specifically, in Williams & Connolly v. Axelrod, it was held that:

> "To invoke the privilege, the party asserting it must demonstrate that an attorney-client relationship was established and that the information sought to be withhold was a confidential communication made to the attorney to obtain legal advice or services...Since this privilege is an 'obstacle' to the truth-finding process, it should be cautiously applied..." [527 NYS 2d 113, 115; ___ AD 2d ___ (1988)].

From my perspective, the attorney-client privilege only applies to communications between an attorney and a client. Once records are disclosed to anyone other than a client, the privilege does not apply.

In the case of a notice of claim, such a record might be prepared by an attorney for a client. However, once it is served or filed on the City, it would not be privileged. Obviously, a notice of claim served upon the City would not have been prepared by the City or its attorney and would not involve a communication between City officials and their attorney. Consequently, I cannot envision how the City could claim that it is confidential.

Similarly, if correspondence, depositions and related materials have been shared by the parties, the City and the claimant, those records could not, in my view, be characterized as "privileged", for they would have been communicated to persons other than city officials and their legal counsel.

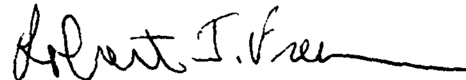
Other related records would in my opinion be available or confidential based upon a similar analysis. For example, the work product of an attorney may be withheld under section 3101(c) of the Civil Practice Law and Rules; material prepared solely for litigation would also be confidential under section 3101(d). However, I believe that those materials remain confidential so

long as they are not disclosed to an adversary. Materials that are served upon or shared with an adversary, such as a notice of claim, a summons or complaint, motion papers and the like would not in my opinion be privileged. In this instance, to the extent that those kinds of documents are maintained by the City, an agency subject to the Freedom of Information Law, I believe that they would be available, for none of the grounds for denial would apparently be applicable.

Lastly, you asked who is the City Attorney's client. That issue does not deal directly with either the Freedom of Information Law or the Open Meetings Law. As such, I do not believe that I can appropriately address the issue.

I hope that I 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 Counsel
Michael McKeon, Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1604

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 11, 1989

Mrs. Anne S. Legg

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. Legg:

I have received your letter of March 31 in which you requested an advisory opinion concerning the Open Meetings Law.

You wrote that the Town Board of the Town of Skaneateles recently conducted meetings "which entailed passing motions as well as discussions pertaining to landfill regulations in the Town...". You added, however, that to your knowledge, "no public notice was given as to the time, location or conduct of these Special meetings...".

In this regard, I offer the following comments.

First, by way of background, section 102(1) of the Open Meetings Law defines the term "meeting" as "the official convening of a public body for the purpose of conducting public business", and 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)]. Therefore, in my view, for purposes of the Open Meetings Law, there is no distinction between a regular town board meeting, a special town board meeting or a work session, for example.

Second, 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 week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Third, with regard to special meetings, section 62(2) of the Town Law states in relevant part that:

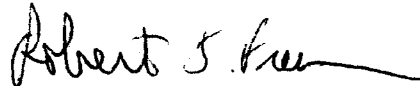
> "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to members of the board of the time and the place where the meeting is to be held."

I point out that section 62 of the Town Law pertains to notice given to members of a town board; the requirements of that provision are distinct from the Open Meetings Law, which requires that additional notice must be given to the public and the news media in accordance with section 104 of that law.

Enclosed are copies of the Open Meetings Law and "Your Right to Know", which describes the Law in detail. To enhance compliance with the Open Meetings Law, copies of those materials and this opinion will be sent to the Town Board.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Board, Town of Skaneateles

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 25, 1989

Hon. Edna Coonrod
Supervisor
Town of Willsboro
Willsboro, NY 12996

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 Coonrod:

I have received your letter of April 11 in which you requested an explanation of the Open Meetings Law as it applies to zoning boards of appeals and planning boards.

In this regard, I offer the following comments.

First, both zoning boards of appeals and planning boards constitute "public bodies". As such, those entities are required to comply with the Open Meetings Law.

Second, the Open Meetings Law pertains to meetings of public bodies, and it has been held judicially that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" of a public body, 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 v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Third, 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. Further, 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.

With respect to zoning boards of appeals, 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, 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. Unless one or more of those topics arises, a public body, including a zoning board of appeals, must deliberate in public.

It is reiternated that, if a topic arises that may properly be considered during an executive session, 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..."

Therefore, 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.

With regard to planning boards, it is often difficult to determine exactly when such boards are 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.

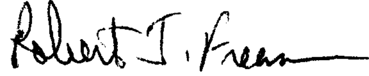
In sum, many activities of a planning board must in my view be conducted in public in accordance with the Open Meetings Law. However, in those situations in which the Board must hold a public hearing, weighs the evidence, applies the law and renders a final and binding determination reviewable only by 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, even when 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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 25, 1989

Mr. J. Stephen Hildreth
Director
Chemung County Department of
Weights and Measures
203 William Street
Elmira, NY 14901

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. Hildreth:

I have received your letter of April 12, as well as the materials attached to it.

As Chemung County Director of Weights and Measures, you wrote that, for years, you had attended monthly staff meetings that are apparently conducted by the County Executive. However, approximately a year ago, you were informed that it would no longer be necessary for you to attend the meetings, and you asked essentially whether you have a right to attend those meetings. You also questioned the propriety of a resolution that relocated the Office of Weights and Measures from the County Health Department to the Sheriff's Department.

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 Laws. As such, your question concerning the propriety of the transfer of the Office of Weights and Measures from one County department to another is outside the scope of the jurisdiction or expertise of this office.

Second, the Open Meetings Law pertains to meetings of public bodies, and section 102(2) of the Law defines the phrase "public body" to mean:

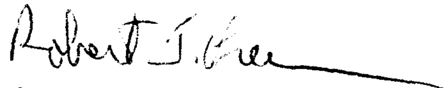
> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction 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 county legislatures, town boards, city councils, other similar bodies, and the committees that they designate. Those entities deliberate as a body and take action by means of voting.

A gathering of the heads of county departments or staff would not, in my opinion, be subject to the Open Meetings Law, for there is no public body involved. Consequently, I do not believe that the staff meetings described in your correspondence would fall within the requirements of the Open Meetings Law, and it would appear that the authority to permit people to attend staff meetings, such as yourself, would rest with the executive.

I hope that the foregoing has clarified the matter. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 27, 1989

Ms. Patricia B. Snyder
Producing Director
Empire State Institute for the
Performing Arts
Empire State Plaza
Albany, NY 12223

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. Snyder:

I have received your letter of April 17 in which you requested an advisory opinion, as well as related correspondence.

According to your letter:

> "On April 10, 1989, the Governor Nelson A. Rockefeller Empire State Plaza Performing Arts Center Corporation Board of Directors held a Board meeting in meeting room five at 1 pm in the Empire State Plaza.
>
> "Four Board members were present -- the Chairman, Vice Chairman, Treasurer and one of the Directors. When the Vice Chairman arrived, she stated that she had obtained a proxy for one of the Directors who was unable to attend.
>
> "The legislation creating the Corporation enumerates nine board memberships. Presently, there are two vacancies on the Board. The Corporation by-laws do not contain any reference to the status of a proxy.

> "The major business conducted on April 10th was to take control of the Corporation finances from the ESIPA budget staff and place the responsibility with a consultant on an interim basis until a new Executive Director is appointed."

You added that, to your knowledge, "no notice was posted for the meeting". Further, you sent a copy of letter addressed to you by Father Louis C. Vaccaro, Chair of the Corporation's Finance Committee, in which he asked that you arrange to turn over to the Corporation's Board of Directors various books and records of the Corporation, "[p]ursuant to the recent resolution" of the Board.

You asked whether the action taken at the Board meeting is "valid and enforceable". Further, in your capacity as the Director of the Empire State Youth Theatre and Producing Director of ESIPA, you requested advice concerning the course of action that should be taken by yourself and the Institute's fiscal officers.

In this regard, I offer the following comments.

First, by way of background, the Corporation was created by Chapter 688 of the Laws of 1979. Subdivision (1) of section 3 of that chapter states in relevant part that "Such corporation shall be a body corporate and politic constituting a public benefit corporation". Subdivision (2) states that "The corporation shall consist of a board of directors comprised of a chairperson and eight other members". That provision also indicates that the members are all either ex officio or appointed by the Governor, legislative leaders, the Mayor of the City of Albany or the Albany County Executive, and that "A majority of the chairperson and other members of the board shall constitute a quorum for the transaction of the business of the corporation". In addition, subdivision (5) provides that "All meetings shall be held and notices filed in accordance with the freedom of information act". As such, the legislation creating the Corporation specifies that its Board of Directors consists of nine members, and that a quorum is a majority of the total membership, which would be five members.

Second, the Open Meetings Law is applicable to meetings of public bodies, and section 102(2) of that statute defines the term "public body" to mean:

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

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

The Board of Directors is an entity that "consists of two or more members". The statute that created the Commission and its board indicates that it must conduct its business by means of a quorum and that it conducts public business and performs a governmental function for a public corporation. The phrase "public corporation" is defined in section 66(1) of the General Construction Law to include "a public benefit corporation", such as the entity in question. As such, I believe that the Corporation's Board of Directors clearly constitutes a "public body" that is subject to the requirements of the Open Meetings Law.

Third, although the statute concerning the Corporation makes specific reference to the number of members needed to constitute a quorum, also relevant in my view is section 41 of the General Construction Law, which is consistent with the Corporation's quorum requirements, and which provides additional guidance concerning those requirements. Specifically, 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 attended by at least a majority of its total membership.

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". 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" of a quorum requires the physical coming together of at least a majority of the total membership of a public body.

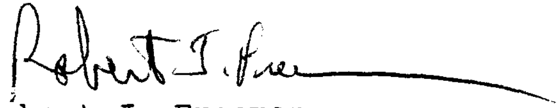
The gathering of the Board described in your letter involved four of its members. Since five members of the Board would constitute a quorum, and since five affirmative votes would be needed for the Board to take action or to carry out its duties, the four members in attendance would not, in my opinion, have had the authority to take action or approve a resolution. Further, nothing in the Open Meetings Law or the terms of Chapter 677 refers to the capacity of a member to vote by "proxy", and it has consistently been advised that a member of a public body cannot cast a vote unless the member is physically present at a meeting of the body. In short, absent a quorum at its meeting of April 10, the Board was, in my view, incapable of passing a resolution or taking action. Therefore, if the request by the Chair of the Finance Committee was made pursuant to a resolution approved at the gathering of April 10 attended by four members, I believe that the resolution would be ineffective, for it could not have been adopted without an affirmative vote of five members of the Board in attendance at a meeting.

Fourth, with respect to notice, I would conjecture that the reference in Chapter 677 to notices of meetings erroneously referred to the "freedom of information act". As you are aware, the "Freedom of Information Law" pertains to access to government records; the Open Meetings Law refers to requirements imposed upon public bodies. Irrespective of what appears to have been an error in drafting, the Open Meetings Law, section 104, requires that every meeting of a public body must be preceded by notice given to the news media and by means of posting in one or more designated, conspicuous public locations.

Lastly, your remaining question, which deals with the course of action that should be taken by yourself and the Institute, involves matters outside the jurisdiction or expertise of this office. Consequently, I do not believe that I can appropriately address that issue.

I hope that I 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 Directors, Empire State Plaza
Performing Arts Center Corporation
Dr. D. Bruce Johnstone, Chancellor

STATE OF NEW YORK
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OML-AO-1608

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 1, 1989

Mr. Robert F. Reninger

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. Reninger:

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

According to your letter, your requests for unapproved minutes of open meetings of the Planning Board of the Town of Greenburgh "have been denied on the basis that the minutes are not available prior to approval by State law and/or Town of Greenburgh custom...". You also indicated that "Board minutes may not be actually approved for four to six weeks after the date of a meeting". In addition, although you have shared opinions rendered by this office with Town officials, you wrote that the Town Attorney "has stated that there is no legal basis for the opinions expressed in those letters".

In this regard, I offer the following comments.

First, with respect to the Committee's authority to provide advice concerning the issue, section 109 of the Open Meetings Law states in relevant part that the Committee on Open Government "shall issue advisory opinions from time to time, as in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the open meetings law".

Second, section 106 of the Open Meetings Law requires the preparation of minutes by public bodies, and it includes direction concerning the contents of minutes and the time within which minutes of both open meetings and executive sessions must be prepared and made available. 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 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."

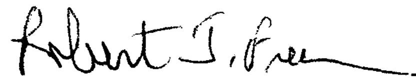
In view of subdivision (3) of section 106, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

Further, while neither the Open Meetings Law nor any other provision of which I am aware requires that minutes be approved, it is recognized that many public bodies routinely, or as a matter of policy or custom, 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.

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Attorney
Planning Board

STATE OF NEW YORK
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 1, 1989

Ms. Pauline M. Salmon

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. Salmon:

I have received your letter of April 15.

You have requested an opinion concerning the contents of minutes and the amount of detail that should be included in minutes of meetings.

In this regard, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 of the Open Meetings Law 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 in my view that minutes need not consist of a verbatim account of what was said at a meeting. Further, although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken.

With respect to executive sessions, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law 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)]. 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.

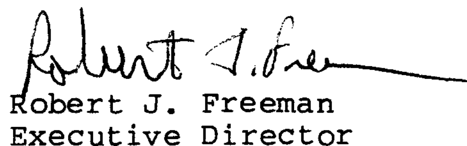
Lastly, since its enactment in 1974, the Freedom of Information Law has contained an "open meetings" requirement with regard to voting by members of public bodies. Specifically, section 87(3) of the Freedom of Information Law states in relevant part that:

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

Consequently, when a school board takes action, a record must be prepared that indicates the manner in which each member cast his or her vote. That record ordinarily should, in my opinion, be included as part of the minutes.

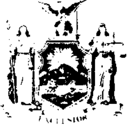
I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1610

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 2, 1989

Hon. Thomas Hankamp
Supervisor
Town of Pleasant Valley
Town Hall
Pleasant Valley, NY 12569

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 Hankamp:

I have received your letter of April 20, as well as the materials attached to it.

The attachments consist of an agenda and minutes pertaining respectively to a work session and a special meeting conducted by the Town Board. You wrote that the agendas were "hand delivered to all town councilmen mailboxes and both were posted on the bulletin board two (2) days before both meetings". You added that: "Because there was action taken at both meetings, [you] took minutes...All action taken had unanimous consent. Both meetings were open meetings". You wrote, however, that "The problem is that the Town Clerk Office was not formally notified and as a result the Town Clerk considers these meetings illegal. As a result the Town Clerk will not accept minutes with Supervisor's signature".

In this regard, I offer the following comments.

First, the Open Meetings Law does not distinguish among regularly scheduled meetings, special meetings or work sessions. In brief, it has been held that the term "meeting" includes 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, 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)].

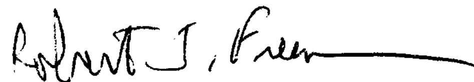
Second, every meeting must be preceded by notice given in accordance with section 104 of the Open Meetings Law. Section 104 refers to notice to the public and the news media; no reference is made to notice to members of a public body or to a clerk, for example. I would conjecture that the means by which a board provides notice of its meetings to the clerk is a matter to be determined by the board.

Third, with respect to the duties of a town clerk, section 30(1) of the Town Law states in part that the clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting...". Although nothing in section 30 pertains to notice of meetings given to the town clerk, I believe that it is implicit that notice should be given. Again, the means by which notice is given to the clerk could likely be determined by the Town Board.

With regard to the "legality" of the meetings, based upon your letter, it appears that the Board complied with the Open Meetings Law. Further, as a general matter, I believe that action taken at a meeting remains valid unless and until a court renders a contrary determination. In addition, although the issue does not directly relate to the Open Meetings Law, I have found opinions indicating that the absence of a town clerk from a meeting would not serve to invalidate action taken at a meeting [see Roth v. Loomis, 281 NYS 2d 158 (1967); 1967 Ops. St. Compt. File #292]. Concurrently, there are opinions indicating that a clerk should be notified of meetings (see 1964 Ops. St. Compt. #258) and that a clerk should attend meetings (see 1979 Ops. St. Compt. File #373).

I hope that I 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-5578
OML-AO-1611

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 4, 1989

Mr. David Zinman
Newsday
Long Island, NY 11747

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

Dear Mr. 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 between April of 1988 and March of this year by the Board 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 Freedom of Information and Open Meetings Laws. It is noted that you requested an advisory opinion involving similar issues approximately a year ago. Therefore, many of my remarks will represent a reiteration of advice offered in the earlier opinion.

First, by way of background, 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.

Second, 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, and matters of policy, should have been discussed in public.

Because the topics that were considered during executive sessions were discussed under the heading of "personnel matters", 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

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. Further, based upon my review of the minutes of executive sessions held over the course of a year, it appears that the Board fails to understand its obligations under the Open Meetings Law and that numerous issues involving matters of policy have been discussed in private under the guise of "personnel matters".

Executive Session of March 27, 1989

Item 3 includes reference to a motion approved to send letters of appreciation to persons who retire or leave the Medical Center in good standing after ten or more years of service. Items 4 and 5 respectively involved announcements that the Executive Director of the Center was asked to serve on a HANYS policy committee and a Senate health committee and that a meeting of the Joint Conference Committee would be held during the following month.

None of those discussions would in my opinion have fallen within the scope of section 105(1)(f) or any other provision permitting the holding of an executive session.

Executive Session of February 27, 1989

Item 4 referred to a report by the Executive Director concerning a seminar that he attended and plans to hold a seminar in May or June. Item 6 involved a discussion of financial and other support provided by the Auxiliary. Item 7 concerned a report of the hospital's annual audit.

As I interpret the minutes, none of those items involved "personnel" and should have been considered in public.

Item 5 consisted of an update on the status of search activities for certain positions. To the extent that the discussion focused on particular candidates for those positions, I believe that the executive session was proper. However, if the discussion did not relate to particular persons, but rather described the general progress of search activities, the matter, in my view, should have been considered in public.

Executive Session of January 23, 1989

Under item 4, the Executive Director announced the institution of a hospital-wide no smoking policy. Since the issue clearly involved a matter of policy, I do not believe that any basis for discussion of the issue behind closed doors could justifiably have been asserted.

Item 5 involved a summary of the Center's malpractice experience in 1988 and included a review of the Center's role in the "County litigation process". Assuming that the discussion was general and did not refer to any specific lawsuit, I do not believe that it could properly have been considered in an executive session.

The provision in the Open Meetings Law concerning litigation is found in section 105(1)(d), which 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, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors. If litigation strategy in conjunction with a particular lawsuit was not discussed, I do not believe that there would have been a basis for conducting an executive session.

With regard to the sufficiency of a motion to enter into 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].

Under item 6, the Executive Director described the reasons "why some physicians did not return their reappointment applications". On the basis of the minutes, it appears that the discussion did not focus upon any particular physicians, but rather on the reasons for their inability to fulfill the requirement. If that was so, I do not believe that the issue could properly have been discussed in the executive session.

Executive Session of December, 19, 1988

Under item 4, a report was given regarding an "executive briefing" concerning a section of regulations of the New York State Health Department. In my view, there was no basis for that discussion to be held in private.

Item 5 involved the placement of residency programs on probationary status, and an appeal of a decision placing the "OB/GYN residency program on probationary status". Assuming that the commentary merely informed the Board of the appeal and did not pertain to "litigation strategy", a subject discussed earlier, I do not believe that the topic qualified for consideration in an executive session.

Item 6 concerned a presentation by two attorneys regarding the Hospital's compliance with a stipulation relative to the "reappointment and credentiating process", as well as the findings of an audit and plans for corrective action. Again, assuming that the discussion did not involve "litigation strategy" relating to an ongoing lawsuit, it does not appear that any basis for entry into an executive session could have been asserted.

A second item 6, which appears to have been erroneously numbered, pertained to the approval of a draft of proposed "Hospital and Governing Body Bylaws". In my view, that issue should clearly have been discussed in public.

Executive Session of November 21, 1988

Part B of item 3 dealt with approval of minutes of a meeting of the Credential Committee. It does not appear that the minutes could have been considered during an executive session.

Part C involved a discussion of a search committee and the necessary criteria that must be met to serve in a position. If those issues involved criteria applicable to any person who might serve in the position, rather than the qualifications of a "particular person", I believe that the issue should have been considered in public.

Part D refers to a motion to establish a search committee to hire a medical director. Again, if the discussion involved the establishment of a committee, rather than the individuals who might serve on the committee or specific candidates for the position of medical director, the issue, in my view, should have been discussed publicly.

Items 4, 5, and 6 dealt respectively with the distribution of articles concerning the responsibilities of hospital governing bodies, an inspection conducted by the Joint Commission on Accreditation, and a draft of proposed changes to the Hospital and Governing Body Bylaws. None of those topics would, in my opinion, have qualified for consideration in executive session.

Executive Session of October 24, 1988

Item 4 involved an announcement that minutes of the Quality Assurance Committee meeting would be discussed at the next Board meeting. I believe that the announcement should have been made during an open meeting.

Executive Sessions of September 26, August 22 and July 25, 1988

Item 4 in the minutes of executive sessions of each meeting refer to the review and discussion of "case specific Quality Assurance materials". If the discussions related to specific cases, i.e., specific patients, it appears that the executive sessions would have been proper, for they likely would have involved the "medical history" of particular persons. If, however, the discussion involved certain kinds of cases or procedures and did not involve specific patients, it does not appear that the executive sessions were properly held.

Executive Sessions of June 27, May 31 and April 25, 1988

Under item 4 of the June 27 minutes, the Board reviewed and discussed minutes of the Administrative and Medical Quality Assurance Committees. The minutes indicate that: "A description of the case specific and physician specific process relative to tracking issues, which is being implemented, was discussed". If the discussion involved the "process" rather than particular cases involving specific patients, I believe that the matter was improperly discussed in executive session.

Similarly, in the May 31 and April 25 minutes, reference was made to minutes of the same two committees, as well as updates concerning progress on a "Plan of Correction". For the reasons described in the preceding paragraph, it does not appear that the issues could have been discussed in private.

In sum, each of the meetings referenced above included executive sessions of questionable validity. Moreover, many of the issues discussed during the executive sessions should clearly, in my opinion, have been discussed in public.

Lastly, as indicated earlier, I believe that the Board properly held executive sessions to discuss appointments, changes of status and proposed resignations of "particular persons". However, the minutes that you enclosed have been redacted; the names of persons who were appointed, whose status was changed or who resigned have been deleted.

In this regard, section 106(3) of the Open Meetings Law states that minutes shall be available to the public in accordance with the Freedom of Information Law.

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

While sections 87(2)(b) and 89(2)(a) of the Freedom of Information Law permit an agency to delete identifying details when disclosure would constitute "an unwarranted invasion of personal privacy", I do not believe that the deletions of the names were proper. On the contrary, I believe that certain aspects of the Freedom of Information Law, as well as its judicial interpretation, indicate that the names must be disclosed.

Section 87(3)(b) of the Freedom of Information Law requires that each agency maintain a record setting forth the name, public office address, title and salary of every officer and employee of the agency. That record, which is accessible, would include reference to persons appointed and those whose status has changed. Moreover, it has been found by the state's highest court that the names of public employees who were terminated due to budget restrictions must be made available, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy [see Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978)]. From my perspective, the identification of those employees who have resigned would result in a lesser invasion of privacy than in the case involving involuntary terminations. As such, I believe that the names that were deleted from the minutes should have been disclosed pursuant to the Freedom of Information Law.

In an effort to enhance compliance with the Freedom of Information Law and the Open Meetings Law, a copy of this opinion will be forwarded to the Board of Managers. In addition, copies of the Open Meetings Law and an explanatory brochure concerning the Freedom of Information Law and the Open Meetings Law will be sent to the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: C. Partricia Meyers, President, Board of Managers
Board of Managers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 4, 1989

Mr. Thomas C. Abraham

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. Abraham:

I have received your letter of April 21, as well as the materials attached to it.

According to your letter, at a meeting of the Penn Yan Central School District Board of Education held on March 15, "the administration presented a proposal to do away with the flexible schedule in the Middle and High Schools in the district". You added that: "It would appear that these discussions were held in closed sessions rather than during the open part of the meeting". Further, at a meeting held on April 5, you indicated that "the Board of Education created a new administrative position of Elementary Principal Grades 3-5 without any discussion in open session."

A review of the minutes indicates that executive sessions were held during the two meetings to discuss "personnel and legal matters" and "personnel and negotiations". From my perspective, to the extent that the issues that you described were discussed by the Board, I believe that the discussions should have occurred during open meetings. Conversely, to the extent that the Board considered those topics during executive sessions, I believe that it would not have complied with the Open Meetings Law.

In this regard, I offer the following comments.

First, 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.

Second, although a discussion of the "flexible schedule" and the creation of a new position might involve issues relating to personnel, neither of the issues would in my opinion have fallen with the so-called "personnel" exception for entry into an executive session.

Under the Open Meetings Law as originally enacted, the "personnel" exception 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be 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.

A change in schedule might affect "personnel" or students generally; however, such a discussion would not focus upon any "particular person". Similarly, a discussion concerning the creation of a position is a matter of policy which, in my opinion, should be discussed in public. When the Board reaches the point of discussing the relative qualifications of particular candidates, I believe that an executive session could properly be held, for its focus than would be on a particular person or persons. However, the Board had not, according to your letter, reached that point at the meeting in question.

Third, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session or "personnel", "litigation", "legal matters" or "negotiations", 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.

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:

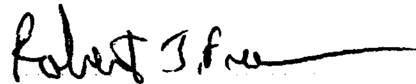
> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current 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.

As you requested, copies of this opinion will be sent to the persons 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:jm

cc: Donald Jensen, President, Board of Education
Maurice Dumas, Finger Lakes Times

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 8, 1989

Mr. Stanley F. Rogers

Dear Mr. Rogers:

Your letter addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. Although the Secretary is a member of the Committee, the staff is authorized to respond to inquiries on behalf of the Committee and its members.

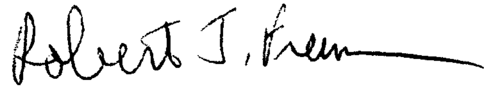
According to your letter, at a recent meeting of the Board of Trustees of the Village of Waverly, you attempted to raise a question regarding a statement made by the Mayor. You wrote, however, that you were initially ignored and that you were told later that you were "out of order". In addition, based upon your letter and the materials attached to it, the Board has adopted a resolution under which citizens are at certain times permitted to address the Board. Nevertheless, under that policy, the Board and staff will not answer questions.

In this regard, I offer the following comments.

The Open Meetings Law provides that any person may attend a meeting of a public body. However, the Law is silent with respect to the issue of public participation at meetings. Therefore, although a public body, such as a village board of trustees, may permit the public to speak at a meeting, there is no requirement that it must permit public participation. Consequently, there is nothing in the Open Meetings Law, or any other law of which I am aware, that requires a public body to answer citizens' questions during meetings.

I hope that the foregoing serves to clarify the matter. 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 Waverly

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COMMITTEE ON OPEN GOVERNMENT

OML-AO-1614

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 8, 1989

Mr. Gordon R. Nearpass

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. Nearpass:

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

In your capacity as a newly appointed ember of the Town of Varick Zoning Board of Appeals, you wrote that the Board has adopted the following procedure:

> "conduct an open meeting with neighbor input, adjourn the open hearing, have a discussion by board members, table, accept or reject the appeal."

You have asked how, under the procedure described above, the Board should comply with applicable law.

First, the Open Meetings Law (see enclosed) pertains to meetings of public bodies. The term "meeting" is defined in section 102(a) of the Law to mean "the official convening of a public body for the purpose of conducting public business". Further, in Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978), the state's highest court held that any time a quorum of the members of 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 in 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.

Second, there may be distinctions in the notice requirements concerning meetings and hearings. In the case of a meeting, section 104 of the Open Meetings Law requires that notice be given to the news media and to the public by means of posting in one or more designated, conspicuous public locations. Subdivision (3) of section 104 specifies that notice given prior to a meeting need not be a legal notice. If a meeting is scheduled at least a week in advance, notice must be given under section 106(1) not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given "to the extent practicable" at a reasonable time prior to such meeting pursuant to section 106(2).

In the case of a hearing held by a zoning board of appeals, the notice requirements are more specific and require the publication of a notice. Enclosed is a copy of section 267 of the Town Law, which pertains to boards of appeals, and which in subdivision (5) describes notice requirements concerning hearings.

In short, meetings and hearings may be legally different, and the notice requirements are separate and distinct. Under the procedure that you described, it appears that the Board holds hearings and meetings on the same evening. If that is so, I believe that separate notices should be given regarding hearings held pursuant to section 267(5) of the Town Law and regarding meetings pursuant to section 104 of the Open Meetings Law.

Lastly, with respect to meetings of a zoning board of appeals, I point out that there are two vehicles under the Open Meetings Law in 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. Further, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

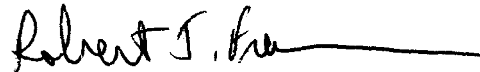
The other vehicle involves an "exemption" from the Law. Section 108 describes three such exemptions. In short, if a matter is exempt from the Open Meetings Law, the Law has no application.

With respect to zoning boards of appeals, 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, 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. Unless one or more of those topics arises, a public body, including a zoning board of appeals, must deliberate in public.

Enclosed is a brochure, "Your Right to Know", which describes the Open Meetings 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.

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 9, 1989

Mr. Ivan L. Albright

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. Albright:

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

Having attended a recent budget hearing conducted by the Board of Trustees of the Village of Wilson, you wrote that you expressed several concerns. Among them were contentions "that the budget work sessions that led to the final budget draft and hearing were not publicly announced or posted, and that they were not open to the public". You added that "[s]everal village trustees and the village attorney stated that budget work sessions are not public meetings and are not included in the Open Meetings Law".

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. All meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted that in a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City

of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. It is noted that the decision dealt with so-called "work sessions" held solely for the purpose of discussion and found that work sessions and similar gatherings are "meetings" that fall within the scope of the Open Meetings Law.

Second, all meetings must be conducted open to the public, except to the extent that the subject matter of a discussion may appropriately be considered during 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:

> "[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, it is noted that a public body cannot conduct an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may properly be considered during executive sessions. 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, employ-

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

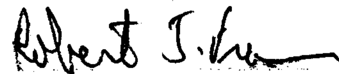
While issues relative to a budget might have an impact upon personnel, those issues often relate to personnel by department or as a group, for example, or the manner in which public moneys may be expended. To the extent that discussions of the budget involve considerations of policy relative to the expenditures 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.

Lastly, all meetings, including work sessions, must be preceded by notice given in accordance with section 104 of the Open Meetings Law. In the case of a meeting scheduled at least a week in advance, section 104(1) requires that notice be given to the news media and posted in one or more designated, conspicuous public locations not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, section 104(2) requires that notice be given to the news media and posted in the same manner as prescribed in section 104(1) "to the extent practicable" at a reasonable time prior to the meeting.

Enclosed is a copy of "Your Right to Know", which describes the Open Meetings Law in detail. In addition, 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
Enc.
cc: Board of Trustees, Village of Wilson

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OML-AO-1616

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 10, 1989

Mr. Bruce Golding
Gannett Westchester Newspapers
1825 Commerce Street
Yorktown Heights, NY 10598

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. Golding:

I have received your letter of May 2 in which you requested an advisory opinion concerning "the convening of executive sessions to discuss pending litigation".

Specifically, you wrote that "the Mount Kisco Village Board routinely goes into executive session, both after its regular meetings and after special meetings called for no other reason than to go into executive session, to discuss what they call 'pending litigation'."

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)].

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. Further, the executive sessions to which you referred, which are held "after" regular meetings and special meetings, should, in my view, be conducted as part of those meetings.

Third, 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..."

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 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:

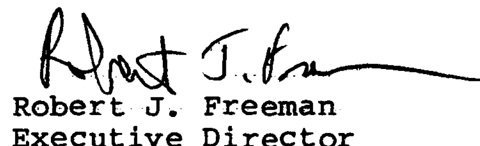
> "...any motion to go into executive session must 'identify the general area' to be considered. It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation.' This boilerplate recitation does not comply with the intent of the 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)].

Based upon the foregoing, I believe that a motion to enter into executive session that merely characterizes the subject to be discussed as "pending litigation" is inadequate. As indicated in the decision cited above, the motion should refer to the particular lawsuit under discussion.

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 Mount Kisco

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OML-AO-1617

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 12, 1989

Mrs. Albert F. Kuehn

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. Kuehn:

I have received your recent note and the materials attached to it. You have raised a series of issues concerning the conduct of meetings held by the Fredonia Central School District Board of Education.

First, you enclosed a copy of the Board's policy regarding its "workshop meetings". The policy statement indicates that "public notice and conduct" of those meetings "shall be in compliance with New York State Law" and that:

> "The primary purpose of the Workshop Meeting shall be to discuss philosophy, policy, goals, reports and long range plans of the Board of Education. The Board will also review all significant business matters scheduled for vote at its next regular monthly meeting."

However, you wrote that "this is not done openly".

In this regard, based upon a decision rendered by the Court of Appeals, the state's highest court, there is no distinction between a "formal" meeting and "workshop meeting". In brief, the court held that the term "meeting" includes any gathering of a quorum of a public body held for the purpose 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 v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

It is noted that the Court dealt specifically with so-called "work sessions" held solely for purposes of discussion and found that those gatherings constitute "meetings" subject to the Open Meetings Law in all respects.

Second, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings must be conducted open to the public, except to the extent that the subject matter falls within the scope of one or more grounds for entry into executive session appearing in paragraphs (a) through (h) of section 105(1) of the Open Meetings Law. In my view, discussions of "philosophy, policy, goals...long range plans" and similar matters must be discussed in public, for none of the grounds for entry into executive session could justifiably be asserted.

Third, several aspects of your comments involve minutes of meetings. Here I point out that the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 of the Open Meetings Law 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 in my view that minutes need not consist of a verbatim account of what was said at a meeting. Further, although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. In addition, even though some public bodies approve their minutes, section 106(3) specifies that minutes must be prepared and made available within two weeks. In cases in which minutes have not been approved within two weeks, to comply with the Law, it has been suggested that such minutes be made available after being marked as "unapproved" or "draft", for example. By so doing, the public can generally learn of what transpired at a meeting. Concurrently, the public is effectively informed that the minutes are subject to change.

With respect to executive sessions, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law 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)]. 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.

It is also noted that, since its enactment in 1974, the Freedom of Information Law has contained an "open meetings" requirement with regard to voting by members of public bodies. Specifically, section 87(3) of the Freedom of Information Law states in relevant part that:

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

Consequently, when a school board takes action, a record must be prepared that indicates the manner in which each member cast his or her vote. That record ordinarily should, in my opinion, be included as part of the minutes.

Lastly, the Open Meetings Law deals with the extent to which meetings of public bodies must be conducted in public and to which the public may be excluded from those meetings. Nothing in that statute pertains to the length of time that items must be discussed. Further, although legislation has been recommended that would generally require that records to be discussed at meetings be made available prior to or at those meetings, the Open Meetings Law does not contain any requirement to that effect. However, as the materials indicate, the records in question may be requested under the Freedom of Information Law.

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 the foregoing serves to clarify the Law. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 15, 1989

Ms. Mary E. Bolt
Town Clerk
Town of Concord
Town Hall
86 Franklin Street
Springville, NY 14141

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. Bolt:

I have received your recent note and the letter attached to it. Please be advised that the letter was erroneously addressed and that our correct address appears above.

As I understand the facts, the Town Board of the Town of Concord identifies executive sessions on its agendas, and following those references, the next item on the agenda is a motion to adjourn. Your question is whether, in your capacity as Town Clerk, you are "required to stay while the board goes into executive session and record the time they come out". You also asked whether the Board may "adjourn the meeting prior to going into executive session".

In this regard, I offer the following comments.

First, 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. As such, an executive session is not separate from an open meeting, but rather is a part of an open meeting. Since adjournment signifies the end of a meeting, I do not believe that the Board could adjourn prior to an executive session. In my view, a motion to adjourn should be made after the completion of all of the Board's business during a given meeting, including its discussions held in executive sessions.

Second, since you indicated that the Board places executive sessions on its agenda, I point out that, in a technical sense, a public body cannot schedule an executive session in advance of a meeting. Section 105(1) of the Open Meetings Law requires that a procedure be accomplished during an open meeting before an executive session may be conducted. Specifically, the cited provision states in relevant part that:

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

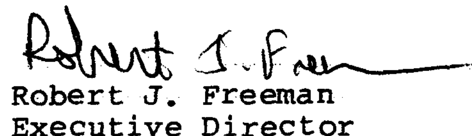
Based on the foregoing, a motion to enter into an executive session must be made and carried during an open meeting. Therefore, technically, a public body cannot know that an executive session will indeed be held until a motion authorizing an executive session has been made and carried by a majority vote of the total membership of the Board during the meeting.

Lastly, with respect to your presence at the meetings, as you are aware, section 30 of the Town Law requires the clerk at attend meetings of a town board and take minutes. Minutes, according to section 106 of the Open Meetings Law, must include reference to motions, proposals, resolutions and any other matter involving a vote by the members. If it is clear that none of those activities will occur either during or after an executive session, it is my view that there is no requirement that the clerk remain at the meeting.

Enclosed are copies of the Open Meetings Law and an explanatory brochure that 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.

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OML-AO-1619

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 17, 1989

Ms. Tamara Katzowitz
Director
West Hurley Public Library
79 Van De Bogart Road
Woodstock, NY 12498

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. Katzowitz:

I have received your letter of April 21, as well as the materials attached to it.

You have expressed concern with respect o the manner in which the Board of Trustees of the West Hurley Public Library has implemented the Open Meetings Law. For instance, motions to enter into executive sessions have been vague. Further, a discussion of "Director's duties", "not evaluation of the Director, employment history, or her salary", was discussed during an executive session under the heading of "personnel 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 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, para- graphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

Third, with respect to a discussion of "personnel" or "personnel matters", 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

In the context of your letter and the materials, a discussion of the duties of the library director should, in my opinion, have been conducted in public. As you suggested, if the discussion involved the duties that would be performed by any person who might serve in the position of director, the issue would have pertained to matters of policy. In contrast, if the discussion focused upon you and how well or poorly you perform your duties as director, the focus would have involved a "particular person", and such a discussion could properly have been held during an executive session.

Lastly, 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.

I hope that I 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, West Hurley Public Library

STATE OF NEW YORK
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 18, 1989

Ms. Donna E. Wilcox

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. Wilcox:

I have received your letter of May 2 in which you requested an advisory opinion concerning the Open Meetings Law in your capacity as a member of the Herkimer Central School District Board of Education.

Specifically, you have raised the following questions:

> "Should there be notice given to the news media and public before regular meetings, special meetings, and work or study sessions? Does verbal notification of an upcoming meeting, made during a previous meeting, constitute a proper notification or should such notice by in writing? Also, should written notice be given to the district by posting such notice?
>
> "Would it be possible or appropriate to carry on discussion in Executive Session on the following:
>
> 1.) Discussion concerning taxing the public for a future building and how it would be worded on the ballot.
>
> 2.) Switching salaries from one budget code to another.
>
> 3.) Employees Benefits.

> 4.) Letters from politicians concerning aid to the district contingent on the Governors approval".

In this regard, I offer the following comments.

First, it is noted that the Open Meetings Law pertains to all 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", and 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)]. Consequently, in my view, with respect to the application of the Open Meetings Law, there is no distinction between a regular meeting, a special meeting or a work session, for example.

Second, with respect to notice of meetings, section 104 of the Open Meetings Law 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 week in advance, again, notice must be given to the news

media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

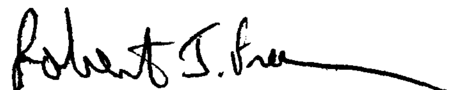
Third, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. As such, a public body cannot enter into an executive session to discuss the subject of its choice.

With regard to the four items that you described, with one exception, those items must, in my view, be discussed in public, for none of the grounds for entry into executive session would be applicable. The issue that might, depending upon the circumstances, be properly considered during an executive session is "employee benefits". Section 105(1)(e) of the Open Meetings Law 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 a public employer, i.e., a school district, and a public employee union, i.e., a teachers association. Therefore, if the Board is involved in collective bargaining negotiations, and a discussion of employee benefits is part of those negotiations, I believe that an executive session to consider that issue would be proper.

Enclosed are copies of the Open Meetings Law and an explanatory pamphlet that 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: Board of Education, Herkimer Central School District

STATE OF NEW YORK
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OML-AO-1621

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 19, 1989

Mr. John Wright

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 May 3 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, on May 2, a meeting was held by the Planning Board of the Town of Ticonderoga to consider the "proposed Ticonderoga Development Law". In attendance were members of the Planning Board, two members of the Zoning Board of Appeals, one member of the Town Board, the Town Attorney, and yourself. You wrote that:

> "When the meeting was opened the Chair asked for a motion to go into executive session to discuss 'possible litigation'. Planning Board member A. McDonald asked of Town Attorney G. Lawson 'Is this legal?' Town Attorney G. Lawson replied 'If there is a reason for it'. All the persons listed in paragraph one above were asked remain except [you]."

You have raised the following questions with respect to the foregoing:

> "1. Is the mouthing of 'possible litigation' by the Chair sufficient legal reason to go into executive session?
>
> 2. Is the mouthing of 'If there is a reason for it' by the Town Attorney:
> (a) A sufficient legal answer to the

> question posed by Planning Board member McDonald? (b) A sufficient legal reason to go into executive session?
>
> 3. Was it permissible for the following to attend the executive session of the Planning Board: (a) Town Board member Ferguson? (b) Town Attorney G. Lawson? (c) Zoning Board of Appeals members H. Otley and J. Lemieux?
>
> 4. Was is permissible for the Zoning Board of Appeals to meet without the meeting being advertised?"

In this regard, I offer the following comments.

First, the Open Meetings Law is based upon a presumption of openness. Stated differently, public bodies must conduct meetings open to the public, except to the extent that the subject matter under consideration may properly be discussed during an executive session. Paragraphs (a) through (h) of the Open Meetings Law specify the topics that may appropriately be considered during executive sessions. As such, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, the topics that may be considered during executive sessions are limited.

Second, 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..."

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 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).

Based on the foregoing, it is unlikely, in my view, that the executive session, at least in terms of the entire two hour session, was justified.

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)].

Based upon the foregoing, I believe that a motion to enter into executive session that merely characterizes the subject to be discussed as "possible litigation" is inadequate. As indicated in the decision cited above, the motion should refer to the particular lawsuit under discussion.

With regard to attendance at an executive session, 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."

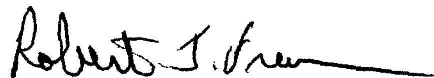
As such, the Planning Board could authorize persons other than its members to attend a proper executive session.

Lastly, I do not believe that the Zoning Board of Appeals was required to give notice of the meeting in question. Only two members of the Board attended. Since less than a quorum of the Board attended, it was not a meeting of the Board, and the notice requirements in the Open Meetings Law would not have applied.

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board, Town of Ticonderoga
G. Lawson, Town Attorney

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 22, 1989

Ms. Mary Louise Schwanz
Town Clerk
Town of Eden
2795 East Church Street
Eden, New York 14057

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. Schwanz:

I have received your letter of May 8 in which you requested assistance.

According to your letter, the Town Board of the Town of Eden has "apparently...either made a resolution...and/or verbally stated that a tape recorder cannot be used to aid or take minutes at the Town Board Meetings". You have requested information "that will help change their past decision".

In this regard, 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 any person 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.

Second, the Open Meetings Law contains what may be characterized as minimum requirements concerning the contents of minutes. Section 106(1) concerns minutes of open meetings states that:

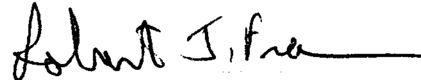
> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

I believe that it is common for a clerk to tape record meetings as an aid in the preparation of minutes. Further, while a tape recording would likely contain the elements of minutes, minutes should be nonetheless reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, the Town might need a permanent written record readily accessible to Town officials who must refer to or rely upon the minutes in the performance of their duties. I point out, too, that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

In sum, it is my view that any person, including a town clerk, may tape record meetings of a town board. However, I believe that a tape recording is not a substitute for minutes; rather, a tape recording may be used as an aid in preparing permanent, written minutes of 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 Eden

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 22, 1989

Mr. John Wright

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 May 11 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, at a meeting of May 8 held by the Town Board of the Town of Ticonderoga, the Board conducted an executive session to "discuss personnel". In addition, to the members of the Town Board, several other Town officials attended the executive session. You added that, at the close of the meeting, the Supervisor read a statement, a copy of which you enclosed. The statement is handwritten and, assuming that I have read it accurately, states as follows:

> "Resolution to be passed by Town Board:
>
> (1) to pay $2,500. deductible on lawsuits and
>
> (2) to pay any and all judgments, if any, against the Town, elected officials and appointed officials.
>
> (3) Your taxes will be raised accordingly. This has been brought about by the concerns of the elected and appointed officials."

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

> "(a) Is a resolution to shift responsibility from the wrongdoer to the taxpayer a 'discussion of personnel' and a proper reason to go into executive session?
>
> (b) Aren't the above stated facts a violation of Public Officers Law Sections 100 and 103?
>
> (c) This Special Meeting was called to discuss 'Answering service for police, fire and ambulance'. Is it permissible to go into executive session at this meeting to discuss an entirely different unadvertised subject?"

In this regard, I offer the following comments.

First, as indicated in previous correspondence, the Open Meetings Law is based upon a presumption of openness. Stated differently, public bodies must conduct meetings open to the public, except to the extent that the sub- ject matter under consideration may properly be discussed during an executive session. Paragraphs (a) through (h) of the Open Meetings Law specify the topics that may appropriately be con- sidered during executive sessions. As such, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, the topics that may be considered during executive sessions are limited.

Second, 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..."

Third, with respect to a discussion of "personnel" or "personnel matters", 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

In the context of your letter and the statement that you attached, it does not appear that the discussion focused upon any "particular person". Rather, it appears that the discussion related to town employees generally relating to a matter of policy. If my interpretation of the facts is accurate, I do not believe that there would have been a basis for conducting an 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 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].

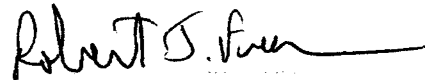
In view of the foregoing, it has been advised that a motion to enter into executive session to discuss "personnel", or "personnel matters", without additional description, is inadequate. Where section 105(1)(f) may be asserted, I believe that a motion for entry into an executive session should contain 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, the notice requirements imposed by the Open Meetings Law require that notice include reference to the time and place of a meeting. Nothing in the Open Meetings Law requires that notice include an indication of the subjects to be discussed at a meeting. Therefore, while the notice apparently given was misleading, I do not believe that it was required to include reference to subjects to be discussed.

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board, Town of Ticonderoga

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DEPARTMENT OF STATE
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OML-AO-1624

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 23, 1989

Ms. Adele Broderick

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. Broderick:

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

According to the correspondence, following the defeat of a bond issue which, if approved, would have authorized funds for the construction of a new school, three of the five members of the Board of Education of the Miller Place Union Free School District met with various persons for the purpose of creating a committee to study overcrowding in the schools. When you attempted to attend the gathering, you were informed that it was not a School Board function and that notice was not required to have been given. One of the items attached to your letter is a communication sent by the President of the Board of Education to a member of the public in which the President wrote that "the School Board is forming an advisory Board-Committee Space Needs Committee and invited that person to serve on the Committee.

In my opinion, the gathering described in the materials was a meeting subject to the Open Meetings Law that should have been preceded by notice. Moreover, I believe that the Committee designated by the Board constitutes a "public body" that falls within the scope of the Open Meetings Law.

In this regard, I offer the following comments.

First, with respect to the gathering during which three of the five members were present, it is noted that the Open Meetings Law pertains to "meetings" of public bodies and 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 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).

In view of the foregoing, if members constituting a majority of a public body meet to conduct public business, formally or otherwise, at school district offices or elsewhere, I believe that such a gathering would trigger the application of the Open Meetings Law, for it would, in my opinion, constitute a "meeting" subject to the Law that must be preceded by notice.

Based upon the news article attached to your letter, the members met for the purpose of determining whether certain residents "were interested in serving on our committee". In my view, the Board members who attended the gathering were not acting as private citizens but rather as members of the Board of Education carrying out their official duties.

With respect to notice of meetings, section 104 of the Open Meetings Law 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 week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Second, with regard to the committee formed by the Board, 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."

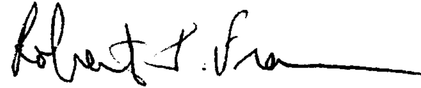
Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies".

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)]. Moreover, in a recent decision involving a committee consisting of citizens designated by a town board, it was found that such a committee is a "public body" required to comply with the Open Meetings Law (Goodson-Todman Enterprises, Ltd. v. Town Board, Town of Milan, Supreme Court, Dutchess County, October 5, 19898).

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education, Miller Place Union Free School District
Raymond E. Evans, President

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 24, 1989

Ms. Kathleen Smith
Secretary
Town of Deerpark
Drawer A
Huguenot, NY 12746

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

Dear Ms. Smith:

I have received your letter of May 15 in which you raised questions concerning a request for a record.

You wrote that the Zoning Commission of the Town of Deerpark has received a request for the "most recent working draft of the Town of Deerpark master plan and most recent working draft of revised Town of Deerpark Ordinance". You added that:

> "The Zoning Ordinance is in a stage where changes are being made weekly and the last draft copy is already obsolete. The master plan has been submitted to the Town Board. The draft copy of the Zoning Ordinance has not been submitted to the Planning Board for their review and comments or to the Town Board. The Zoning Commission has not yet held a public hearing because the Ordinance is not at that stage. The Zoning Commission is now working with the master planner on a weekly basis to coordinate the master plan to the Zoning Ordinance. When this is accomplished the ordinance will be retyped with the changes and made available to the public."

Based on the foregoing, you asked the following questions:

> "Is this draft copy of the Zoning Ordinance considered a record at this point? Should it be made available to the public even though the draft is very obsolete? Would this draft be considered intra-agency material?"

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and section 86(4) of the Law defines the term "record" expansively 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."

In view of the breadth of the definition, a draft would, in my opinion, constitute a "record" subject to rights of access, even though it may be "obsolete" or subject to change.

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

Third, as you suggested, a draft could be characterized as "intra-agency material" subject to section 87(2)(g) of the Freedom of Information Law. That 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..."

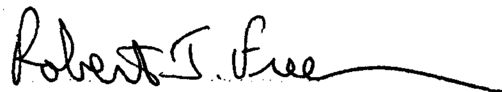
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations 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. I would conjecture that the draft could be withheld, for it would apparently not contain any of the kinds of accessible information described in subparagraphs (i) through (iv) of section 87(2)(g).

Lastly, even though the draft might justifiably be withheld, I point out that the Zoning Commission is a public body subject to the requirements of the Open Meetings Law. Like the Freedom of Information Law, the Open Meetings Law is based upon a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that the subject under discussion falls within one or more among eight grounds for entry into an executive session.

Assuming that the Zoning Commission conducts meetings to discuss and revise the zoning ordinance, I believe that those meetings would be required to be conducted in public, for none of the grounds for executive session could justifiably be asserted. If the substance of the draft is or has been effectively disclosed at open meetings, there may be little reason for withholding the draft, despite the authority to do so pursuant to section 87(2)(g) of the Freedom of Information Law.

I hope that the foregoing will be useful to you. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 31, 1989

Ms. Patricia Rickard

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. Rickard:

I have received your letters of May 17 and 18, both of which pertain to the Open Meetings Law.

The first relates to a meeting of the Town Board of the Town of Poestenkill on May 16, a Tuesday. You wrote, however, that:

> "Town Board meetings in Poestenkill are regularly held on the second Wednesday of each month. The Tuesday meeting was not announced or given public notice in any way. The decision to have the meeting was made sometime on Thursday, May 11, 1989."

In this regard, the Open Meetings Law requires that notice be given prior to all meetings, whether they are regularly scheduled or otherwise. Specifically, section 104 of the Open Meetings Law states that:

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

> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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 week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

According to the second letter, the Town of Poestenkill Planning Board discussed holding a joint meeting with the Planning Board of the Town of Sand Lake. When asked whether the public could attend the joint meeting, the response was affirmative. Nevertheless, when members of the public arrived at the meeting, they were told that it was not an open meeting.

Here I point out that the scope of the Open Meetings Law is determined in part by section 102(1) of the Law, which defines the term "meeting". That definition has been interpreted broadly by the state's highest court to include any convening of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action action and regardless of the manner in which the gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Therefore, if a quorum of any one of the public bodies was present at the gathering to which you referred, I believe that it constituted a "meeting" subject to the Open Meetings Law in all respects. Moreover, it has been held that joint meetings held by two or more public bodies also fall within the scope of the Open Meetings Law [see Oneonta Star, Division of Ottoway Newspapers, Inc. v. Board of Trustees of Oneonta School District, 66 AD 2d 51].

Assuming that the gathering in question was a "meeting", I believe that it should have been preceded by notice in the manner described earlier.

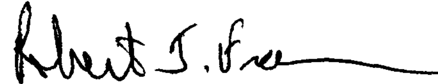
Lastly, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings must be conducted open to the public, except to the extent that a topic arises that may appropriately be considered during an executive session. Paragraphs (a) through (h) of the Open Meetings Law specify the topics that may be discussed during an executive session. Therefore, a public body (or bodies) cannot discuss the topic of its choice behind closed doors; on the contrary, the grounds for entry into executive session are limited.

In sum, assuming that a majority of the members of any public body convened at the joint meeting, I believe that the Open Meetings Law was applicable, that the meeting should have been preceded by notice, and that it should have been conducted in public in accordance with the requirements of the Open Meetings Law.

As you requested, copies of this opinion will be sent to the persons 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:jm
cc: Mr. Richard Amadon, Town Supervisor, Town of Poestenkill
Mr. Carpenter, Town Supervisor, Town of Sand Lake
Mrs. Janice Moody, Poestenkill Planning Board
Mr. Owen Goldfarb, Poestenkill Planning Board
Mr. Stanley Wright, Poestenkill Planning Board
Mr. Thomas Horton, Poestenkill Planning Board
Mr. John Gowdy, Poestenkill Planning Board
Mr. Ray Legenbaur, Poestenkill Planning Board
Mrs. Roberta Spencer, Poestenkill Planning Board
Mr. Roland Blais, The Record

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 1, 1989

Mr. Ron Britzke
Editor
The Cornwall Local
35 Hasbrouck Avenue
Cornwall, NY 12518

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. Britzke:

I have received your letter of May 18 in which you requested an advisory opinion concerning the status of a "newly-formed police commission" in the Town of Cornwall.

In this regard, I offer the following comments.

First, section 150 of the Town law deals with the establishment of town police departments. Subdivision (2) of that provision states in relevant part that:

> "The town board of a town in which such a police department has been established at any time by resolution may establish a board of police commissioners for such town and appoint one or three police commissioners who shall at the time of their appointment and throughout their terms of office be owners of of record of real property in and electors of such town, and who shall serve without compensation, and at the pleasure of the town board. If the town board shall appoint only one such police commissioner, it shall in addition designate two members of the town board to serve as members of such police commission."

Based on the foregoing, a police commission is established by a town board and consists of three members.

Second, 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 view, each of the conditions necessary to conclude that a police commission is a public body can be met. As indicated earlier, a police commission is an entity consisting of three members. It is required to conduct its business by means of a quorum pursuant to section 41 of the General Construction Law. A police commission clearly conducts public business and performs a governmental function for a public corporation, which, in this instance, is the Town. Further, the definition of "public body" includes not only a governing body, such as a town board; it also includes reference to any committee, subcommittee "or similar body of such body". Since a town police commission is a creation of a town board, I believe that it is a "similar body", and a public body subject to the Open Meetings Law in all respects.

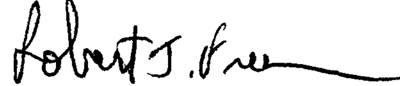
Lastly, I point out that the the term "meeting" has been interpreted broadly by the state's highest court to include any convening of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action action and regardless of the manner in which the gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, if a quorum of the Commission (two of its three members) convenes to conduct the business of the Commission, such a gathering would, in my opinion, constitute a meeting that should be preceded by notice given in accordance with section 104 of the Open Meetings and convened open to the public. Moreover, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings must be conducted

open to the public, except to the extent that a topic arises that may appropriately be considered during an executive session. Paragraphs (a) through (h) of the Open Meetings Law specify the topics that may be discussed during an executive session. Therefore, a public body cannot discuss the topic of its choice behind closed doors; on the contrary, the grounds for entry into executive session are limited.

In sum, I believe that a police commission established by a town board falls within the requirements of the Open Meetings Law applicable to all public bodies.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Cornwall

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June 2, 1989

Mr. John J. Byrnes

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. Byrnes:

I have received your letter of May 12, as well as the materials attached to it.

You have raised a series of issues concerning the conduct of meetings by the Board of Trustees of the Village of Montgomery. You included a statement made by a former member of the board who attended the meetings that are the subject of your inquiry, and who asserted that the facts as you presented them are accurate.

According to your letter and the materials, although the minutes include reference to motions for entry into executive sessions to discuss specific matters, tape recordings of the meetings indicate that the motions identified matters to be discussed as "personnel", without additional description. You also suggested that budgetary and other matters were discussed in the executive sessions and that the Board and its attorney discussed issues unrelated to the announced subject for the executive session. In addition, you questioned the propriety and accuracy of minutes of meetings.

In this regard, I offer the following comments.

First, the Open Meetings Law is based upon a presumption of openness. Stated differently, public bodies must conduct meetings open to the public, except to the extent that the subject matter under consideration may properly be discussed during an executive session. Further, 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, and paragraphs (a)

through (h) of the Open Meetings Law specify the topics that may appropriately be considered during executive sessions. As such, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, the topics that may be considered during executive sessions are limited.

Second, 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..."

Therefore, if a motion for entry into an executive session identifies one subject to be discussed, only that subject should be considered during that executive session. When the discussion of that subject has ended, I believe that the Board should return to an open meeting.

Third, with respect to a discussion of "personnel" or "personnel matters", 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

In the context of your letter, to the extent that an issue might have focused upon a particular person or persons in conjunction with the topics listed in section 105(1)(f), an executive session would properly have been held. However, most issues relating to budgetary matters, although they may affect "personnel", involve the manner in which public monies will be spent or allocated. Those issues would, in my opinion, rarely qualify for discussion in 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 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.

With respect to minutes, section 106 of the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of 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."

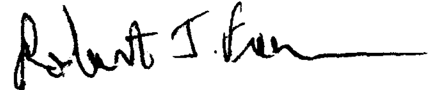
As such, all motions, including a motion to enter into an executive session must, in my opinion, be accurately referenced in minutes of an open meeting. It is noted that if a public body discusses an issue during an executive session but takes no action, minutes of the executive session need not be prepared. 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 with one week to the extent required by the Freedom of Information Law.

Lastly, with regard to discussions between the Board and its attorney, 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 may 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 acting in his capacity as an attorney.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Montgomery
Donald G. Nichol

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June 2, 1989

Mr. Garry Douglas
Village Treasurer
Village of Waterford
123 Fonda Road
Waterford, NY 12188

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

Dear Mr. Douglas:

I have received your thoughtful letter of May 24 in which you requested advice.

According to your letter, the Village of Waterford administers joint programs that provide direct grant assistance to residential property owners for housing rehabilitation. You wrote that "all residential property owners within set target areas are eligible for some level of assistance (with 25% grants up to $2000 even to those considered upper income), [and] grant totals and percentages are determined by the incomes of both owner occupants and tenants". In evaluating eligibility, personal income data is obtained from applicants. Therefore, as a matter of policy, you indicated that program data is considered confidential, as in the identity of recipients, for disclosure of recipients' identities "might in itself be an invasion of their privacy and might lead to public assumptions about income, even if income and grant level data is not also provided".

Recently, you have discovered a case of "possible fraud", for it appears that "an applicant- property owner and his daughter-tenant wilfully provided false and/or misleading income data in order to qualify for a level of assistance they should not have". It is anticipated that the Village Board of Trustees will take action to terminate the grant and seek repayment of grant funds, and it is possible that the matter may be referred to "investigative authorities".

Although information concerning the case of possible fraud has yet been disclosed, you wrote that, "[g]iven the circumstances involved, [the Village is] not necessarily opposed to publicly revealing - if asked - the basic circumstances of this case, insofar as [you] believe the integrity of [y]our program is involved and some enforcement action is being contemplated".

Based on the foregoing, you have requested an opinion on the following question:

> "is it within the authority of the Village Board to decide in such a case to acknowledge the situation, reveal identities, and perhaps even make available as public documents relevant correspondence with the property owner and public agencies (i.e., HUD for example), while withholding income data and documentation, as well as the grant levels involved, so as to protect truly personal information"?

You expressed the view that this is a situation in which "a local government needs somehow to balance a general policy of protecting individual identity and privacy with another general policy of recognizing the public's right to know, particularly where a question of the integrity and proper administration of a public program is also involved".

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except 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 the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence in my opinion indicates that a single record might be accessible or deniable in whole or in part. Moreover, that phrase imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Second, of relevance under the circumstances in terms of the authority to withhold is section 87(2)(b) of the Freedom of Information Law. That provision enables an agency to withhold records or portions of records the disclosure of which would result in "an unwarranted invasion of personal privacy". While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law

in my view enable government to prevent disclosures concerning the personal or intimate details of individuals' lives. As such, with respect to grant programs, often the question involves the extent to which disclosure would constitute an unwarranted as opposed to a permissible invasion of personal privacy.

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

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

If in this instance eligibility for participation in the program is based upon the location of property, I believe that the identity of the applicant would be available, but that personal financial information could be withheld as an unwarranted invasion of personal privacy.

In another context that may be somewhat analogous, section 136 of the Social Services Law requires that records identifying applicants for or recipients of public assistance must be kept confidential. Obviously the receipt of public assistance is based upon an income qualification, and it has been held that the confidentiality of social services records is necessary to preserve the dignity and self-respect of recipients and to insure the integrity and efficiency of the administration of the program [Doe v. Grieco, 62 AD 2d 498 (1978)]. Nevertheless, subdivision (4) of section 136 states in part that:

> "Nothing in this or the other subdivisions of this section shall be deemed to prohibit bona fide news media from disseminating news, in the ordinary course of their lawful business, relating to the identity of persons charged with the commission of crimes or offenses

> involving their application for or receipt of public assistance and care, including the names and addresses of such applicants or recipients who are charged with the commission of such crimes or offenses."

As such, even though records identifiable to applicants for or recipients of public assistance must be kept confidential, the Legislature recognized the role of the news media in disclosing information involving what may be criminal acts carried out by applicants or recipients. In the situation that you described, no criminal charges have been initiated and there is no statutory requirement of confidentiality. However, a similar rationale might be offered, in that information that might ordinarily be withheld based upon considerations of privacy might justifiably be disclosed due to the possibility of fraud and an intent to preserve the integrity of the program.

Third, I point out that the Freedom of Information Law is permissive; an agency may withhold records, or perhaps portions of records, in accordance with the grounds for denial found in section 87(2) of the Freedom of Information Law. However, as indicated 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)].

Therefore, even when it is questionable whether disclosure would constitute an unwarranted invasion of personal privacy, the Freedom of Information Law imposes no requirement that an agency must withhold the records.

Lastly, viewing the matter from a different vantage point, you indicated that the Board of Trustees will likely consider the issue at an upcoming meeting. I believe that the matter could properly be discussed during an executive session, for section 105(1)(f) of the Open Meetings Law permits a public body to conduct an executive session to consider:

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

I point out that when a public body holds an executive session, minutes of the executive session need not be prepared if no action is taken during the executive session. However, if action is taken in an executive session or perhaps following an executive session during an open meeting, minutes must be prepared. In the case of a vote taken during an executive session, section 106(2) of the Open Meetings Law 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, if, for example, the Board acts by terminating the grant agreement or by seeking repayment, minutes would be required to indicate the nature of the action, the date and the vote of the members. Further, I believe that those minutes would be available under the Freedom of Information Law, for disclosure would, in my view, constitute a permissible rather than an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 5, 1989

Mr. Kevin P. Gorman

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. Gorman:

I have received your letter of May 24 in which you requested an advisory opinion concerning the Open Meetings Law.

Attached to your letter are copies of minutes of proceedings conducted in federal court on January 19, 1988 relating to the case of the United States of America v. City of Yonkers (80 Civ. 671). In brief, during the morning session, Judge Sand asked whether the City had, pursuant to an earlier order, adopted a Housing Assistance Plan (HAP). Following a lengthy commentary on the issue by the Court and the parties, the Court directed that "the City of Yonkers adopt a HAP" by January 21. The judge suggested that those present could caucus later in the day with the City Council to obtain a commitment to adopt the HAP and to express its intention to comply in good faith with its legal obligation to implement the housing remedy order. At the end of the morning session, the City's legal counsel asked the Court whether the City Council and the Mayor could meet and report to the Court later in the day. The Judge agreed and adjourned the proceeding until 3 o'clock that afternoon.

At the afternoon session, counsel for the City stated that he had "met with the new mayor of Yonkers and with those city councilman who are in court today, who are a majority of the entire council". He stated further that he had been "authorized to represent to the court that, in the first place, a meeting of the council will take place at 5:00 tomorrow afternoon, Wednesday afternoon, that the appropriate calls for that meeting have gone out", adding "that that is as soon as Yonkers could meet under its rules...". In response to a question by the Judge concerning whether the persons with whom counsel conferred "constitute a

majority of the council", counsel answered affirmatively. Soon thereafter, the Court adjourned the matter until the following week, stating that "an adjournment of a week is appropriate if in fact there is a good-faith basis for believing that the interval of time will enable consensual resolution of this matter".

Based on the foregoing, you have raised the following questions:

> "1. When the mayor and City Council majority convened on January 18, 1988, between 11:00 A.M. and 3:40 P.M. to arrive at a 'commitment' regarding legislation, was this considered for the purpose of discussing public business subject to Open Meetings?
>
> 2. When the majority present authorized the defense counsel to state that they would support legislation, was that considered an action subject to open meetings?
>
> 3. Should the public [have] been permitted to attend the meeting assuming no executive session was called[?]
>
> 4. Assuming an executive session was properly called, should any majority agreement [have] been recorded by vote?
>
> 5. When the quorum decided that a meeting of the Council would be held at 5:00 P.M. the following day, was this decision proper within the Open Meetings"?

In this regard, I offer the following comments.

First, 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)]. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

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

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

If indeed a majority of the City Council met "to arrive at a 'commitment' regarding legislation", such a gathering would in my view have apparently constituted a "meeting" subject to the Open Meetings Law.

Second, every meeting of a public body must be preceded by notice of the time and place of the meeting. Section 104(1) of the Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 104(2) per-

tains 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.

Third, it is noted that the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, section 105(1) of the Open Meetings Law states in relevant part that:

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

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

Of potential relevance under the circumstances is section 105(1)(d), which permits a public body to discuss "proposed, pending or current litigation". It would appear that perhaps portions of the gathering in question could appropriately have been conducted during an executive session. It is noted, too, that it has been held that the purpose of the "litigation" exception for executive session "is to enable a public body to discuss pending litigation privately, without 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)]. While a discussion of "litigation strategy" could in my opinion have properly been considered during an executive session, that issue might have been distinguishable from a discussion of a legislative action, such as the adoption of a HAP.

Also of possible relevance is section 108 of the Open Meetings Law concerning exemptions from the Law. If a matter falls within the scope of an exemption, the Open Meetings Law has no application. 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 City Council) 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 may 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 acting in his capacity as an attorney outside the scope of the Open Meetings Law. It is possible that some of the gathering in question might have been exempt from the Open Meetings Law. However, to the extent that action was taken, I believe that the Open Meetings Law would have applied.

Lastly, when a public body takes action by means of a vote, its action must ordinarily be memorialized in the form of minutes. Section 106 of the Open Meetings Law pertains to minutes of meetings and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings ex-

> cept 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.

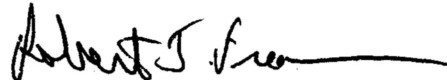
In addition, I point out that the Freedom of Information Law, since its enactment in 1974, has contained what may be viewed as an open meetings or open vote requirement. Section 87(3) of the Freedom of Information Law states in relevant part that:

> "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 Council is an "agency" as defined by the Freedom of Information Law [see section 86(3)], minutes, in my opinion, should include reference to each motion made or action taken during a meeting, as well as, reference to each member's vote as affirmative or negative.

I hope that the foregoing is responsive to your questions.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 6, 1989

Ms. Norma Schmucker

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. Schmucker:

I have received your letter of May 26 in which you raised a series of issues concerning the implementation of the Open Meetings Law by the Board of Education of the East Islip School District.

According to your letter, open meetings are scheduled to begin at 8 p.m. However, preceding its meetings, "the Board meets in a small room behind closed doors in 'executive session'". Voting by the Board is apparently carried out informally as follows: "The following (item) has been requested... Motion, Second, Aye". You added that there "were many meetings held to formulate the budget", but that "[n]one of these meetings were announced to the public". In another case, it appears that a decision was made without any public discussion of the issue. Further, the "superintendent's contract has been renewed each year in Executive Session". Finally, you wrote that "minutes are not available to the public for six weeks after the meeting. This is two weeks after the meeting in which they are approved".

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

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

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

Based upon the direction given by the courts, if a quorum of the School Board is present at the gatherings held prior to the open meetings, those gatherings are, in my opinion, meetings that should be convened open to the public.

Second, every meeting of a public body must be preceded by notice of the time and place of the meeting. Section 104(1) of the Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 104(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in section 104(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is reiterated that notice must be provided prior to all meetings, regardless of whether the meetings are considered formal or otherwise.

Third, it is noted that the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. I point out 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. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, section 105(1) of the Open Meetings Law states in relevant part that:

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

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

a basis for entry into an executive session during the pre-meeting gatherings described in your letter, those meeting must, in my view, be preceded by notice and convened open to the public, followed by a motion to go into executive session, indicating the reason and carried by a majority vote of the Board.

Fourth, if a quorum of the Board convened to discuss the formulation of the budget, I believe that those gatherings, for reasons discussed earlier, constituted "meetings" subject to the Open Meetings Law. 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.

Next, 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 meetings and executive sessions are available in accordance with the Freedom of Information Law. Nevertheless, various interpreta-

tions 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, I believe that votes to renew the superintendent's contract should have been taken during open meetings.

Lastly, the Open Meetings Law requires that minutes of open meetings bodies be prepared and made available within two weeks. 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.

In addition, 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:

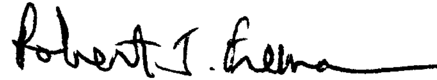
> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Since the Board is an "agency" as defined by the Freedom of Information Law [see section 86(3)], minutes, in my opinion, should include reference to each motion made or action taken during a meeting, as well as reference to each member's vote as affirmative or negative.

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: Board of Education, East Islip School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5627
OML-AO-1633

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 13, 1989

Mr. Lowell McAllister
Executive Director
Frederic Remington Art Museum
303 Washington Street
Ogdensburg, New York 13669

<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. McAllister:

As you are aware, your letter of June 1, 1989, addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State upon which the Secretary of State serves as a member, is responsible for advising with respect to the Freedom of Information and Open Meetings Laws. Further, as indicated above, the staff is authorized to advise on behalf of the Committee and its members.

In brief, your question is whether the Frederic Remington Art Museum is an agency of municipal government, particularly with respect to the status of meetings of its Board of Trustees under the Open Meetings Law.

Having reviewed the Museum's Provisional Charter and By-laws, copies of which you forwarded, I attempted to elicit additional information concerning the Museum and its Board from a variety of sources, including yourself. As I understand the issue from a historical perspective, near the turn of the century, Mr. Remington's widow donated paintings, sculptures and other works of her late husband to the Ogdensburg Public Library, which continues to own much of the Museum's collection. Because the work of the Museum became too great a burden for the Library to handle effectively, a new educational corporation, the Frederic Remington Museum, was created in 1981 and was granted a provisional charter. The By-laws indicate that members of the Board "are appointed by the Mayor of the City of Ogdensburg, upon re-

commendation of the Board of Trustees of the Frederic Remington Art Museum, with the advice and consent of the City Council." Further, the City provides money for "staff salaries, fringe benefits and insurance on the collection." In addition, you indicated that much of the staff consists of civil servants who are public employees.

Based on the foregoing, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and section 102(2) of that statute defines "public body" to mean:

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

By viewing the language quoted above in terms of its components, I believe that the Board is a "public body" subject to the Open Meetings Law. The Board is an entity consisting of at least two members, for the By-Laws specify that it includes from 13 to 17 members. Section VIII of the By-Laws refers to a quorum requirement. Under the circumstances, since the Board historically is an offshoot of the Public Library, which in turn is an arm of City government, and since most of the staff consists of civil servants, I believe that the Board conducts public business and performs a governmental function for a public corporation, which, in this instance, is the City of Ogdensburg. If my analysis is accurate, each of the elements needed to conclude that the Board is a public body is present.

Second, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be convened. Section 105(1) of the Law specifies and limits the topics that may be discussed during an executive session.

Third, due to your concerns regarding the capacity of Board members to exchange ideas outside the context of an open meeting, as suggested during our conversation, it may be worthwhile to consider the presentation or exchange of information or ideas in writing. Here I direct your attention to the Freedom of Information Law. That statute is applicable to agency records, and section 86(3) 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."

In my view, the Board would constitute an "agency," for it performs a governmental or perhaps a proprietary function for a municipality.

Like the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access. All records are available, except those records or portions thereof falling within the scope of the grounds for denial appearing in section 87(2) of the Law.

Relevant to the suggestion made earlier concerning an exchange of ideas made by means of written communications is section 87(2)(g). That provision permits an agency to withhold records that:

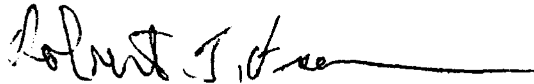
> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller 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.

Memoranda communicated between yourself and the Board or among Board members would constitute "intra-agency materials." Further, to the extent that those materials consist of ideas, recommendations or opinions, for example, I believe that they could be withheld. While there might not be any basis for discussion of those matters in executive session, the exchange of written materials might enable the members to be more focused at meetings or to avoid raising issues of questionable merit.

I hope that the foregoing will be of use to you and the Board. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 14, 1989

Mr. Isidore Gerber

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

Dear Mr. Gerber:

I have received your letter of May 31, 1989, as well as the materials attached to it.

You referred initially to two appeals directed to the Village of Liberty that had not been answered and which you forwarded to this office with a previous letter. I addressed the issues relating to those appeals in a letter dated May 31, 1989. As such, it appears that your most recent correspondence and my response to you crossed in the mail. I hope that the response satisfactorily clarified and resolved the issues.

The remaining issue raised in your letter pertains to minutes of meetings. According to your letter, having reviewed the Village's minute book on May 26, you found that there were no minutes concerning a meeting held in April and at least one other meeting. You also indicated that votes were taken at the meetings in question.

In this regard, 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."

If indeed votes were taken at the meetings in question, I believe that those actions were required to have been memorialized in minutes. Moreover, 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.

Lastly, 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:saw

cc: Deborah Tanous, Clerk/Treasurer

STATE OF NEW YORK
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 15, 1989

Mr. Richard A. Benedict
President
Mt. Pleasant Cottage School
Teachers Association
Route 141 Broadway
P.O. Box 8
Pleasantville, NY 10570

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

Dear Mr. Benedict:

I have received your letter of May 30, as well as the materials attached to it.

According to your letter, various requests for records of the Mt. Pleasant Cottage School District have been denied by the District Superintendent, Dr. Peter P. Gioiella. The records sought include minutes of meetings of the Board of Education, the current School District budget, a copy of a collective bargaining agreement applicable to administrators, and records reflective of moneys expended on "legal fees, lawyers and related legal expenses" during the current fiscal year.

In this regard, I offer the following comments.

First, with respect to minutes of meetings, the Open Meetings Law requires that minutes be prepared and made available. Section 106(1) of the Open Meetings Law 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."

Further, section 106(3) of provides 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 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, minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Consequently, I believe that the minutes that you requested must be made available upon payment of the appropriate fee for photocopying.

Second, with respect to rights of access to records generally, 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 my opinion, a collective bargaining agreement, a contract, as well as the District's budget, would clearly be available, for none of the grounds for denial appearing in the Freedom of Information Law could appropriately be asserted to withhold such records.

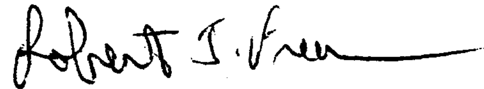
Lastly, bills, vouchers, contracts and similar records reflective of expenses incurred by an agency are in my opinion generally available, for none of the grounds for denial would be applicable. With respect to payments to attorneys, I point out that, while the communications between an attorney and client are generally privileged, 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 found in the records in question 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 village to its attorney are available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., August 20, 1981; Young v. Virginia R. Smith, Mayor of the Village of Ticonderoga, Supreme Court, Essex County, Jan 9, 1987].

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to Dr. Gioiella.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Peter P. Gioiella

STATE OF NEW YORK
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OML-AO-1636

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 15, 1989

Mr. Roger Biagi
Deputy County Executive
Westchester County
Michaelian Office Building
White Plains, New York 10601

Dear Mr. Biagi:

I have received your letter of May 8, 1989, which relates to an advisory opinion prepared on February 28 at the request of Audrey G. Hochberg, a member of the Westchester County Board of Legislators.

Ms. Hochberg questioned the status of "Pre-Board" meetings that precede the formal meetings of the County's Board of Acquisition and Contract. In brief, it was advised that the Pre-Board sessions constitute meetings of a public body that are subject to the requirements of the Open Meetings Law.

You wrote, however, that the gatherings in question are staff meetings, adding that they "do not contemplate attendance by sitting members of the Board," that "no one is asked to vote" and that they are not "de facto" meetings of the Board. You also wrote that the purpose of the Pre-Board sessions "is to determine what matters shall be presented by executive branch agencies of county government to the Board of Acquisition and Contract....The Pre-Board meetings are chaired by [you]...to gather information, spot problems, coordinate the administration's activities and brief the County Executive when necessary." Further, you indicated that: "Staff members who are potential delegates of actual Board members in their absence are not delegates at Pre-Board. It cannot actually be known until later in the week when the Board of Acquisition and Contract actually meets, whether anyone would be acting in behalf of an absent member."

While I appreciate your comments, nothing that you have offered has, from my perspective, refuted any of the facts offered by Ms. Hochberg in her letter. Further, I continue to believe that the "Pre-Board" sessions are meetings that fall

within the requirements of the Open Meetings Law when at least two of the three members of the Board or their designees attend "Pre-Board" meetings.

Based upon your comments and those of Ms. Hochberg, it is clear that the members of the Board are permitted to and have in fact delegated their authority to vote at the Board meetings to representatives who act in their stead. It is also clear that delegates who have been authorized to act on behalf of members at Board meetings attend the Pre-Board gatherings. In my opinion, those delegates are essentially the alter egos of the members of the Board when they attend the Pre-Board meetings.

Whether votes are taken at Pre-Board meetings is, in my view, irrelevant to the status of these gatherings under the Open Meetings Law. On the basis of your letter, it is clear that the Pre-Board sessions are held to lay the groundwork for the ensuing deliberations and actions to be taken by the Board itself. Contrary to your assertion, it appears that the Pre-Board meetings are in reality de facto meetings of the Board of Acquisition and Contract, for the Pre-Board sessions are apparently held to do what the Board itself would do in the process leading to decision making.

In short, the Pre-Board sessions are in my opinion analogous to the gatherings described in the decision discussed at length in my letter to Ms. Hochberg, Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburg [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. While it is unnecessary to repeat the specific points enunciated in that decision, it is reiterated that the thrust of the holding is that the entire deliberative process is intended to be affected by the Open Meetings Law. The decision made clear that gatherings held without any intent to vote but only an intent to discuss, such as " 'work sessions,' 'agenda sessions,' 'conferences,' 'organizational meetings,' and the like" (id. at 414) are "meetings" subject to the Open Meetings Law. In my view, any of the gatherings denominated in the previous sentence might be used to describe the "Pre-Board" meetings.

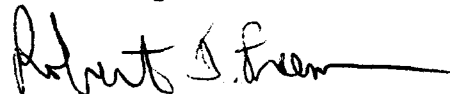
Similarly, although you wrote that it cannot be known whether anyone will act in behalf of an absent Board member until the Board actually meets at its formal meeting, I believe such a factor or possibility is irrelevant, for in reality two kinds of meetings are held by the Board. One, the formal meeting, generally involves a situation is which members or their authorized representatives convene for the purpose of taking action. The other, the Pre-Board, is as its characterization suggests, a meeting attended by several people, including two representatives of "actual" members who have been authorized by those members to vote at the formal meetings. Further, on the basis of your letter, the representatives of the members attend due to their

roles as the delegates of those members in order to carry out functions of the Board constituting necessary preliminaries to eventual action by the Board.

At the conclusion of your letter, you suggested that my opinion relied upon assumptions that were factually inaccurate. Other than your characterization of the Pre-Board as a staff meeting, I do not believe that anything in your letter serves to demonstrate that my assumptions were anything but accurate. As such, I continue to advise that the Pre-Board meetings are subject to the Open Meetings Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

cc: Hon. Audrey G. Hochberg
Ed Tagliaferri

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 16, 1989

Honorable Edward R. Grause
Town Chairman
Town of Hempstead Democratic
Committee
94 Newbridge Road
East Meadow, New York 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 Chairman Grause:

I have received your letter of June 6, as well as the materials attached to it.

One of the items included among the materials is a portion of a copy of the "regular" calendar prepared in conjunction with a meeting of the Nassau County Board of Supervisors. The problem is that the calendar includes little in the way of description with respect to matters that will be considered by the Board at its meetings. You wrote that: "The refusal of the Board of Supervisors to permit examination of a more detailed 'member' calendar or the back-up documentation makes it impossible for the public to weigh the merits or demerits of any given proposal and to take a position." In addition, you inferred that the Board considers "all of the inter-departmental memoranda as 'classified'..."

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law or the Open Meetings Law that specifically refers to agendas or calendars relating to meetings.

Second, under the circumstances that you described, it would appear that "regular" and "member" calendars, as well as "back-up" materials distributed to or used by Board members in preparation for or at its meetings, 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..."

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.

I would conjecture that some aspects of the records in question, particularly "back-up materials", would consist, at least in part, of statistical or factual information accessible under section 87(2)(g)(i). Consequently, it is suggested that a request be made prior to meetings, specifying your interest in obtaining statistical or factual materials found within the records sought.

Third, it is noted similar issues have arisen frequently. Often records used by members of public bodies are reviewed and discussed at open meetings but are not distributed to members of the public who attend. The result may be a discussion of facts and figures that are unknown to the public. Due to the expressions of frustration, the Committee has recommended to the Governor and the Legislature that the Open Meetings Law specify that, with certain restrictions, records discussed at an open meeting must be available to the public prior to or at the beginning of a meeting. Our proposal, however, has not resulted in the passage of legislation.

In another unrelated aspect of your letter, you wrote that two members of the Town Board of the Town of Hempstead recently announced their resignations from the Board. On the following

morning, the Board met and appointed two new members. You wrote that you were "told that section 62 of the Town Law covers such meetings and that upon written notice of two members, a special meeting can be convened on two days notice." You added that "At no time was any notice given to the public."

With regard to special meetings held by Town Boards, 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."

I point out that section 62 of the Town Law pertains to notice given to members of a town board; the requirements of that provision are distinct from the Open Meetings Law, which requires that additional notice must be given to the public and the news media in accordance with section 104 of that law. In addition, although two days notice was apparently not given to members of the Board, the State Comptroller and others have advised that the members may meet if they waive the notice requirement, and that if Board members are present and participate at a special meeting, business may be transacted, even though two days written notice was not given (see e.g., 1962 Ops. St. Compt. #977).

Separate and distinct from the notice provisions of section 62 are the notice requirements of the Open Meetings Law. Specifically, section 104 of that statute states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by

> this section shall not be construed to require publication as a legal no 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 prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable," at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations. If notice was not given pursuant to the Open Meetings Law, the Board in my opinion would have failed to have complied with district law.

Since you asked "what can be done," I direct your attention to section 107(1) of the Open Meetings Law, which pertains to the enforcement of that law and states in part that:

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

However, the same provision also states that:

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

As such, in the kind of situation that you described, one issue would involve whether a failure to give notice was unintentional or otherwise.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Thomas L. Carroll
Town Board, Town of Hempstead

STATE OF NEW YORK
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OML-AO-1638

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June 16, 1989

Mr. Dan Heffner

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. Heffner:

I have received your letter of June 9 in which you raised questions concerning the Open Meetings Law.

Your first question is whether a taxpayer can tape record school board and town board meetings.

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

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was 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, including meetings of town boards and boards of education.

Secondly, you asked whether minutes of executive sessions must be taken and whether the preparation of such minutes is "mandatory or optional."

Here I direct your attention to section 106 of the Open Meetings Law. 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 of 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 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 avail-

able to the public within one week from the date of the executive session."

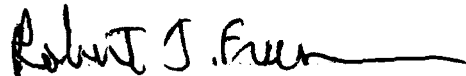
As such, minutes of open meetings must be prepared and made available within two weeks of such meetings. If action is taken during an executive session, minutes indicating the nature of the action taken, the date and the vote must be prepared and made available within one week to the extent required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

The preceding comments concerning minutes of executive sessions pertain generally to public bodies. 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)]. If a school board does not vote during its executive sessions, minutes of those sessions need not be prepared.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

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ROBERT J. FREEMAN

June 20, 1989

Ms. Mary-Carol S. Aiello
Trustee
Village of Herkimer

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. Aiello:

I have received your letter of June 11 concerning our recent telephone conversation.

You have requested an advisory opinion concerning the use of tape recorders at meetings of the Board of Trustees of the Village of Herkimer, on which you serve as a member.

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

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was 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).

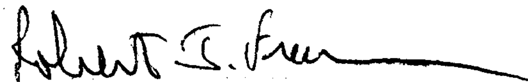
In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, including meetings of a village board of trustees.

During our conversation, you also raised the issue of your authority to tape record executive sessions. Since an executive session involves a portion of a meeting during which the public may be excluded, it does not appear that the Open Meetings Law or the decisions cited earlier would govern the issue of the capacity of a member of a public body to record the discussion during an executive session. From my perspective, since it has been held in a variety of contexts that a public body may establish reasonable rules to govern its own proceedings, the question would be whether the Board has adopted a rule on the subject and, if so, whether the rule is reasonable. Absent such a rule, it does not appear that it would be illegal for a Board member to use a tape recorder at an executive session. While I am not an expert on the subject, eavesdropping may be illegal in certain circumstances. In a provision of the Penal Law that may be relevant, section 250.00(2) defines "mechanical overhearing of a conversation" to mean "the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment." As I understand the quoted language, if a person is a party to a conversation, that person may generally record the conversation.

As you requested, copies of this opinion will be sent to the persons designated in your letter, as well as 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:saw

cc: Board of Trustees, Village of Herkimer
Gregg DeLuca, Chief of Police
Samuel J. Conde, P.B.A. President

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 21, 1989

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

Dear Mr. Scalise:

Senator Donovan has asked that I respond to a question that you had addressed to him and to Assemblyman Casale concerning the Open Meetings Law. As you are aware, the Open Meetings Law authorizes the Committee on Open Government to render opinions concerning the interpretation of that statute.

According to your letter, the Village of Herkimer "is repeatedly stalemated with the governmental employees contracts". You wrote that "Discussions concerning these contracts are held behind closed doors", even though the unions made "tremendous demands" relating to the expenditure of public money. You added that you "know of no reason why these meetings should be closed to the public".

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, such as those held by the Board of Trustees of the Village. Further, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings must be conducted open to the public, except to the extent that the subject matter under consideration may properly be discussed during an executive session. Paragraphs (a) through (h) of the Open Meetings Law specify and limit the subjects that may be discussed in executive sessions.

Second, one of the grounds for entry into executive session, section 105(1)(e), is relevant to your inquiry. The cited provision permits a public body to enter into an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article fourteen of the Civil Service Law is commonly known as the "Taylor Law", and it pertains to the relationship between a public employer (i.e., a

municipality) and a public employee union. Consequently, I believe that a public body clearly has the authority to enter into an executive session to engage in the kinds of discussions or negotiations that are the subject of your inquiry.

It is noted that section 105(1) of the Open Meetings Law requires that a procedure be accomplished by a public body before it may conduct 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..."

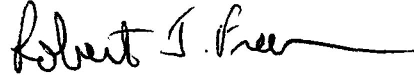
As I interpret that provision quoted above, an executive session cannot be held until a motion to do so is made and carried by a majority vote of the total membership of a public body. Presumably, if a motion to enter into an executive session does not carry, an issue that could appropriately be considered behind closed doors might be discussed in public. Moreover, the language of section 105(1) indicates that a public body may conduct an executive session under proper circumstances, but that it is not required to hold an executive session. As such, it would appear that a public body could engage in the kinds of discussions you described in public, even though an executive session could be held.

Nevertheless, there is a judicial decision on the subject that reached a contrary result. In response to an inquiry by a local government official who, like you, sought to open the collective bargaining process, I advised that the process could be opened to the public, for the Open Meetings Law permits but does not require that an executive session be held. However, the Supreme Court, Saratoga County, held that the Open Meetings Law does not apply to collective bargaining negotiations [see Application of Saratoga County, 476 NYS 2d 1020 (1984)]. While the Court cited decisions rendered in other states to bolster its conclusion, I do not believe that a clear rationale for the holding was offered.

In short, although I disagree with the Court's conclusion, in good faith, I feel compelled to point out that it is the only judicial decision on the subject of which I am aware. Enclosed are copies of the decision and the opinion that was prepared at the request of Saratoga County.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James H. Donovan, Member of the Senate
Hon. Anthony J. Casale, Member of the Assembly

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 22, 1989

Mr. David McKay Wilson
Westchester Rockland Newspapers
Corporate Park II
One Gannett Drive
White Plains, New York 10604

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

Dear Mr. Wilson:

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

Your inquiry focuses upon a meeting of the Board of the Metro-North Commuter Railroad held on June 14. According to your letter:

> "The Board called an executive session, announcing that they were to discuss 'litigation matters' and personnel behind closed doors. When they reconvened, [you] requested that the Board Chairman, Constantine Sidamon-Eristoff, identify the litigation under discussion. He refused, saying it would compromise the railroad's position."

You wrote, however, that is your understanding that "such disclosure had been mandated" by the courts.

In this regard, I offer the following comments.

First, 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:

> "[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 subjected or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only...."

Second, with respect to "litigation matters," 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 fro 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 boiler plate 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,

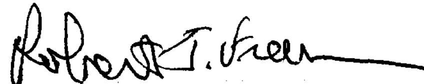
> proposed or current litigation to be discussed during the executive session. Only through such an identification will the purposes of the Open Meetings Law be realized" [emphasis added by court; Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981)].

Based upon the foregoing, I believe that a motion to enter into executive session made in conjunction with section 105(1)(d) of the Open Meetings Law must include reference to the parties involved in the litigation. The only instances in which the parties need not be named would, in my view, involve situations in which a public body discusses proposed litigation to be initiated against a party and disclosure of the identity of that party would enable the party to evade effective law enforcement or legal process.

A copy of this opinion will be sent to Chairman Sidamon-Eristoff.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

cc: Constantine Sidamon-Eristoff, Chairman

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ROBERT J. FREEMAN

June 22, 1989

Mr. Hal Otley, Chairman
Ticonderoga Zoning Board of
Appeals
Town of Ticonderoga
Ticonderoga, New York 12883

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

Dear Mr. Otley:

I have received your letter of June 16. In your capacity as the newly designated Chairman of the Zoning Board of Appeals (ZBA) of the Town of Ticonderoga, you have raised a series of questions concerning the Freedom of Information Law and the Open Meetings Law.

You referred initially to page page 6 of "Your Right to Know" concerning the designation of a records access officer and asked whether the ZBA designates its own records access officer or whether the Town Clerk serves as records access officer.

By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Law (21 NYCRR Part 1401). The Committee has done so, and I have enclosed a copy for your review. In turn, section 87(1)(a) of the Freedom of Information law states that the governing body of a public corporation, such as a town board, "shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of the article" (the Freedom of Information Law).

Section 1401.2(a) of the Committee's regulations provides in relevant part that:

> "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."

As such, ZBA does not designate its own records access officer. The Town Board has the duty of designating one or more records access officers. If there is but one records access officer, such as the town clerk, the clerk would serve as records access officer for the ZBA. Similarly, I believe that the Town Board would be responsible for complying with the notice requirements to which you referred.

You asked where, in terms of location, the Zoning Board of Appeals should keep its records. The Freedom of Information Law does not specifically deal with that issue. However, I point out that section 30 of the Town Law indicates that the town clerk is the legal custodian of all town records. In addition, section 57.19 of the Arts and Cultural Affairs Law, which contains the Local Government Records Law, specifies that the "town clerk shall be the records management officer." It is noted, too, that the Freedom of Information Law pertains to all records of an agency and that section 86(4) of the Law defines the term "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."

Next, you asked whether a "tape recording of the ZBA meeting (Public Hearing) constitute[s] an official record of the proceeding in addition to written minutes." You also asked how

such a recording should be maintained. I believe that there may be a distinction between a "meeting" and a "hearing." A meeting involves a situation in which a quorum of a public body, such as the ZBA, seeks to conduct business or deliberate as a body. It is my understanding that a hearing generally refers to situations during which members of the public are given an opportunity to express their views on a certain subject, or in which a person or body seeks testimony from witnesses or interested parties, often in the context of a quasi-judicial proceeding. The Open Meetings Law pertains to meetings and requires that minutes be prepared in conjunction with section 106 of that statute. In what may be characterized as minimum requirements concerning the contents of minutes, section 106(1), which pertains to minutes of meetings, states that:

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

While I believe that it is common to tape record meetings as an aid in the preparation of minutes and a tape recording would likely contain the elements of minutes, minutes should be nonetheless reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, the Town might need a permanent written record readily accessible to Town officials who must refer to or rely upon the minutes in the performance of their duties. I point out, too, that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

I am unaware of any requirement that a tape recording must be prepared for either meetings or hearings. However, in terms of the retention of those documents, the State Education Department has adopted records retention schedules applicable to local governments. The town clerk as records management officer should have a copy of the schedules, which provide minimum retention periods pertaining to both tape recordings and written minutes.

You asked whether minutes of Zoning Board of Appeals meetings must be approved to become public records. Once again, I direct your attention to section 106 of the Open Meetings Law. Subdivision (3) of that section requires that minutes of open meetings bodies be prepared and made available within two weeks. 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

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.

In addition, in conjunction with a related question, 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...."

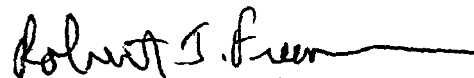
Since the Board is an "agency" as defined by the Freedom of Information Law (see section 86(3)], minutes, in my opinion, should include reference to each motion made or action taken during a meeting, as well as reference to each members vote as affirmative or negative.

Lastly, you questioned whether the Zoning Board of Appeals may "require" an attendance record of all persons present at a Zoning Board of Appeals meeting (hearing) and made a part of the written record of such proceedings." I know of no requirement that an attendance record be kept concerning members of the public who attend meetings or hearings. Further, since section 103 of the Open Meetings Law enables any person to attend an open meeting, it is doubtful in my view whether persons attending a meeting could be required to identify themselves.

Enclosed are copies of the Freedom of Information Law and the Open Meetings Law for your review.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1643

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 12, 1989

Mrs. Mary L. Fedorka

Dear Mrs. Fedorka:

I have received your letter of July 9 in which you indicated that meetings of boards of visitors are not publicized. In addition, you also requested a copy of the "Smoking in Public Places Law."

In this regard, I offer the following comments.

I believe that a board of visitors constitutes a "public body" subject to the requirements of the Open Meetings Law. Section 102(2) of the Open Meetings Law defines "public body" to mean:

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

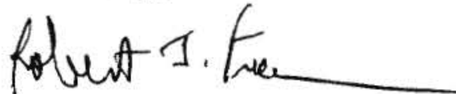
A board of visitors consists of fifteen members (see Executive Law, section 512), it is required to conduct its business by means of a quorum (see General Construction Law, section 41), and it conducts public business and performs a governmental function for an agency of the state. Therefore, I believe that a board of visitors clearly falls within the scope of the definition of "public body" and is required to comply with the Open Meetings Law in all respects.

With respect to notice, section 104 of the Law requires that notice of the time and place of every meeting be given. Section 104(1) pertains to meetings scheduled at least a week in advance. The cited provision requires that notice of the time and place of such meetings must be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 104(2) concerns meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in 104(1) "to the extent practicable" at a reasonable time prior to such meetings.

As requested, enclosed is a copy of the legislation regulating smoking in public places. Please note that most of the provision of the legislation will become effective 180 days following its approval by the Governor.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

Encl.

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COMMITTEE ON OPEN GOVERNMENT

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 14, 1989

Mr. John Wright

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

Dear Mr. Wright:

I have received your letter of July 1 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, the Town of Ticonderoga Police Commission scheduled a meeting for June 20 at 11 a.m. The Commission consists of three members. Having arrived early, you inquired as to the location of the meeting, and you were informed that it would be held in the Town Board Room. You also wrote that "A radio with a speaker located just outside door to the Town Board Room was blasting a radio broadcast." Although you asked whether the radio could be turned down or off, it remained on. At approximately 11 o'clock, two members of the Commission, Ms. Ferguson and Mr. Thatcher, arrived and "sat down at the table and started a conversation amongst themselves." You added that:

> "Papers were exchanged. I was the only person from the public. Carter [the third member] did not appear. No one announced the Meeting had started or was in progress. Nothing could be heard from Ferguson or Thatcher. After about one half hour Ferguson and Thatcher started picking up their papers. I then asked when is the meeting going to start? Thatcher replied the Meeting is over. If you wanted to hear what was going on you could have sat closer. The room in question is about 16 ft. wide and 20 ft. long. The door into the hall is left open

> at all meetings. The radio is not played during Town Board Meetings. Just about everything is heard in a Town Board Meeting in the same room."

Based on the foregoing, you have raised the following questions:

> "a. Doesn't a public meeting have to conducted in a manner so that all persons with normal hearing within the room where Meeting is being conducted be able to hear most of the Meeting?
>
> b. When a public meeting starts doesn't the Chair have to announce the meeting and that the meeting is starting?
>
> c. Is it permissible for members of a public body when conducting an open meeting to conduct that meeting in such a manner so that the public is not made aware of what is transpiring?
>
> d. Based on the facts given you was this a legal open meeting of a public body?"

In response to your questions, I believe that every provision of law, including the Open Meetings Law, should be called out in a manner that gives effect to its intent. I direct your attention to section 100 of the Open Meetings Law, its legislative declaration, which states that:

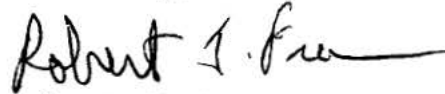
> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

The language quoted above indicates that the Open Meetings Law confers not only the right to attend meetings, but also the right to "listen to the deliberations and decisions that go into the

making of public policy." If, under the circumstances, a person with normal hearing could not hear the Board from seats made available to those in attendance, I believe that the meeting would have failed to meet the requirements of the Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw
cc: Police Commission, Town of Ticonderoga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1645

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 14, 1989

Mr. Jerome Ehrlich
Jaspan, Ginsberg, Ehrlich, Schlesinger
& Hoffman
Attorneys at Law
300 Garden City Plaza
Garden City, New York 11530-3302

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

Dear Mr. Ehrlich:

I have received your thoughtful letter of July 6 in which you requested guidance concerning the Open Meetings Law.

According to your letter, although most meet on a monthly basis, boards of education of union free school districts are only required to meet quarterly. You added that school district clerks are required to attend board meetings and keep records of their proceedings. Your concern focuses upon section 106(3) of the Open Meetings Law, which generally requires that minutes of meetings of public bodies be prepared and made available within two weeks of the meetings to which they pertain. You wrote that:

> "Since most boards of education meet less frequently than at two week intervals, it has been suggested that subdivision 3 requires that minutes be made available to the public before they can be presented to the board of education for approval and ratification. Experience shows us that frequently at scheduled monthly meetings, boards of education find it necessary to entertain motions to correct or enlarge upon the minutes of the immediately preceding public meeting. Such action, of course, must be taken at a public meeting, consistent with the Open Meetings Law.

> "If literally applied, subdivision 3 would seem to suggest a board of education must convene a public meeting within two weeks of any public meeting if it wishes to amend, correct or approve the minutes of that prior meeting. While the 'two week' time limitation may be appropriate for those municipal agencies which meet on a more frequent basis, it seems to us that the application of such a requirement to boards of education will not only be onerous, but contrary to efficient governmental processes.
>
> "On occasion a district clerk does inaccurately summarize the proceedings of a public meeting. In the event unapproved or uncorrected minutes must be made available to the public, the confusion which would be engendered by a second set of minutes, approved by the board, is obvious."

You have suggested that disclosure of minutes containing erroneous or inaccurate information could result in "dire consequences."

In this regard, I offer the following comments.

First, neither the Open Meetings Law or any other statute of which I am aware requires that minutes be approved. Nevertheless, by many public bodies, as a matter of practice or policy, review minutes prepared by a clerk, for example, and officially vote to modify or approve the minutes.

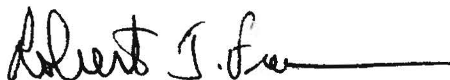
Second, the provisions concerning the time limits within which minutes must be compiled were enacted within a series of amendments to the Open Meetings Law that became effective on October 1, 1979. After that legislation passed, but before its effective date, the Committee transmitted a memorandum to all public bodies in the State offering advice and assistance with respect to the scope and interpretation of the amendments to the Law. At that time, the Committee recognized that in many instances public bodies might not convene within two weeks after a meeting and that, therefore, there might be no opportunity to approve minutes of meetings within the two week time period specified in the Law. Although it was advised that minutes, whether approved or otherwise, be made available within the time limits specified in the Law (i.e., two weeks), it was also recommended that such minutes might be marked as "unapproved,"

"draft," or "non-final," for example. By so doing, the public has the ability to learn generally what transpired at a meeting; concurrently, notice is effectively given that minutes are subject to change, and the members of a public body are thereby given a measure of protection.

The advice rendered in 1979 has been consistently offered over the course of nearly ten years. While your concerns are appreciated, no event has been reported to this office suggesting that the disclosure of unapproved minutes has resulted in the serious consequences that you described. In my view, the Law requires that minutes be prepared and made available within two weeks. If a board cannot or does not meet within that time to approve the minutes, I believe that the minutes must nonetheless be disclosed, perhaps with the kind of notation described earlier. Again, I believe that such a notation would clearly indicate that the minutes are not final and that they may undergo modification.

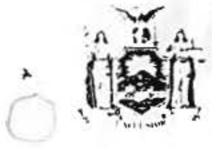
I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1646

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 17, 1989

Mr. Howard Pozmanter

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. Pozmanter:

I have received your letter of July 10, as well as the materials attached to it. You have raised a series of issues concerning the implementation of the Open Meetings Law by the Town of Somers.

In this regard, I offer the following comments.

First, by way of background, I point out as a general matter that that 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 an limit the topics that may appropriately be considered during an executive session.

Second, since several of the issues pertain to issues involving personnel-related matters, 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 maters 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 not states that a public body may enter into an executive session to discuss:

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

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

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

In conjunction with the issues raised, one such issue involved a discussion by the Town Board in an executive session to consider "whether to hire a deputy town attorney." In my opinion, if the discussion did not focus upon a "particular" candidate, but rather upon the question of whether such a position should be created, there would not have been any basis for entry into an executive session. As you suggested, the issue would not have involved the qualifications of an individual but rather a question of policy, i.e., whether the position should be created.

Similarly, you referred to an executive session held to discuss "when to fill a Planning Board vacancy." Again, the issue apparently involved an issue of policy, not the relative merits of persons who might be considered to fill the vacancy. If that was so, I do not believe that an executive session could justifiably have been filled.

Other personnel-related issues involved the salary of the receiver of taxes and the job description and salary of a new town planner. To the extent that those issues focused upon a "particular" person or persons relative to one's performance or employment history, for example, I believe that executive sessions could have properly been held. Nevertheless, to the extent that the issues involved the duties of or salaries accorded a position or positions, I believe that they should have been discussed publicly. In essence, if the discussions pertained to the duties or salaries of positions held by any person who would fill such positions, the discussions would, in my opinion, have involved questions of policy.

Although you did not refer to motions to enter into executive sessions to discuss the matters described earlier, I point out 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 'personal 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, Sp. 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.

Third, you referred to an "illegal executive session" held between the Supervisor and the Planning Board without any public notification. As specified earlier, 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. If a quorum of the Planning Board met with the Supervisor to discuss public business as a body, I believe that the gathering was a meeting that should have been preceded by notice given in accordance with section 104 of the Open Meetings Law. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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 prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable," at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

The final issue pertains to the Town Board's Subcommittee on Environmental Legislation. Although memoranda attached to your letter suggest that the subcommittee met to discuss, draft and review legislative proposals, it appears that the subcommittee did not hold meetings open to the public. In my view, meetings of the Subcommittee should have been conducted pursuant to the Open Meetings Law.

The Law is applicable to public bodies, and section 102(2) defines "public body" to mean:

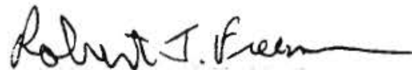
> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction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

Since the definition includes not only a governing body, such as the Town Board, but also any "committee, subcommittee or other similar body of such public body," I believe that the Subcommittee is a public body. As such, in my opinion its duties should have been carried out in accordance with the requirements of the Open Meetings Law.

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

cc: Town Board, Town of Somers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 19, 1989

Mr. Jeffrey H. Brainard
Reporter
The Times Herald-Record
232 Main Street
New Paltz, New York 12561

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

Dear Mr. Brainard:

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

Your inquiry pertains to the propriety of an executive session recently conducted by the Ways and Means Committee of the Ulster County Legislature. You wrote that the Chairman of the Committee initially informed you that the purpose of the executive session "was to allow the Committee to discuss personnel," and that no additional elaboration was given. However, you indicated that "Later he said it was to discuss the salary scale for the county's management staff."

It is your view that there was no basis for conducting the executive session. In this regard, I offer the following comments.

First, by way of background, 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. Only to the extent that a discussion falls within the scope of the exceptions to openness may a public body conduct an executive session.

Second, it is noted that the term "personnel" appears nowhere in the Open Meetings Law. Moreover, 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 maters 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, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

Based upon the facts described in your letter, the discussion did not involve any particular employee, but rather the salary scale applicable to management staff generally. If that was so, I do not believe that there would have been a basis for conducting the executive session.

Lastly, I point out 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:

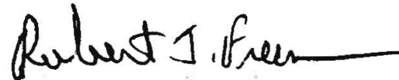
> "[T]he minutes of the March 26, 1981 meeting indicate that the Board voted on two separate occasions to enter executive session to discuss 'personnel' and 'negotiations' without further amplification. On May 28, 1981, the Board again entered into executive session on two occasions. The reasons given 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 execu- tive session of 'personal 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, Sp. 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.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

cc: Ways and Means Committee, Ulster County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMLAO -1648

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 19, 1989

Ms. Donna A. Combs
Town Clerk
Town of Warrensburg
Warrensburg, New York 12885

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. Combs:

I have received your letter of July 12 in which you request an advisory opinion "concerning the difference between a workshop and a meeting." You added that you "are having some difficulties with [your] Planning Board having unadvertised 'workshops' at which no minutes are being taken."

In this regard, I offer the following comments.

It is noted initially that the Open Meetings Law pertains to meetings of public bodies, including planning boards. Section 102(1) of the Law defines the term "meeting" as "the official convening of a public body for the purpose of conducting public business". Further, in a case dealing specifically with the status of "work sessions" and similar gatherings held solely for the purpose of discussion, 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" meeting, and a work session or "workshop."

Further, every meeting, including a workshop, must be preceded by notice. 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.

Lastly, with respect to the taking of minutes at open meetings, section 106(1) of the Open Meetings Law states that:

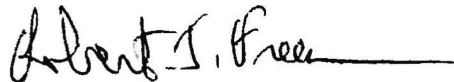
> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

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 "workshop," 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. However, it is suggested that minutes be prepared merely to indicate that a meeting was held.

I hope that the foregoing serrves to clarify the matter. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 9, 1989

Mr. Marvin G. Nailor
Press Secretary to the Comptroller
Office of the State Comptroller
Albany, New York 12236

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

Dear Mr. Nailor:

I have received your thoughtful letter of July 26 concerning my comments regarding an "exit conference" that had been scheduled by your auditors with officials of the City of Amsterdam.

You indicated that an exit conference is not held due to any legal requirement but rather as a courtesy to municipal officials. I appreciate and understand the function of the exit conference, and I discussed the matter with attorneys at the Office of the State Comptroller several years ago. I also understand that, in most instances, those conferences are not attended by a quorum of a public body. I have been led to believe that, more often, the municipal officials in attendance might include only a fiscal officer and a chief executive officer.

Nevertheless, if indeed a quorum of a public body attends an exit conference, I believe that such a gathering would constitute a "meeting" that falls within the requirements of the Open Meetings Law. It is noted that the term "meeting" has been broadly construed by the the courts. In a landmark decision rendered more than ten years ago, the Court of Appeals held that any gathering of a quorum held for the purpose of conducting public business constitutes a meeting subject to the Open Meetings Law, even if there is no intent to take action and irrespective 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 NYS 2d 947 (1978)]. The gatherings in question in that case, which were held solely for the purpose of discussion and without intent to take action or vote, were found to be meetings.

With respect to an exit conference, if the members of a public body attend, presumably they do so in the performance of their official duties and for the purpose of conducting public business. Therefore, based upon the judicial interpretation of the Open Meetings Law, I believe that the presence of a quorum at an exit conference would constitute a meeting subject to the Open Meetings Law.

I point out that local governments operate differently in many cases from most state agencies. Usually, state agencies are headed by a executive rather than a governing body. Moreover, exit conferences held with respect to audits of state agencies likely include the staff of an agency; no public body would be present of otherwise involved. Moreover, since municipalities are run by governing bodies, I believe that those bodies have generally become used to conducting their business in public. Similar business conducted by state agencies, for reasons mentioned earlier, likely would not involve a public body and the Open Meetings Law does not become an issue.

From my perspective, the policy of the Office of the State Comptroller places municipal bodies in an anomalous position. When a quorum of such a body wants to attend an exit conference, if they accede to your policy, they are faced with the likelihood of violating the Open Meetings Law. Although the audit may not be final, again, those bodies have become inured to conducting business in public, even in situations in which no action will be taken. Moreover, since the municipality is subject of the audit, any criticism or embarrassment that might arise if an exit conference is held in public would likely be directed to the municipality rather than in your office. If municipal officials are willing to subject themselves to openness, it is difficult to understand why your office should object.

I hope that the foregoing has served to clarify the matter. I would be pleased to discuss the issue with you or others from the Office of the State Comptroller.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1650

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 11, 1989

Ms. Dorothy Gibson, President
Citizens for a Livable Environment
and Recycling, Inc. - CLEAR
21 Platt Place
Huntington, L.I., New York 11743-3527

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:

As you are aware, I have received your letter of July 22. Please accept my apologies for the delay in response.

You have raised a series of issues concerning the implementation of the Open Meetings Law by the Huntington Town Board. Your letter refers to several problems, including notice of public hearings, notice of meetings, the Board's procedure for entry into executive sessions, the inability of the public to participate at meetings and the general incapacity of the public to know of the substance of the Board's deliberations and the effects of the resolutions considered by the Board.

Based on the foregoing, you have asked this office "immediately notify the Huntington Town Board that all resolutions adopted on July 20, 1989, are to be suspended until you [the Committee on Open Government] undertake an investigation and submit [a] finding."

In this regard, it is emphasized at the outset that the Committee on Open Government has neither the authority nor the resources to investigate, "suspend" action taken by a public body, or to make findings that are binding. Stated differently, although the Committee on Open Government is authorized by section 109 of the Public Officers Law to advise with respect to the Open Meetings Law, it cannot enforce the Open Meetings Law, compel a public body to comply with the Open Meetings Law, or nulify action taken by a public body.

With respect to the issues that you have raised, I offer the following comments.

First, since you referred to notice of both meetings and hearings, I point out that there is a distinction between a hearing and 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 pursuant to a particular provision of law. Depending upon the nature of the hearing, legal notice requirements may differ. 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.

Second, the Open Meetings Law requires that notice of the time and place of every meeting be given to the news media and posted. With regard to meetings scheduled at least a week in advance, section 104(1) requires that notice be given to the news media and posted in one or more designated conspicuous public locations not less than seventy-two hours prior to such meetings. With regard to meetings scheduled less than a week in advance, section 104(2) requires that notice be given to the news media and by means of posting "to the extent practicable" at a reasonable time prior to such meetings. As such, an announcement made at a meeting indicating that an ensuing meeting would be held on a certain date would not, in my opinion, be adequate to comply with the Open Meetings Law. Again, I believe that notice must be given to the news media and posted in one or more designated public locations prior to each meeting.

Third, you wrote that, at the meeting of July 20, the Board "went into closed session without identifying the areas to be considered even though the reasons -- contracts and personnel matters -- were apparently legitimate reasons for going into executive session." Here I point out that the Open Meetings 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...."

Further, the language quoted above indicates that the ensuing provisions of section 105(1), paragraphs (a) through (h), limit the topics that may properly be considered during an executive session.

With regard to a discussion of "personnel," it is noted that under the Open Meetings Law as originally enacted, the so-called "personnel" exception for executive session differed from the language of the 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 not states that a public body may enter into an executive session to discuss"

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

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

It is unclear whether a discussion of "contracts" could appropriately be discussed in an executive session. In some instances, a public body might consider the financial or credit history of a particular person or corporation, for example. In those instances, section 105(1)(f) might justifiably be asserted. The other provision that might pertain to "contracts" 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 involving a public employee union.

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 15 of the Civil Service Law [Doolittle, supra]."

Lastly, although many public bodies have adopted rules or policies concerning public participation at meetings, the Open Meetings Law is silent with regard to that issue. Although the public has the right to attend meetings in accordance with the Open Meetings Law, that statute confers no right upon the public to speak or otherwise participate at meetings. If a public body opts to permit public participation, I believe that it should do so in conjunction with 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:saw

cc: Town Board, Town of Huntington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 1651

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 11, 1989

Mr. Carl W. Staley

Dear Mr. Staley:

Your "Hotline" call to the Department of State has been referred to this office. The Committee on Open Government, a unit of the Department of State, is authorized to advise with respect to the Open Meetings Law. Please note that I attempted unsuccessfully to reach you by phone.

According to the message, the Cincinnatus Town Board closed an open meeting and held what was characterized as an "illegal" meeting. Without further details concerning the issue, I cannot provide specific guidance. However, I offer the following general comments.

First, the Open Meetings Law is based upon a presumption of openness. Meetings of public bodies must be conducted open to the public except to the extent that an executive session may appropriately be held.

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. However, 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) of the Law specify and limit the subjects that may properly be considered during an executive session. Further, the Open Meetings 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 of areas of the subject or

> subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only...."

Enclosed are copies of the Open Meetings Law and an explanatory brochure that may be of value to you. If you could provide additional information concerning the meeting in question, perhaps I could offer additional advice.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw
Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5706
OML-AO-1652

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 15, 1989

Mr. Robert Kushner

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

Dear Mr. Kushner:

As you are aware, I have received your letter of July 28. Please accept my apologies for the delay in response.

You have raised a series of issues concerning meetings held and the disclosure of information by the East Williston Union Free School District and its Board of Education. You referred specifically to a meeting held in July during which you asked for the costs of four "items" listed on the agenda. Although you were verbally given the amounts to be expended regarding three of those items, you were refused the information for the fourth, which involved the Superintendent's salary adjustment. You were informed further that you should submit a request under the Freedom of Information Law to obtain that information. Moreover, you indicated that the procedure for voting on materials is "simply to group them by numbers...and then vote" and that rarely is there discussion of those kinds of items by the Board. In your description of an earlier meeting, the Superintendent referred to a specific firm as the cost estimator for a construction project. When you asked when the appointment was made and what the cost to the District would be, you were told that it would be considered by vote during that meeting. Nevertheless, the item did not appear on the agenda and you noted that it was "hastily voted on with no discussion". In response to a request for records concerning the discussion leading to the award of the bid, you were informed that there are no minutes of any such discussions, because no meetings were held.

It was stated that copies of the list of bids were sent to Board members by the Superintendent and that their opinions "were solicited during the development of the Superintendent's recommendations". In a related vein, you wrote that the Board "never gives bid information to the public, and rarely mentions costs regarding bids unless prodded by a member of the community".

You have asked for guidance concerning the matters discussed above. In this regard, I offer the following comments.

First, to put the issues that you have raised in perspective, the Open Meetings Law generally provides a framework, as the title of the statute suggests, concerning the openness of meetings of public bodies. In brief, the Law requires that meetings of public bodies, including boards of education, must be conducted in public, except to the extent that a closed or "executive" session may held. The Law specifies and limits the topics that may appropriately be considered behind closed doors and requires that a procedure be accomplished before an executive session may be held (see Open Meetings Law, section 105). The Open Meetings Law also contains provisions involving notice requirements (section 104) and minutes (section 106). Further, as a general matter, it has been held in a variety of contexts that a public body may adopt rules to govern its own proceedings, so long as those rules are reasonable and consistent with statutes (i.e., the Open Meetings Law).

Second, although the Open Meetings Law provides the public with the right to attend meetings and listen to the deliberations and decisions occurring and made at those meetings, the Law is silent with respect to public participation. While a public body may permit the public to speak or otherwise participate at meetings, it is not obliged to do so. Should a public body opt to permit public participation at its meetings, I believe that, as a general matter, it should do so pursuant to reasonable rules that treat members of the public equally. In conjunction with the facts described in your letter, absent rules adopted by the Board to the contrary, the Board in my opinion could have responded to your questions, but I do not believe that it had any obligation to do so.

In a related vein, the Open Meetings Law nowhere refers to agendas or their status. The procedure by which a public body conducts its meetings in terms of its preparation of agendas or its duty to follow agendas that have been prepared are within the scope of the authority of the body.

Similarly, there is nothing in the Open Meetings Law that requires a public body to engage in a lengthy or significant discussion of issues before it acts. In some instances, a discussion may be brief if Board members are educated in advance, i.e., by means of written communications transmitted prior to collective consideration of the issues. Written materials prepared and sent to Board members might enable them to dispense with lengthy deliberations. On the other hand, I do not believe that a public body may vote or otherwise take action by means of a series of telephone calls, for example.

Lastly, if a public body chooses not to provide answers to questions or otherwise disclose information in response to questions at meetings, records containing the information sought may be requested under the Freedom of Information Law.

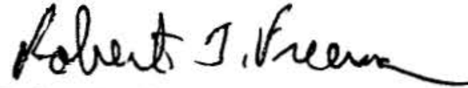
The Freedom of Information Law pertains to existing records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i)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

In addition, by way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Law (21 NYCRR Part 1401). In turn, section 87(1) of the Law requires the governing body of a public corporation, such as a board of education, to adopt rules and regulations consistent with the Law and the regulations promulgated by the Committee. One aspect of the Committee's regulations pertains to the time during which requests may be made. In brief, that provision, section 1401.4, states that requests may be made and shall be accepted during regular business hours. Therefore, while I do not want to appear overly technical, I believe that the District could require that requests for records be made during regular business hours rather than at meetings. It is noted, too, that the Freedom of Information Law does not require agency officials to answer questions. It does, however, require that all records be disclosed to the extent required by the Law.

Enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, the Committee's regulations promulgated under the Freedom of Information Law and an explanatory pamphlet dealing with both statutes.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1653

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

August 16, 1989

Mr. Isidore Gerber

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:

As you are aware, I have received your letter of July 30. Please accept my apologies for the delay in response.

You have requested an advisory opinion with respect to the status of "work sessions" and requirements concerning the taking of minutes of those gatherings.

In this regard, I offer the following comments.

First, the Open Meetings Law, based upon case law, is applicable to so-called "work sessions" to the same extent as "formal" meetings. In a landmark decision rendered by the Court of Appeals in 1978, it was held that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action and irrespective of the manner in which such a gathering might be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. It is noted that the decision dealt specifically with "work sessions" held solely for the purposes of discussion and without an intent to take action. Therefore, a "work session" is, in my opinion, a "meeting" subject to the requirements of the Open Meetings Law, including any requirements that might be applicable relative to the preparation of minutes.

Second, the Open Meetings Law contains what might be considered as minimum requirements concerning the contents of minutes. Section 106(1), which pertains to minutes of open meetings, states that:

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 16, 1989

Councilman William Meyer
Town of Cicero
Town Hall
Cicero, New York 13039

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 Meyer:

As you are aware, I have received your letter of July 28. Please accept my apologies for the delay in response.

According to your letter and the materials attached to it, on July 6, the Town Supervisor sent a notice of a special meeting to Board members indicating that a consulting engineer would made a presentation before the Board on July 13. On July 10 at a regular Town Board meeting, "it was announced that there was a meeting scheduled on July 13th to get an engineering report." The news media was apparently notified of the July 13 meeting, and you were informed by a reporter that she was told that the meeting would involve the engineer's presentation. Further, you wrote that no notice of that meeting was posted. Following the engineer's report, those in attendance left the room. Soon afterward, a vote regarding an assessor's position was held. It is your understanding "that the only items that can be addressed at a special meeting are those on the stated agenda."

You have requested my views on the matter. In this regard, I offer the following comments.

First, with respect to special meetings held by town boards, section 62(2) of the Town Law states in relevant part that:

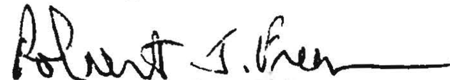
> "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving

jects listed on an agenda or that prohibits a public body from discussing subjects that are not referenced on an agenda. I point out that a town board "may determine the rules of its procedure" [see Town Law, section 63]. Therefore, if the Town Board has adopted rules specifying that only matters identified on an agenda or included in the notice of a meeting may be considered at a meeting, the Board, in my view, would have violated its own rules. Absent such rules, I do not believe that the discussion of the assessor's position would have been inconsistent with either the Town Law or the Open Meetings Law.

Lastly, you suggested in your letter that you feel that "the spirit of the law was not followed," for the public did not have the opportunity to know that the Board would consider the hiring of an assessor at the July 13 meeting. Under the circumstances you described, in which the notice indicated that single topic would be discussed, I agree with your comment, for the public and the news media were apparently led to believe that the Board would consider only one subject. Nevertheless, I do not believe that the law precluded the Board from discussing other subjects at the meeting.

I hope that the foregoing serves to clarify the matter. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

cc: Town Board, Town of Cicero

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 5718
OML-AO-1655

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 21, 1989

Ms. Karen Dhanda

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

Dear Ms. Dhanda:

I have received your letter of August 4, as well as the correspondence attached to it. Please note that I attempted without success to reach you by phone in order to discuss the matter. In addition, I received a letter from Mr. Frank Valletta, Supervisor of the Town of Pompey, concerning your request.

In brief, according to your letter, a house adjacent to your home has been built despite your view that the zoning law may have been violated. Although you have contacted Town officials on several occasions to deal with the matter and to request records, your efforts have been largely unsuccessful. The records sought include a building permit, a site plan, results of septic tank and percolation tests, dates of inspections, variances issued, minutes of meetings and actions taken by the Town's Zoning Enforcement Board and the Town Board, the certificate of occupancy, and copies of tape recordings of Town Board meetings held since September of 1988.

I point out that the Supervisor wrote that he has attempted to resolve the matter on many occasions, and that the problem arose before he became Supervisor. He also indicated that Mr. Mahr, the Building Inspector, was responsible for maintaining the records, but that the Supervisor has no control of Mr. Mahr's actions, and that Mr. Mahr no longer serves as building inspector. The Supervisor also wrote that he would again attempt to obtain the records in question from the engineer.

Notwithstanding the efforts of the Town Supervisor undertaken on your behalf, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency is not required to create or prepare records in response to a request, unless specific direction is provided to the contrary.

Second, separate from the Freedom of Information Law are new provisions found in the "Local Government Records Law" (Article 57-A of the Arts and Cultural Affairs Law), which became effective on August 5, 1988. Section 57.19, which requires the establishment of a local government records management program, states in part that:

> "The governing body, and the chief executive official where one exists, shall promote and support a program for the orderly and efficient management of records, including the identification and appropriate administration of records with enduring value for historical or other research. Each local government shall have one officer who is designated as records management officer. This officer shall coordinate the development of and oversee such program and shall coordinate legal disposition, including destruction of obsolete records. In towns, the town clerk shall be the records management officer."

Further, section 57.25(1) states that:

> "It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of

> the office. In towns, records no longer needed for the conduct of the business of the office shall be transferred to the custody of the town clerk for their safe-keeping and ultimate disposal."

Subdivision (2) of section 57.25 states that public records cannot be destroyed without the consent of the Commissioner of Education. In turn, the Commissioner is authorized to develop schedules indicating minimum retention periods for particular categories of records. As such, local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. I would conjecture that all of the records in which you are interested should continue to exist, with the exception of tape recordings of some meetings.

In a related vein, in addition to being the "records management officer," the town clerk, under section 30 of the Town Law, is the custodian of all town records. If you have not done so already, it is suggested that you confer with the town clerk.

Third, 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, virtually all of the records in which you are interested, should they exist, are accessible under the Freedom of Information Law, for none of the grounds for denial could apparently be asserted.

Actions taken by the Town Board and the Code Enforcement Board must, in my view, be memorialized in minutes. Here I point out that the Open Meetings Law contains what may be characterized as minimum requirements concerning the contents of minutes. Specifically, section 106 of the Open Meetings Law 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 he provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, minutes must indicate the nature of action taken, the date and the vote of members of public bodies. Further, minutes must be prepared and made available within two weeks of the meetings to which they pertain.

With regard to access to tape recordings, I point out that the Freedom of Information Law is applicable to all agency records. Section 86(4) of the Law defines the term "record" expansively to include:

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

If tape recordings are produced by and for the Town, I believe that they constitute "records" subject to rights of access.

In my view, a tape recording of an open meeting is accessible, for none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, October 3, 1983]. I believe, however, that tape recordings of meetings must be retained for a minimum of four months following the approval of minutes. As such, tape recordings of some meetings dating back to September of 1988 might not exist.

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

In an effort to enhance compliance, 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
Executive Director

RJF:saw

cc: Hon. Frank Valletta, Town Supervisor
Town Clerk, Town of Pompey

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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1656

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 28, 1989

Ms. Elise W. Enk
Chairman
Town of Rensselaerville
Planning Board
RD 1 Box 105
Medusa, NY 12120

The staff of the Committee on 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. Enk:

Your letter addressed to Harry Willis of the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to advise with respect to the Open Meetings Law.

In your capacity as Chair of the Town of Rensselaerville Planning Board, you requested an opinion concerning "what constitutes a public meeting". Specifically, you wrote that:

> "The Planning Board was recently urged by the representative of the subdivider to walk a proposed subdivision in order to better understand the placement of a road. The Board agreed that it would be helpful, a date was set, and [you] advertised the meeting in the paper with the understanding that since the whole board would be in attendance it would be considered an open public meeting. A quorum of the board did arrive, along with five citizens who were interested in the subdivision. The representative of the subdivider said that the owner of the property would only allow the Planning Board members, not the pub-

> lic, to walk the property. The basic reason, he stated, was that only Board members were covered by Town insurance; several other emotional, irrelevant reasons were also given. When one of the citizens insisted on taking part by stepping on the property, the police were called. After seeing that no business could be conducted in good faith, three of the board members left, along with four of the citizens, and, in the end, one board member was shown the property.
>
> "During a discussion of the situation at a following meeting, it was stated that the open meetings law did not have to be followed literally, that no official action was going to take place, and that the Board has the right to meet for such informational purposes without involving the public; a meeting for the public at the town building following the walk-through would have been adequate."

You raised a series of questions concerning the kind of gathering described in your letter. 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).

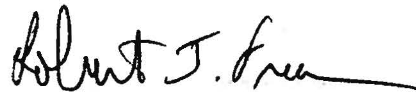
Under the circumstances, I do not believe that the scheduled "walk-through" of the property was a "casual encounter"; rather, it was apparently "a gathering by a quorum, on notice, at a designated time and place" that was held by the Board in conjunction with the performance of its official duties --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

Third, although the gathering in question appears to have been a "meeting", it also appears that the owner of private property would have the right to exclude the people of his or her choice from the property. As such, a public body might hold a meeting that ordinarily should be open to the public, but which might result in a charge of trespassing imposed upon persons other than the members of the public body. Further, although the Court did not analyze the issue in significant detail, it was recently held that a tour of a proposed power line route conducted in a van by the members of the Public Service Commission did not violate the Open Meetings Law [City of New Rochelle v. Public Service Commission, 541 NYS 2d 49 (1989)]. It is unclear on the basis of that decision whether the holding would apply in the situation that you described.

Lastly, if no quorum of a public body is present, the Open Meetings Law would not, in my view, be applicable. As such, if less than a quorum of the Planning Board conducts a "walk-through", I do not believe that the public would have the right to attend. Perhaps as an alternative to a tour in which the entire Board participates, a member or representatives of the Board could do so, with a tape recorder. A tape recording could be used to replay questions and answers about the property and describe what was seen. Even more accurate, if available, would be a videotape of a tour that could be shown to Board members and the public.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1657

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 29, 1989

Mr. John K. Balevic

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

Dear Mr. Balevic:

I have received your letter of August 24 in which you raised questions concerning the Open Meetings Law.

In your capacity as a member of the Albany-Schoharie-Schenectady Board of Cooperative Educational Services (BOCES), you have requested my views concerning "what constitutes a full meeting (public) versus a privileged meeting (non-public) of a board committee". Attached to your letter is a copy of a list of the Board's committees and its members. One committee consists of five members; others consist of as few as two members.

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 have 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 a public body, such as a BOCES, would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

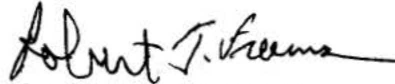
Second, the term "meeting", for purposes of the Open Meetings Law, has been construed to mean a gathering of at least a majority of a public body for the purpose of conducting public business, regardless of whether action is intended to be taken [Orange County Publications v. Council of the City of Newburgh, 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.

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

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OML-AO-1658

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 7, 1989

Mr. Hans Luebbert

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. Luebbert:

I have received your letters of August 27 and September 2. You have requested an advisory opinion concerning meetings held by the Newburgh Town Board and its Planning Board.

You referred initially to a joint meeting held by the two Boards. Although the meeting was closed due to the assertion of the attorney-client privilege, you expressed the opinion that it included "conversations over possible rezoning," "developments pending in the Planning Board," and "an application for water [and] sewer backups." You also referred to an executive session held by the Town Board during which the "exact items for discussion [were] clearly not delineated prior to declaration of executive session." You added that the Board did not specify "what pending, current or contemplated litigation it wished to discuss..." and pointed out that "there is no record of the town board having called for an executive session..." Lastly, with respect to a meeting of the Planning Board, you contend that "minutes should be available from that body."

In this regard, I offer the following comments.

First, it is noted at the outset that the scope of the Open Meetings law is determined in part by section 102(1) of the Law, which defines the term "meeting." That definition has been interpreted broadly by the state's highest court to include any convening of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action and regardless of the manner in which the gathering may be characterized [see Orange County Publications v. Council of the

City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, if a quorum of either the Town Board or the Planning Board was present at the gathering to which you referred, I believe that the gathering constituted a "meeting" subject to the Open Meetings Law in all respects. Moreover, it has been held that joint meetings held by two or more public bodies also fall within the scope of the Open Meetings Law [see Oneonta Star, Division of Ottoway Newspapers, Inc. v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)].

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." When an attorney-client relationship has been invoked, it is considered confidential under section 4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

By way of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney. As such, it is suggested that the mere presence of an attorney with a municipal board, for example, would not in my view automatically result in a privileged relationship and an exemption from the Open Meetings Law, for the subject matter of a discussion and the nature of the communication determine the applicability of an attorney-client relationship and the existence of an exemption from the Open Meetings Law.

In a judicial determination that described the parameters of the attorney-client relationship and the conditions precedent to its initiation, it was held by the Appellate Division that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney is informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

As suggested above, I believe that a line of demarcation may often be drawn between that portion of a gathering in which legal advice is sought and given, and that portion in which a public body discusses public business or 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. If, for example, the Boards discussed rezoning or sewer hook-ups during the closed session, and those portions of the session did not include seeking legal advice from their attorney, those aspects of the session should in my opinion been conducted in public unless there was a basis for entry into executive session.

Third, 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..."

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 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 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" (id. at 841).

Moreover, with regard 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, 'discussion 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)]."

Based upon the foregoing, I believe that a motion to enter into executive session that merely characterizes the subject to be discussed as "litigation," for example, is inadequate. As indicated in the decision cited above, the motion should refer to the particular lawsuit under discussion.

Lastly, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 of the Open Meetings Law states that:

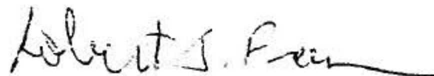
> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal 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 in my view that minutes need not consist of a verbatim account of what was said at a meeting. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, including a motion to enter into an executive session, as well as proposals, resolutions and any other matters upon which votes are taken.

With respect to executive sessions, as a general rule, a public body subject to the Open Meetings Law may take action during a properly covened 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). However, if no action is taken during an executive session, minutes of the executive session need not be prepared.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

cc: Town Board
Planning Board

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OML-AO - 1659

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 8, 1989

Mr. Stephen D. Miller
Milks & Miller
Attorneys and Counselors at Law
Delevan Professional Building
36 N. Main Street
Delevan, New York 14042

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. Miller:

I have received your letter of August 25 in which you requested advice concerning the Open Meetings Law.

Specifically, you have asked whether a town board of ethics has "the right to exclude members of the general public while confidential matters are being discussed," and whether the board has "the right to exclude a town official or employee being investigated from its meetings."

In this regard, I offer the following comments.

First, I believe that 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 abusiness only be 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 a 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.

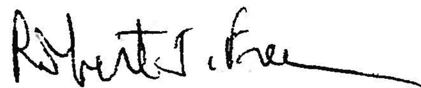
Lastly, section 105(2) of the Open Meetings Law states that:

> "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body."

As such, a board of ethics may in my opinion exclude any person other than a member of the board from a proper 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:saw

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 11, 1989

Ms. Maybelle F. Kutka

The staff of the Committee on 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. Kutka:

I have received your letter of August 28, as well as the materials attached to it.

You described a variety of practices of the Elmira City Council and suggested that attendance at its meetings does not necessarily guarantee that the public can be aware of the Council's activities and actions. One of the issues that you raised involves public "agenda workshops" held in the City Manager's conference room on Thursday afternoons. The workshops are apparently held to lay the groundwork for action to be taken at ensuing formal meetings of the Council. During the workshops, a "consent agenda" is prepared, so that "one vote is cast for all Councilmembers on all resolutions" referenced in that agenda. You indicated that the workshops are not well attended because the time is inconvenient for most people and added that the conference room is "not accessible to the handicapped". You also wrote that executive sessions are often held "under the titles of property, personnel and litigation". No additional information concerning those topics is provided prior to entry into executive session.

In this regard, I offer the following comments.

So long as the workshops and other meetings are preceded by notice and conducted open to the public to the extent required by the Open Meetings Law, the practices that you described, in terms of procedure, are not, in my view contrary to the Open

Meetings Law. Nevertheless, the site of the workshops is, in my opinion, inappropriate, and, based upon judicial interpretations of the Open Meetings Law, the descriptions of the subjects to be discussed during executive sessions are inadequate.

With respect to the location of the workshops, the City Manager's conference room, I point out that section 103(b) of the Open Meetings Law states that:

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

Therefore, if the Council may use a room or facility for its meetings that would permit barrier-free access to physically handicapped persons, I believe that section 103(b) would require that the meetings be held in that room or facility rather than a conference room that is not accessible to handicapped persons.

With regard to executive sessions, it is noted 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.

Under the Open Meetings Law as originally enacted, the so-called "personnel" exception 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be 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.

Further, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session or "personnel", "litigation", "negotiations" or "property matters", 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" or "labor matters", the only ground for entry into executive session that mentions the term "negotiations" 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.

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 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 or possibility of 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].

Lastly, the reference to "property" in the Open Meetings Law is section 105(l)(h), which permits a public body to conduct an executive session to discuss:

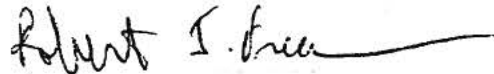
> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

Based on the foregoing, it is clear that not every issue that relates to real property may appropriately be held during an executive session. As indicated above, issues involving the proposed acquisition, sale or lease of real property may be considered in executive session only when publicity would "substantially affect" the value of the property.

In short, when the descriptions of the subjects to be discussed during executive sessions are vague, the public cannot know whether those subjects can properly be considered behind closed doors. Further, based upon the information that you provided, the motions to enter into executive sessions routinely authorized by the City Council are, in my opinion, inadequate.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Elmira

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 11, 1989

Hon. Robert Kanaly
Supervisor
Town of Dannemora
Cook Street
Dannemora, NY 12929

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

Dear Mr. Kanaly:

I have received your letter of September 6 in which you raised a question concerning the Open Meetings Law.

According to your letter, at a recent meeting of the Town Board, a motion was made to enter into an executive session to discuss a personnel matter concerning an employee on disability leave. Before the motion was seconded, you were informed by a reporter that you had to "identify the person, by name". Your question is whether a motion must name the person who is the subject of the discussion prior to entry into an executive session.

In this regard, I offer the following comments.

First, as you are aware, section 105(1) of the Open Meetings Law prescribes a procedure that must be accomplished during an open meeting before a public body may enter into an executive session. Specifically, the cited provision states that:

> "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..."

Second, with respect to "personnel matters", 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..."

Judicial decisions indicate that a motion for entry into executive session that contains a recitation of the language of the grounds for executive session, or "personnel", for example, without more, fails to comply with the Law. However, one such decision held and the Committee has consistently advised that the motion need not identify the person who is the subject of the discussion. In that decision, it was held that:

> "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].

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 view of the decision quoted above, I agree with your contention that the motion for entry into executive session need not identify the person who is the subject of the discussion.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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COMMITTEE ON OPEN GOVERNMENT

OML-AO-1662

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 15, 1989

Ms. Theresa Lonergan

<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. Lonergan:

I have received your letter of September 8 in which you raised a series of related questions.

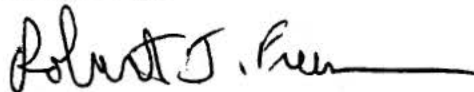
Since the Open Meetings Law is silent with respect to the right of the public to speak or participate at meetings of public bodies, you asked who makes a decision to permit or preclude public participation, i.e., whether it is made by the chairman of the body, for example, or perhaps by the body as a whole.

In this regard, your questions do not deal specifically with the Open Meetings Law. However, there are various contexts in which it has been held that public bodies have the authority to adopt reasonable rules to govern their own proceedings. For instance, section 63 of the Town Law states in part that a town board "may determine the rules of its procedure"; section 272 of the Town Law states that a town planning board "may adopt rules and regulations in respect to procedure before it"; section 1709(1) of the Education Law authorizes a board of education to adopt by laws and rules for its government and operation. Therefore, as a general matter, I believe that a public body, rather than a single member thereof, may determine its rules of procedure, including rules regarding public participation. Further, it has been found that "Irrational and unreasonable rules will not be sanctioned" [see <u>Mitchell v. Board of Education of the Garden City Union Free School District</u>, 113 AD 2d 924, 925 (1985)].

In sum, generally, I believe that a public body as a whole determines its rules of procedure, and that such rules must be reasonable.

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-1663

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September 18, 1989

Ms. Helene O'Brien
ACORN
300 Flatbush Avenue
Brooklyn, NY 11217

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

Dear Ms. O'Brien:

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

You have described a series of events relative to your experience with the New York City Board of Education. Specifically, you wrote that, on July 12, 30 parents and community school board members sought to attend a meeting of the "Committee of the Whole" of the Board of Education. Security guards apparently prohibited the group from entering the building. After waiting outside for some time, parents were allowed to enter the Hall of the Board. The meeting of the Committee of the Whole, however, "was going on upstairs", and "parents waited downstairs until the Board convened its public calendar meeting an hour later".

The next Committee of the Whole meeting was scheduled for August 16. Several people contacted the Board daily "to make sure the Board did not change the meeting-time". Each caller was told that the meeting would begin at 1:30. Nevertheless, when you arrived at the location of the meeting, you were informed that the Board was conducting a "closed session" that began at noon. The public portion of the meeting began at 2:10 and the public "was not informed of the topic of discussion in the closed session".

A few days after that meeting, you indicated that you spoke with a member of the Board of Education, who told you that he and another member were the only members "who voted for another parent on the Chancellor search committee". Since ACORN had

at least one of its members present at every meeting of the Board held during the summer, you questioned when such a discussion by the Board might have occurred, for it was not raised or discussed at any meeting attended by representatives of your organization.

You also added that it has been difficult to obtain agendas of meetings and that when the public was given the opportunity to speak at a meeting, only two members of the Board remained for that portion of the meeting. Consequently, you wrote that there "does not seem to be a way for parents to ensure that an issue that concerns them is discussed by the Board".

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 the language quoted above, the Board of Education and any committee that it designates, including the Committee of the Whole, would, in my opinion, constitute "public bodies" subject to the requirements of the Open Meetings Law.

Second, it is emphasized 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 actions, and regardless of the manner in which a gathering may be characterized [see <u>Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh</u>, 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).

The court also referred specifically to what might be described as preliminary gatherings, stating that:

> "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 addition, in its consideration of the characterization of meetings as "informal," the court found 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. at 415).

Based upon the judicial interpretation of the Open Meetings Law, a gathering of a quorum of the Board or the Committee of the Whole, held for the purpose of conducting public business, would in my view constitute a "meeting" that falls within the requirements of the Open Meetings Law. Assuming that a quorum of

the Board or the Committee of the Whole was present at the gatherings to which you referred, I believe that those gatherings were meetings that should have been conducted in accordance with the Open Meetings Law.

Third, every meeting of a public body must be preceeded by notice of the time and place of the meeting. Section 104(1) of the Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 104(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in section 104(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is reiterated that notice must be provided prior to all meetings, regardless of whether the meetings are considered formal or otherwise. In addition, if a meeting is scheduled to begin at noon, for example, the notice should so indicate, even if the "public" part of a meeting starts later.

Fourth, the Open Meetings Law is based upon a presumption of openness. Section 103(a) of the Law requires that all meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. It is noted that the phrase "executive session" is defined in section 102(3) to mean a portion of an open meeting during which the public may be excluded and that a public body must follow a procedure prescribed by the Law during an open meeting before it 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 of areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only...."

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

circumstances, even if there was a basis for entry into an executive session, in my opinion, the meetings in question should have been preceeded by notice specifying the time when and the place where the meetings were to begin. In addition, I believe that the meetings should have been convened upon to the public, followed, if appropriate, by a motion to conduct an executive session, indicating the reason and carried by a majority vote of the Board or the Committee.

With respect to a discussion of the Chancellor Search Committee, section 105(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to consider:

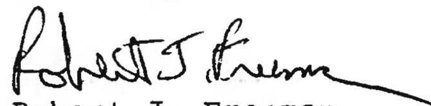
> "The medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."

If the Board in its discussion focused upon a "particular" person or persons who might be designated to serve on the Committee, an executive session would, in my view, have been proper. However, based upon your letter, it appears that the issue involved the composition of the Committee in terms of the characteristics of those who might be designated, rather than any specific individual who might serve. If that was so, if the discussion did not involve a matter leading to the appointment of a " particular person," I believe that the issue should have been discussed in public, for none of the grounds for entry into executive session would have applied.

Lastly, the Open Meetings Law includes no reference to agendas or their preparation, nor does it provide specific guidance regarding public participation at meetings. As such, those aspects of your commentary do not appear to pertain to the Open Meetings Law. Rather, the Board's rules of procedure, if any, would likely deal with those issues.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

cc: Board of Education
Arthur Isenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1664

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 18, 1989

Mr. Anthony J. Pecorale
Superintendent of Schools
Lindenhurst Public Schools
Administration Building
350 Daniel Street
Lindenhurst, New York 11757

<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. Pecorale:

I have received your letter of September 6, as well as the materials attached to it.

By way of background, the materials include a letter sent to the District's attorney in which you raised the following question:

> "Before the Board votes whether to ratify a proposed settlement of negotiations under the provisions of the Taylor Law, may the negotiated settlement be discussed at an open meeting?"

In brief, the attorney, Ms. Mona N. Glanzer, wrote that the School Board may discuss the issue in public, but that it is not required to do so. You have asked whether I agree with Ms. Glanzer's opinion.

First, as Ms. Glanzer pointed out in her letter, the Open Meetings Law requires that public bodies conduct meetings in public, except to the extent that the subject matter under consideration may appropriately be discussed during a closed or "executive" session in accordance with section 105(1) the Law. While the Open Meetings Law provides a framework concerning the extent to which meetings must be conducted open to the public or

which may be closed, it does not specify which issues must be considered by a public body. Similarly, the Law does not specify the length of time that an issue should be discussed or require that issues be considered with particular degrees of detail.

Ms. Glanzer cited a decision rendered by the Commissioner of Education, Rockville Centre School District, 21 Ed. Dep. Rep. 509 (1982), in which it was found that a school board cannot be compelled to disclose its reasoning for action taken with respect to an action taken concerning an employee, and she suggested that the same rationale would apply to the facts described here. In my view, as in the case cited above, the Board could have discussed the settlement at an open meeting; nevertheless, there is nothing in the Open Meetings Law, or any other statute of which I am aware, that would require the Board to do so.

Second, the Open Meetings Law is permissive. Stated differently, although the Law might enable a public body to discuss an issue during an executive session, there is no requirement that the issue must be discussed behind closed doors and a public body may, in my opinion, choose to discuss such an issue in public.

Lastly, section 105(1)(e) of the Open Meetings Law permits a public body to enter into an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Based on the foregoing, I believe that a public body may conduct an executive session to discuss collective bargaining negotiations involving a public employee union.

In sum, the Board may, but in my opinion, need not discuss a proposed negotiated settlement at an open meeting. As such, I am in general agreement with the opinion offered by Ms. Glanzer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Mona N. Glanzer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5754
OML-AO-1665

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 19, 1989

Ms. Karen J. Tiano

The staff of the Committee on 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. Tiano:

I have received your letter of September 12 in which you raised a series of questions concerning the government of the Town of Henderson.

You asked initially whether the Town Attorney is a member of the Town Board, and whether it is "appropriate for him to initiate an executive session." Although section 20 of the Town Law authorizes a town board to establish an office of town attorney or employ a town attorney to provide professional service or advice, a town attorney is not a member of a town board. Further, I believe that only a member of a public body, such as a town board, may introduce a motion to enter into an executive session. Section 105(1) of the Open Meetings Law prescribes a procedure that must be accomplished before an executive session may be held. That provision states in relevant part that:

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

Based on the foregoing, in my view, only a member of a public body may make a motion to enter into an executive session.

In a related vein, you questioned whether it is appropriate for the Town Attorney "to state personal opinions and make recommendations to the Board" concerning the purchase of books or attendance of Town officials at training sessions. The Open Meetings Law does not deal with the issue, and the Board, in my opinion, may permit the Town Attorney to speak to the extent that it deems appropriate.

Next, you asked whether committees appointed by the Town Board are "supposed to provide minutes of their meetings to the Town Clerk to be included in the public record." In this regard, the Open Meetings Law is applicable to 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."

As such, the Town Board and committees of the Town Board are, in my view, public bodies required to comply with the Open Meetings Law. With respect to minutes of meetings, section 106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except

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

Based upon the foregoing, if during a meeting of a public body, including committees, there are motions, proposals, resolutions or votes taken, those activities must, in my opinion, be memorialized in minutes and generally must be available to the public.

Next, "if a group has been meeting as the Playground Committee and then continues to meet as the Recreation Committee," you asked whether it remains bound by the Open Meetings Law. Assuming that the former is a public body, I do not believe that a change in its title would alter its responsibilities under the Open Meetings Law.

You also questioned whether it is proper for the "ruling click" (sic, "clique") to "get together both before and after the official meetings to plan strategies and rehash what was said by whom." You added that such gatherings often occur at a local restaurant. In this regard, it is noted 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 actions, 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 ed 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).

The court also stated that:

> "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 addition, in its consideration of the characterization of meetings as "informal," the court found 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 be 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. at 415).

In view of the judicial interpretation of the Open Meetings Law, if a majority of the membership of the Board gathers to "plan strategies," I believe that such gatherings would constitute "meetings" subject to the Open Meetings Law. On the other hand, a gathering held to socialize or perhaps to "rehash" what transpired at a meeting would not, in my opinion, likely fall within the requirements of the Open Meetings Law.

In a matter unrelated to the Open Meetings Law, you asked whether it is "appropriate for mail that deals with Town business to go to the home or business address of the Town Supervisor rather than to the Town Clerk." Here I point out section 30(1) of the Town Law states in relevant part that the town clerk of each town "shall have the custody of all the records, books and papers

of the town." Further, it would appear that mail that comes into the possession of the Town would be subject to rights conferred by the Freedom of Information Law. The Freedom of Information Law pertains to agency records, and 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."

Due to the breadth of the language quoted above, it would appear that the materials in question constitute "records" for purposes of the Freedom of Information Law, irrespective of their physical location or custody.

Lastly, I believe that issues involving the conduct of attorneys may be brought to the attention of a grievance committee of a county bar association, for example. The Appellate Division of the Supreme Court has ultimate authority regarding such issues.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Town Board, Town of Henderson
Marie Ross, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1666

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 21, 1989

Ms. Mary L. Lemley

The staff of the Committee on 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. Lemley:

I have received your letter of September 15 in which you raised issues concerning compliance with the Open Meetings Law by the Board of Education of the Miller Place Union Free School District.

According to your letter, although you and your husband attend every meeting of the Board, you learned recently that the Superintendent had planned to travel to Italy in October "to study the feasibility of implementing a third language in our district...". You apparently inquired about the trip just before the Board was to conduct an executive session, when the Superintendent described the purpose of the trip and its itinerary. Following the executive session, the Board voted 3 to 2 to approve the trip, at which time the Board President indicated that while he could understand one member's negative vote, he criticized the other member's negative vote and asked: "why didn't you tell us how you were going to vote in the back room?" You added that three members of the Board had apparently known about the trip since April; the other two learned about it at the same time as yourself. It is your view that "the trip was not an item strictly for 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 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)]. Every meeting must be convened open to the public and preceded by notice given in accordance with section 104 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 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.

Third, I do not believe that a discussion concerning the Superintendent's proposed trip to Italy could properly have been considered during an executive session. Presumably any such discussion would have involved the feasibility of offering a third language to students, the benefits to the District and the cost of the trip to borne by taxpayers. While the issue might have related to the duties of the Superintendent, I do not believe that it could properly have been characterized as a personnel matter. Here 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in section 105(1)(f) are considered. In this instance, it does not appear that any of the subjects listed in that provision would have been discussed.

Moreover, 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].

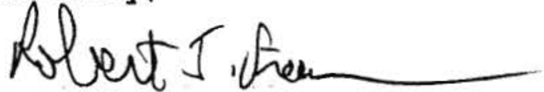
"With respect to 'personnel', Public Officers Law section 100[1][f] permits a public body to conduct an executive session concerning certain matters regarding a 'particular person'. The Committee on Public Access to Records has stated that this exception to the open meetings law is intended to protect 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 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.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded 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: Board of Education, Miller Place Union Free School District

STATE OF NEW YORK
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OML-AO-1667

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 25, 1989

Mrs. L. Pound

<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 Mrs. Pound:

I have received your letter of September 18 in which you raised an issue concerning compliance with the Open Meetings Law.

Specifically, in your capacity as clerk of a public body in the Town of Clarkstown, you wrote that you are responsible for preparing minutes of meetings. In addition, you indicated that you "must also handle all of the correspondence that comes before the Board" and that "these responses are part of the minutes." Recently, a request was made for the minutes, within two weeks as required by the Open Meetings Law, and you informed the applicant that "it was physically impossible" to complete the minutes within that time.

You have requested my advice on the matter. In this regard, I offer the following comments.

First, the Open Meetings Law, section 106(3), states in relevant part that:

> "minutes of meetings of all public bodies shall be available in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings..."

As such, I believe that the Open Meetings Law imposes a duty upon public bodies to prepare and make available minutes of meetings within two weeks of the meetings to which the minutes pertain.

Second, from my perspective, the problem emanates from expansiveness of the minutes that you prepare. The Open Meetings Law prescribes what may be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 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."

Based on the foregoing, it is clear that minutes need not consist of a verbatim transcript or account 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..." Similarly, minutes do not have to refer to those who may have spoken during a discussion or the nature of their comments, and although the Board may include responses to correspondence as part of the minutes, the Open Meetings Law does not require that kind of information to be included in minutes. In short, I believe that the minutes that you routinely prepare go beyond the requirements of the Open Meetings Law.

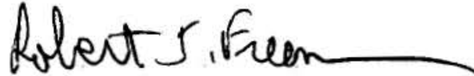
You did not indicate whether the Board for which you prepare the minutes had directed you to include all of the information that you described. Whether it has directed you to do so or otherwise, it is suggested that you raise the issue with the Board for the purpose of suggesting that the minutes that you have been preparing are unnecessarily detailed. If you could condense the minutes or avoid including items not required to be referenced in the minutes, perhaps compliance with the two-week time limitation could be achieved.

Lastly, while neither the Open Meetings Law nor any other provision of which I am aware requires that minutes be approved, it is recognized that many public bodies routinely, or as a matter or policy or custom, review minutes prepared by a clerk, for example, and officially note 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:saw

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 26, 1989

Hon. Richard Randazzo
Supervisor
Town of Cornwall
Town Hall
183 Main Street
Cornwall, NY 12518

<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 Supervisor Randazzo:

I have received your letter of September 20 and appreciate your interest in complying with the Open Meetings Law.

Attached to your letter is correspondence sent to you by a citizen who raised several issues concerning a newly created Board of Police Commissioners. According to her letter, the Commission recently met in an upstairs room that did not permit access to the handicapped. She also questioned discussions of a towing policy and the creation of a new position during executive sessions. In addition, she complained that the minutes were inaccurate and were adopted before members of the public were permitted to speak at the meeting. Lastly, her letter criticized the Board for cancelling a scheduled meeting without notifying the public of the cancellation.

In this regard, I offer the following comments.

First, section 150 of the Town law deals with the establishment of town police departments. Subdivision (2) of that provision states in relevant part that:

> "The town board of a town in which such a police department has been established at any time by resolution may establish a board of police commissioners for such town and appoint one or three police commis-

> sioners who shall at the time of their appointment and throughout their terms of office be owners of of record of real property in and electors of such town, and who shall serve without compensation, and at the pleasure of the town board. If the town board shall appoint only one such police commissioner, it shall in addition designate two members of the town board to serve as members of such police commission."

Based on the foregoing, a police commission is established by a town board and consists of three members.

Second, 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 view, each of the conditions necessary to conclude that a police commission is a public body can be met. As indicated earlier, a police commission is an entity consisting of three members. It is required to conduct its business by means of a quorum pursuant to section 41 of the General Construction Law. A police commission clearly conducts public business and performs a governmental function for a public corporation, which, in this instance, is the Town. Further, the definition of "public body" includes not only a governing body, such as a town board; it also includes reference to any committee, subcommittee "or similar body of such body". Since a town police commission is a creation of a town board, I believe that it is a "similar body", and a public body subject to the Open Meetings Law in all respects.

Second, 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 Board has the capacity to hold its meetings in a first floor room that is accessible to handicapped persons rather than a room "upstairs", I believe that the meetings should be held in the room that is most likely to accommodate the needs of people with handicapping conditions.

Third, the Open Meetings Law requires that meetings of public bodies be conducted open to the public, except to the extent that topics may appropriately be discussed during executive sessions. Further, paragraphs (a) through (h) of section 105(1) of the Law specify and limit the topics that may properly be considered in executive session.

The discussion of the towing policy, according to the citizen's letter, was discussed in executive session pursuant to section 105(1)(c). That provision permits an executive session to be held to discuss:

> "information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed..."

From my perspective, a towing policy likely has little relationship to the investigation of criminal activities and would not "imperil effective law enforcement if disclosed". If my assumptions are accurate, there would have been no basis for conducting an executive session to discuss the issue.

Similarly, although a discussion of the creation of a new position might involve issues relating to personnel, it would not in my opinion have fallen with the so-called "personnel" exception for entry into an executive session.

Under the Open Meetings Law as originally enacted, the "personnel" exception 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be 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.

A discussion concerning the creation of a position is a matter of policy which, in my opinion, should be discussed in public. When the Board reaches the point of discussing the relative qualifications of particular candidates for a position, I believe that an executive session could properly be held, for its focus than would be on a particular person or persons. However, the Board had not apparently reached that point at the meeting in question.

Fourth, with respect to minutes, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, section 106 of the Open Meetings Law pertains to minutes and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

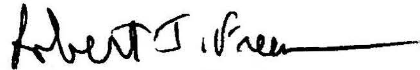
Based upon the foregoing, it is clear that minutes need not consist of a verbatim transcript of the entire discussion at a meeting, but rather only "a record or summary" of "motions, proposals, resolutions and any other matter formally voted upon..." Therefore, when a public body discusses public business but does not engage in the making of "motions, proposals, resolutions" or voting, presumably the minutes need not include reference to the particulars of the discussion. Further, minutes of executive sessions are required to be prepared only when action is taken during an executive session.

Fifth, the Open Meetings Law is silent with respect to public participation. As such, there is no requirement that members of the public be given an opportunity to speak. However, if a public body chooses to permit public participation, I believe that it should do so based upon reasonable rules that treat members of the public equally.

Lastly, there is nothing in the Open Meetings Law concerning the cancellation of meetings. Nevertheless, if it is known in advance that a meeting will be cancelled, I believe that considerations of courtesy and good faith should be recognized and that notice should be given to indicate that a scheduled meeting has been cancelled.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 4, 1989

Ms. Ann Ruzow Holland
Executive Director
Friends of Keeseville, Inc.
Box 446
Keeseville, New York 12944

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

Dear Ms. Holland:

As you are aware, your letter of September 27 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government. The Committee, on which the Secretary serves, is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

Your inquiry, based upon your letter and our conversation, involves the status of the Friends of Keeseville, Inc. under those statutes. You indicated that the Friends of Keeseville is a private, not-for-profit, tax-exempt organization.

Both the Freedom of Information Law and the Open Meetings Law apply to governmental entities. Specifically, the Freedom of Information Law pertains to agency records, and section 86(3) of that statute defines the term "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."

Since the organization that you serve is not a "governmental entity," it is not in my opinion an "agency," and rights conferred by the Freedom of Information Law would not extend to the Friends of Keeseville. As such, although you may choose to disclose records, you are not required to do so by the Freedom of Information Law.

As we discussed, the organization may have relationships with agencies that are subject to the Freedom of Information Law. Records pertaining to the Friends of Keeseville kept by those agencies must be disclosed by the agencies to the extent required by the Freedom of Information Law.

Similarly, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of that Law defines the phrase "public body" to include:

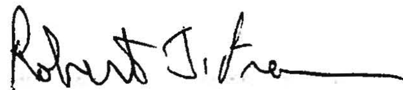
> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction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

Again, based upon my understanding of the organization, it would not constitute a public body, for it does not perform a governmental function. Therefore, meetings of the Board would not be governed by the Open Meetings Law and the Board could, in its discretion, conduct public or private meetings.

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws and an explanatory brochure.

I hope the foregoing serves to clarify the matter. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw
Enclosures

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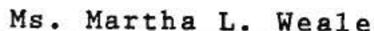
October 10, 1989

Ms. Martha L. Weale


The staff of the Committee on 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. Weale:

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

According to your letter, on September 27, you requested a copy of the minutes of the meeting of the Addison Village Board of Trustees held on September 11. You were informed that the "minutes would not be available until the regular meeting scheduled October 9th".

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."

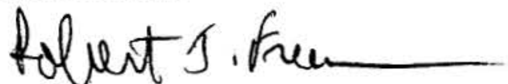
In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. Minutes of executive sessions reflective of action taken, the date and the vote must be prepared and made available, to the extent 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.

As you requested, copies of this opinion will be forwarded to the persons that you 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:jm

cc: Mrs. M.L. Hanrahan
Mr. Oakley Hayes
Mr. Mark Sweetwood
Mr. Larry Wilson
Addison Village Board
Mr. Peter R. Weale

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OML-AO-1671

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 11, 1989

Ms. Lilian M. Popp

The staff of the Committee on 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. Popp:

I have received your letter of October 1 in which you requested a "clarification" concerning the Open Meetings Law.

According to your letter, at a meeting of the Community School Board for District 31, on which you serve as Chairman, a member of the Board introduced a motion to enter into an executive session to discuss a "grievance and the employment of a person." It was apparently stated that an executive session could properly be held to consider the issues pursuant to section 105(1)(f) of the Open Meetings Law.

You wrote, however, that when the executive session began, the member who introduced the motion stated that the subject to be discussed was "the Superintendent and you, Mrs. Popp." You also wrote that the topics considered during the executive session involved contentions that:

> "1. The chairman did not make phone calls to the members.
>
> 2. The chairman had omitted her home phone number from the list of Board members.
>
> 3. The member said the chairman 'lied' in connection with a committee assignment.

4. The chairman had given a Board member a committee assignment that was his second choice, not his first.

5. The Board members requested that copies of all mail and notices be given to all members.

6. Board stationery should be given to members so they can send their own letters, not through the school board office.

7. The chairman's telephone was always busy.

8. All Board members should have been invited to a school when the Chancellor made a visit."

You have questioned the propriety of the executive session. In this regard, I offer the following comments.

First, by way of background, section 105(1)(f) is often characterized as the "personnel" exception, and the current language of that provision differs from the language that appeared when the Open Meetings Law was originally enacted in 1976. 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, 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

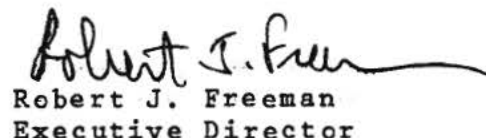
Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be conducted in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in section 105(1)(f) are considered.

Second, based upon your description of the subject matter discussed during the executive session in question, I do not believe that section 105(1)(f) could appropriately have been asserted to consider those matters. Although some "grievances," depending upon their nature, might involve a "particular person" in relation to a topic identified in section 105(1)(f), the matter that you described would not, in my opinion, typically be characterized as a grievance as that term is generally used. Further, while the issue focused upon you and your activities, as a member of the Board of Education, I do not believe that you are an employee or that the issues involved the "employment of a person."

In short, the language of section 105(1)(f) is, in my view, quite precise and specific. In view of its language, I do not believe that section 105(1)(f), or any other ground for entry into executive session, could validly have been asserted to discuss the subject matter that you described.

I hope that the foregoing serves to clarify the issue. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

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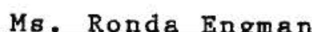
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 16, 1989

Ms. Ronda Engman


The staff of the Committee on 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. Engman:

I have received your letter of October 5, as well as the materials attached to it.

Your inquiry concerns a request for records directed to Mr. Jack Lowe, Director of Sponsored Programs at Cornell University. The records sought, which relate to certain grants, include:

> "1. The grant reference number.
> 2. When the grant first went in effect.
> 3. How much money has been allocated thus far for each grant.
> 4. What kind of and how may research models are being used for each grant.
> 5. The general nature of the experimentation being conducted on these research models."

In response, Mr. Lowe indicated that his office, as a matter of policy, "does not release specific information contained within grants for a variety of reasons not the least of which is to protect the proprietary information contained therein." He added that three aspects of the information sought, including "the grant number, date of activation and total award" have been made available to you through a newsletter. Mr. Lowe also referred to the functions and procedures of the University's Institutional

Animal Care and Use Committee, which protect "proprietary information," and to recent incidents that have threatened the safety of personnel, the projects and the animals used in the projects.

In this regard, I offer the following comments.

First, the initial issue to be considered is whether Cornell University is subject to the requirements of the Freedom of Information Law. As you are aware, although Cornell is in many respects a private institution, it also operates four "statutory colleges" that function in certain respects as extensions of the State University of New York. I believe that the records in question are maintained by or involve one of the four statutory colleges. As such, rights of access under the Freedom of Information Law would be contingent upon whether that materials sought are "agency records." Section 86(3) of the Freedom of Information Law defines the term "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."

In Holden v. Board of Trustees of Cornell University [440 2d 58, aff'd 80 AD 2d 378 (1981)], it was held that the Cornell Board of Trustees is a "public body" subject to the Open Meetings Law when it deliberates with respect to the four statutory colleges administered by Cornell under the supervision of the State University of New York. Although the court found that such activities of the Board of Trustees fell within the scope of the Open Meetings Law, it did not determine whether the records regarding statutory colleges would be subject to the Freedom of Information Law. Section 102(2) of the Open Meetings Law defines "public body" to include:

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

From my perspective, a distinction between the definitions of "agency" in the Freedom of Information Law and "public body" in the Open Meetings Law involves the language referring to "governmental" entities performing a governmental or proprietary func-

tion in the case of the former, as opposed to "any" entity performing a governmental function in the latter. Whether a court would equate these two phrases in view of the activities performed by Cornell with respect to the statutory colleges is as yet undetermined.

Second, the difficulty in determining whether or not an entity is "governmental" in character was recognized by the Court of Appeals in Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)]. In that case, the State's highest court found that records of a volunteer fire company, a not-for-profit-corporation, providing fire protection services to a municipality, are subject to the Freedom of Information Law. However, the Court stated that:

> "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" (Westchester News v. Kimball, supra, at 581)."

The Court of Appeals disagreed with the argument of the volunteer fire company that it should not be subject to the Freedom of Information Law because it did not constitute an "organic arm of government." The extent to which there may be similarities or analogies that can be drawn between the Kimball holding and the factual situation at issue is in my view conjectural. It is undisputed that the State University system is an "agency" subject to the Freedom of Information Law; whether the records of the four statutory colleges are "agency records" remains to be determined.

In short, unless the statutory colleges are "agencies" subject to the Freedom of Information Law, there would be no obligation, in my view, to give effect to the Freedom of Information Law.

Third, assuming that the Freedom of Information Law is applicable, I point out that 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.

Of potential significance is the initial ground for denial, section 87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." A federal statute, 7 U.S.C. section 2142, which is entitled "Standards and certification process for humane handling, care, treatment and transportation of animals," and which deals with institutional committees in research facilities, states in subdivision (6)(b) that:

> "No rule, regulation, order or part of this chapter shall be construed to require a research facility to disclose publicly or to the Institutional Animal Committee during its inspection, trade secrets or commercial or financial information which is privileged or confidential."

In my view, to the extent that your request involves "proprietary information," i.e., trade secrets or commercial or financial information that is privileged, such information would be specifically exempted from disclosure by federal statute.

Based on the foregoing, to the extent that the federal statute cited above is applicable, it appears that records falling within the scope of your request could be withheld, whether or not the documents in question could be characterized as "agency records." On the other hand, to the extent that the federal statute does not apply, the records sought would be subject to the Freedom of Information Law if the documentation consists of agency records. I do not have sufficient familiarity with the contents of the records or the possibility that they may consist of "proprietary information" to offer specific guidance concerning Cornell's obligation to disclose or its authority to withhold the records.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Jack W. Lowe, Director

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 19, 1989

Mr. Chris Brock
Palladium-Times
140 W. First Street
Oswego, New York 13126

<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. Brock:

I have received your recent letter, as well as the documentation attached to it.

According to the materials, the City of Oswego School District Board of Education "schedules an executive session before their regular meeting...every time they meet." You have asked what action, if any, this office may take concerning the matter.

In this regard, the Committee on Open Government is authorized to advise with respect to the Open Meetings Law; it has no power to enforce the Law or to compel a public body to open or close its meetings. In an effort to persuade, educate, advise and enhance compliance with the Open Meetings Law, copies of this opinion will be forwarded to the Board of Education and its President, Ms. Veronica Clark.

In conjunction with the issue that you raised, I offer the following comments.

First, the term "meeting" has been construed broadly by the courts. In a landmark decision rendered eleven years ago, the Court of Appeals confirmed 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, even if there is no intent to take action, and irrespective of the manner in which the gathering may be characterized [see <u>Orange County Publications v. Council of the City of Newburgh</u>, 60 AD 2d 409, 45 NYS 2d 947 (1978)].

Second, every meeting must be preceded by notice of the time and place of a meeting. Subdivision (1) of section 104 of the Open Meetings Law pertains to meetings scheduled at least a week in advance and requires that notice of such meetings must be given to the news media and posted in one or more designated public locations not less then 72 hours prior to those meetings. Subdivision (2) of section 104 pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and posted in the same manner described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. As such, if the Board intends to convene at 6 p.m. on a particular evening, notice must, in my opinion, be given to that effect.

Third, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

> "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.

Further, I point out 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 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].

It is also noted that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may appropriately be considered during an executive session.

Lastly, judicial interpretations of the Open Meetings Law indicate that motions to enter into executive sessions cannot merely describe the subjects to be discussed as "personnel", "negotiations" or "litigation", for example.

More specifically, in the Open Meetings Law as originally enacted, the "personnel" exception 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be 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.

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, supra; 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.

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.

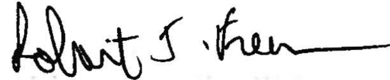
With regard to the sufficiency of a motion to discuss "litigation", it has been held that:

> "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.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

cc: Board of Education
Veronica Clark, President

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 6, 1989

Ms. Patricia J. Stauffer

The staff of the Committee on 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. Stauffer:

Your letter of October 20 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Open Meetings Law.

You have complained concerning "the policies and practices of the current administration of the Village of Sodus Point". Specifically, you wrote that the "administration persists in the practice of calling special board meetings regardless of the necessity of the same". Further, you expressed the belief that the Open Meetings Law "requires notice of at least seventy-two hours prior to a special meeting".

In this regard, I offer the following comments.

First, the Open Meetings Law does not make reference to or distinguish among special meetings as opposed to what may be characterized as "regular" meetings. Rather, the Law distinguishes between meetings scheduled at least a week in advance as opposed to those scheduled less than a week in advance.

Section 104 of the Open Meetings Law prescribes notice requirements applicable to public bodies and states that:

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

> spicuously 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 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 week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Second, I believe that the actions taken by the Board of Trustees generally remain valid unless and until a court renders a determination to the contrary. With respect to the enforcement of the Open Meetings Law, section 107(1) states in part that:

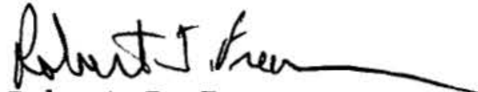
> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or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

The same provision also 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."

I hope that the foregoing serves to clarify the law and that I 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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 9, 1989

Mr. William Locker

Dear Mr. Locker:

As you are aware, I have received your letter of October 16.

Your initial area of inquiry involves what you characterized as "unadvertised exit audit meetings between State auditors and a municipal government body or elected officials". You referred specifically to an exit conference recently held in the Town of Stanford.

Having discussed the matter with representatives of the Department of Audit and Control, I believe that reasonable people may differ with respect to the status of such gatherings regarding the application of the Open Meetings Law. Since they are convened by an auditor, and since there is no intent on the part of municipal officials to engage in a deliberative process or to take action, one might contend that an exit conference is not subject to the Open Meetings Law under any circumstances. On the other hand, if a quorum of a public body is present, it might also be contended that such a gathering constitutes a "meeting" that falls within the requirements of the Open Meetings Law.

I was informed that no quorum of the Town Board was present at the exit conference conducted in the Town of Stanford. Absent a quorum, I do not believe that the Open Meetings Law would have applied.

The other issue raised in your letter pertains to an amendment to the Stanford Town Code stating that any member of an appointed board or commission who "acts or communicates in writing or orally outside of said board does so beyond the scope of their public responsibility/duty and shall not be entitled to a right of defense by the Town of Stanford in a civil action...".

As I explained to you by phone, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. Since the subject of the amendment deals with neither of those statutes, I cannot offer guidance concerning its propriety.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 9, 1989

Mr. Harold G. Otley

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

Dear Mr. Otley:

I have received your recent letter which reached this office on October 30. You have raised a series of questions relating to the Freedom of Information Law and the Open Meetings Law.

The first area of inquiry involves the custody of town records. Specifically, you asked whether the town's records access officer and/or town clerk have the authority "to require all Town mail to come through that office so that it can be opened, copied, and then copies sent to the respective Town offices and/or departments with the original placed in the Town files". You also asked whether such official or officials can "arbitrarily mail copies of Town records and/or letters of any official and/or Department to any person...without a request or directive to do so under any circumstance".

In this regard, some of the issues raised do not deal with the Freedom of Information Law and are outside the scope of the jurisdiction of this office. However, several provisions of law may be relevant to those issues. First, section 30 of the Town Law describes the duties of town clerks. Subdivision (1) of that section states in part that the town clerk "Shall have the custody of all the records, books and papers of the town". Second, section 57.19 of the Arts and Cultural Affairs Law, which includes the "Local Government Records Law" (Article 57-A), states that the town clerk is the "records management officer". Third,

with respect to duties imposed by the Freedom of Information Law, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, specify the responsibilities of the designated records access officer. I have enclosed a copy of those regulations for your review.

It is noted that section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate such regulations. In turn, section 87(1)(a) of the Freedom of Information Law requires the governing body of a public corporation, i.e., a town board, to promulgate regulations consistent with the Law and the Committee's regulations.

A second area of inquiry involves executive sessions held to discuss litigation. Here I point out that 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..."

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 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)]. Therefore, if a public body seeks to discuss litigation with its adversary in the litigation, I do not believe that an executive session could appropriately be held. Further, 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)].

Based upon the foregoing, I believe that a motion to enter into executive session that merely characterizes the subject to be discussed as "litigation" is inadequate. As indicated in the decision cited above, the motion should refer to the particular lawsuit under discussion.

You also asked whether a motion to enter into an executive session must "state the names and/or positions of other than board members authorized or requested to stay in the executive session". 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 other persons authorized by the public body."

I am unaware of any judicial decisions indicating that persons authorized to attend executive sessions other than the members of a public body must be identified. I believe that there should be some indication in such a motion to the effect that persons other than members are permitted to attend.

With respect to minutes, I direct your attention to section 106 of the Open Meetings Law. 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 of 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 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.

Further, 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."

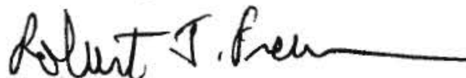
As such, minutes of open meetings must be prepared and made available within two weeks of such meetings. If action is taken during an executive session, minutes indicating the nature of the action taken, the date and the vote must be prepared and made available within one week to the extent required 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, you asked that I "explain how Section 105(1) and Section 106(1) of...[the] Open Meetings Law apply to each other". Although your question is unclear, section 105(1), as stated earlier, requires that a motion to enter into an executive session be made during an open meeting. Section 106(1) requires that minutes include reference to motions. As such, a motion to enter into an executive session must in my view be referenced in minutes.

I hope that I have been of some assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
Enc.

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 9, 1989

Ms. Dawn L. Dittmar
Councilman-Elect

The staff of the Committee on 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. Dittmar:

I have received your letter of October 25. In your capacity as a newly elected member of the Colden Town Board, you have sought clarification concerning a series of issues regarding the conduct of meetings by the Board.

You wrote that the Board gathers prior to its formal meetings "and conducts what they refer to as 'pre meetings' for the purpose of discussing and reviewing their agenda". You also referred to a recent "workshop session" held to discuss the tentative budget. You and others were asked to leave the room when the Board discussed "salaries".

Several questions have been raised in relation to those events. 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", "agenda sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

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

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

Based upon the direction given by the courts, if a quorum of the Town Board meets to discuss public business, including the review of an agenda, such a gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, regardless of its characterization. So long as the pre-meeting is conducted in accordance with the requirements of the Open Meetings Law, I believe that votes could be taken at those gatherings. However, in my opinion, since the Open Meetings Law applies equally to the pre-meeting and the ensuing regular meeting, it is likely that confusion or questions could be eliminated by referring to each as meetings, rather than distinguishing them in a manner that is apparently artificial.

It is also noted 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 as "pre meetings", for example.

Second, the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, section 105(1) of the Open Meetings Law states in relevant part that:

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

In view of the foregoing, it is clear in my view that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting during which the public may be excluded. It is also clear that

a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss a subject listed in the Open Meetings Law as appropriate for discussion behind closed doors.

Third, if a quorum of the Board convened to discuss the formulation of the tentative budget, I believe that such a gathering, for reasons discussed earlier, constituted a "meeting" subject to the Open Meetings Law. 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, however, 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.

On the other hand, to the extent that the discussion focused upon a particular person in terms of that person's performance (i.e., whether that person performed well or poorly and merited an increase or a cut in salary), that portion of the meeting could, in my view, have properly been conducted during an executive session pursuant to section 105(1)(f).

Fourth, with respect to minutes of "pre meetings", as well as other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 of the Open Meetings Law 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."

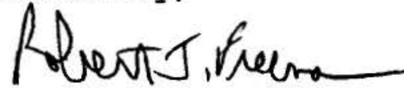
Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. Further, if those actions, such as motions or votes, occurred during pre-meetings, I believe that minutes must be prepared indicating those actions and made available to the public.

Lastly, you asked whether the public can make comments at workshop meetings. In this regard, while the Open Meetings Law permits the public to attend meetings, it is silent with respect to public participation. As such, while a public body may choose to permit public participation at meetings, I do not believe that the public has the right to speak or otherwise participate.

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

Enc.

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 9, 1989

Ms. Nicaletta J. Greer
Town Clerk
Town of Seneca Falls
10 Fall Street
Seneca Falls, NY 13148

The staff of the Committee on 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. Greer:

I have received your letter of October 25, which reached this office on October 30.

You have requested an advisory opinion concerning the propriety of an executive session held "to discuss the performance and salary" of three named officials of the Town of Seneca Falls.

In this regard, I offer the following comments.

First, the Open Meetings Law is based upon a presumption of openness. All meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. Moreover, a public body must follow a procedure prescribed by the Law during an open meeting before it may enter into a closed or "executive session". Specifically, section 105(1) of the Open Meetings Law states in relevant part that:

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

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

Second, most issues involving the preparation of a budget or the expenditure of public monies 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, however, 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 function of a position. 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.

On the other hand, to the extent that a discussion focuses upon a particular person in terms of that person's performance (i.e., whether that person performed well or poorly and merited an increase or a cut in salary), that portion of the meeting could, in my view, be properly conducted during an executive session pursuant to section 105(1)(f).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 13, 1989

Mr. Steven Tiska

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

Dear Mr. Tiska:

I have received your letter of October 29, as well as the materials attached to it.

As I understand the matter, you have attempted without success to obtain records reflective of an "agreement" into which the Town of Masonville has entered concerning property located in the Town. It appears that you were given a copy of a record containing the Town Assessor's notarized signature on the Town's letterhead; however, the remainder of the document has been deleted.

While the nature of the documentation in which you are interested is not entirely clear, I offer the following general comments.

First, the Freedom of Information Law is applicable to all agency records, and section 86(4) of the Law defines the term "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."

Therefore, if the information sought is kept, held, filed, produced or reproduced by the Town, I believe that it would constitute a "record" subject to rights of access.

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. Assuming that the record sought is an agreement into which the Town has entered, I believe that it would be available, for none of the grounds for denial would apply. If such an agreement was approved by the Town Board, as you inferred, the action to approve the agreement should, in my view, have occurred at a meeting of the Board. Further, any vote on the matter should be memorialized in minutes of the meeting in which the vote was taken. It is noted that the Open Meetings Law, section 106, requires that minutes include reference to motions, proposals, resolutions, action taken, the date and the vote of the members. Subdivision (3) of section 106 specifies that minutes must be prepared and made available within two weeks of the meetings to which they pertain.

Third, if in response to a request for a record, any portion of the record is withheld, the regulations promulgated by the Committee on Open Government specify that the reasons for the denial must be given in writing (see 21 NYCRR Section 1401.2). Further, an applicant may appeal such denial pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

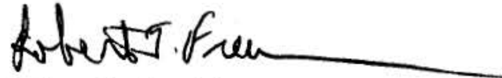
> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal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

Lastly, in the event that a response to a request indicates that the record cannot be located, section 89(3) of the Freedom of Information Law states that an applicant may ask that they agency "certify that it does not have possession of such record or that such record cannot be found after diligent search."

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to the Town Clerk.

I hope that I have been of some assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

cc: Pam Johnson, Town Clerk

STATE OF NEW YORK
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 22, 1989

Mr. Milton Goldin
The Milton Goldin Company
266 Crest Drive
Tarrytown, New York 10591

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

Dear Mr. Goldin:

I have received your letter of October 31 and the report attached to it.

You referred to our earlier correspondence concerning an action initiated against the Village of Tarrytown that resulted in part in an order that the terms of the determination not be made public. When you inquired as to the cost of the determination to taxpayers, the Village Administrator indicated that the decision would not affect taxes.

In relation to the foregoing, you attached a report which you assume was prepared by a political organization that refers to an increase in taxes and problems in the Village Police Department. You express concern over "how far a government can go in New York restricting information on public matters." Further, you asked how you "can obtain -- in writing -- accounts of what is happening."

In this regard, I offer the following comments.

There are two statutes within the area of advisory jurisdiction of this office that might serve to enable you to be better informed. The report that you enclosed indicates that Village taxes were increased "for two good reasons: not as much new income came in and expenses continued to go up."

The Freedom of Information Law is a vehicle under which any taxpayer may review a variety of records. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Records reflective of the expenditures of public monies, as well as revenues, are generally accessible under the Law, for none of the grounds for denial could be asserted. As such, books of account, ledgers, contracts and related records involving Village finances would be available. Similarly, the current Village budget and preceding budgets are also available for review and comparison.

It is reiterated, however, that the Freedom of Information Law does not require an agency to answer questions or prepare records. As such, if there is no analysis or study that details the reasons for an increase, the Village would not, in my view, be required to create new records on your behalf.

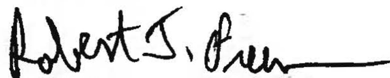
The other vehicle that enables the public to be informed with respect to the governmental activities of the Village is the Open Meetings Law. While that Law does not require the production of records, other than minutes of meetings, it provides the right to attend and listen to the deliberations that are part of the decision-making process.

Like the Freedom of Information Law, the Open Meetings Law is based upon a presumption of openness. Meetings of the Board of Trustees, for example, must be conducted open to the public, unless the subject matter may appropriately be considered during a closed or executive session. Paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. In addition, the Village Law requires that a tentative budget be disclosed and that a public hearing be held prior to the adoption of a budget [see Village Law, section 5-508].

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 27, 1989

Ms. Donna B. Amberman

The staff of the Committee on 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. Amberman:

I have received your letter of November 10, which pertains to the status of the board of trustees of a county historical Society under 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 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."

Second, historical societies are "type B not-for-profit corporations according to section 1408 of the Not-for-Profit Corporation Law. Type B not-for-profit corporations:

> "...may be formed for any one or more of the following non-business purposes: charitable, educational, religous, scientific, literary, cultural or for the prevention of cruelty to children or animals" [Not-for-Profit Corporation Law, section 201(b)].

In addition, it appears that the visitation and inspection of the premises and records of such a corporation are conferred only upon a justice of the Supreme Court (Not-for-Profit Corporation Law, section 114).

In view of the foregoing and particularly section 201(b) of the Not-for-Profit Corporation Law, I would conjecture that a board of a historical society is not a public body, for it likely does not conduct what may be characterized as "public business," nor does it perform what may be considered a "governmental function." If those contentions are accurate, such a board is not a public body and is not subject to the Open Meetings Law.

Based upon the foregoing, issues involving the disclosure of minutes of meetings of the a historical society, as well as its other records, would in my view be governed by its board, rather than by the Open Meetings Law. In essence, I believe that the board in this instance may choose to disclose or withhold its records.

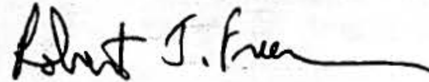
Lastly, concerning the matter from a different vantage point, the statute that deals with access to government records is the Freedom of Information Law. That statute pertains to agency records, and section 86(3) of the Freedom of Information Law defines "agency" to mean:

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

As in the case of the Open Meetings Law, the Freedom of Information Law is generally applicable to records maintained by governmental entities that perform a governmental function. Since a historical society is a not-for-profit, rather than a governmental entity, I do not believe that the Freedom of Information Law would govern access to its records.

I hope that the foregoing serves to clarify the matter. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

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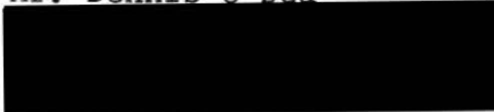
ROBERT J. FREEMAN

November 29, 1989

Mr. Dennis O'Dea



The staff of the Committee 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. O'Dea:

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

According to you letter, while serving as a member of the Board of the Broome County Resource Recovery Agency, which is an independent public benefit corporation created by section 2047-e of the Public Authorities Law, you participated in both open and closed meetings and possess "personal and official notes" regarding its business. During your term with the Agency, bids for a resource recovery facility were received and evaluated. Following the award of a contract to the Foster Wheeler Corporation, various persons and organizations requested copies of the evaluations of the bids. You also indicated that requests have been made to review the criteria used in the evaluations. Those requests have been denied for the reason that the "information no longer exists." You added that:

> "Without this information there can be no verification by citizen organizations or the Legislature that the evaluation process did comply with the New York State Municipal Law, Part 360 of the Department of Environmental Conservation Regulations or even the requirements of the Request for Proposal, and the 1988 State Solid Waste Management Plan."

In conjunction with the foregoing, you raised a series of questions. Specifically, you asked whether:

> "As a past Broome County Resource Recovery Agency member, can [your] personal files be opened to the public in regard to the bid evaluation? What information would remain confidential after the contract has been executed? Under what grounds could the Agency destroy information used in making the bid evaluation. Are files of consultants such as Hawkins, Delafield and Wood that contain bid evaluation methodology and presentations subject to the Freedom of Information Law? Can the Agency cause [you] to surrender [your] files to them?"

In this regard, I offer the following comments.

First, according to our conversation, there has been no effort or intent on the part of the agency to maintain control over your "personal files," which are apparently duplicates of records distributed to other members of the agency. It is noted that the scope of the Freedom of Information Law is broad, for it pertains to all records of an agency. 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, I believe that the materials that you received during your term with the Agency clearly constitute "records." Whether those records remaining in your possession are still within the custody or control of the Agency is, in my view, conjectural. If there was no effort or intent on the part of the Agency to retrieve the records, and if there is no legal prohibition concerning their disclosure, I would conjecture that you may do with the records as you see fit.

I point out, too, that the Freedom of Information Law is permissive. 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. However, the introductory language of section 87(2) states that an agency "may" withhold records falling within the grounds for denial that follow. There is no requirement that records must be withheld, even though a basis for denial may be applicable. 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 permissive rather than mandatory language, and it is within the agency's discretion to disclose the records..." [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

The only instances in which records cannot be disclosed involve situations in which statutes prohibit disclosure. I am unaware of any statute that would, under the circumstances presented, prohibit disclosure.

Second, the materials that you forwarded, all of which were prepared by consultants retained by the Agency, are marked "confidential." In other contexts, it has been found that even though records might be marked as "confidential," such notations or claims are generally irrelevant. An assertion of confidentiality, absent specific statutory authority, may be all but meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to section 87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute." In this instance, however, I do not believe that any statute specifically exempts the records in question from disclosure. If that is so, the records are subject to whatever rights exist under the Freedom of Information Law, notwithstanding the fact that they are marked "confidential" [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)].

Third, even though the Freedom of Information Law permits the disclosure of any records, subject to the qualification mentioned earlier, several of the grounds for denial may be or have been relevant to the records in question.

Section 87(2)(c) permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards..." Since the contract has already been awarded, it is unlikely, in my view, that section 87(2)(c) would serve as a basis for denial.

Section 87(2)(d) permits an agency to withhold records that:

> "are trade secrets or are maintained for the regulation or commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

While records submitted by bidders might have contained "trade secrets," it is doubtful in my view that the records in question, evaluations and related materials prepared by consultants or Agency officials, would consist of trade secrets that would, if disclosed, cause substantial injury to the competitive position of a bidder.

With respect to records prepared by the Agency or its consultants, I believe that section 87(2)(g) of the Freedom of Information Law would be most relevant. Based upon the judicial interpretation of the Law, records prepared for an agency by a consultant should be treated as "intra-agency" materials that fall within the scope of section 87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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, unless a different ground for denial applies. 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.

In a discussion of the issue of consultant reports, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional material, prepared to assist an agency decision maker***in arriving at his decision' (Matter of McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Creat Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared from the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (See, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

The court, however, specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers law section 87[2][g][i]), or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

Having reviewed the materials that you forwarded, which, as indicated earlier, were prepared by consultants, I believe that a great deal of their contents consist of factual information that would be available under section 87(2)(g)(i). In addition, in a situation in which opinions and factual materials were "intertwined," Ingram v. Axelrod, a decision rendered by the Appellate Division, Third Department, indicated that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subjective analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality.' (10 NYCRR 50.2 [b]) Additionally, pages 7-11 (ambualnce records, list of intervies, and reports of interview) should be disclosed as 'factual data.' They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 AD 2d 176, 181, mot for lv to app den 48 NY 2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined

> in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v. Regan, 81 AD 2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [9- AD 2d 568, 569 (1982); see also Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979); Xerox Corporation v. Town of Webster, a65 NY 2d 131, 490 NYS 2d 488 (1985)].

In short, even though factual information contained within a record may be "intertwined" with opinions, the factual portions, if any, would in my opinion be available under section 87(2)(g)(i), unless a different ground for denial applies.

Further, if "criteria" regarding the evaluations were developed or used, it appears that would be available, for they might be viewed as "instructions to staff that affect the public" accessible under section 87(2)(g)(ii) or as an agency policy accessible under section 87(2)(g)(iii). In essence, the criteria would represent the standards to be met by the bidders.

Fourth, issues involving the destruction of records do not deal directly with the Freedom of Information Law. However, a relatively new provision of law, the "Local Government Records Law" (Arts and Cultural Affairs Law, Article 57-A), is likely relevant. The phrase "local government" for purposes of that law is defined to mean:

> "any county, city, town, village, school district, board of cooperative educational services, district corporation, public benefit corporation, public corporation, or other government created under state law that is not a state department, division, board, bureau, commission or other agency, heretofore or hereafter established by law" [Arts and Cultural Affairs Law, section 57.17(1)].

The Agency, as indicated earlier, is a public benefit corporation. Further, section 57.25(2) states in part that:

> "No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education."

In conjunction with the foregoing, the Commissioner is authorized to develop schedules that include minimum retention periods for certain classes of records. I am unaware of any such retention schedules that may be applicable to the Agency. However, it would appear that the Agency may destroy records only with the consent of the Commissioner or pursuant to a retention schedule.

In a related vein, I point out that the Freedom of Information Law pertains to existing records. If records are no longer maintained by the Agency, the Freedom of Information Law would have no application. Whether records were properly disposed of or destroyed is, in my view, a separate issue. It is noted that an amendment to the Freedom of Information Law that became effective on November of this year, section 89(8), states that:

> "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."

Based upon your correspondence, I have no knowledge of whether the amendment is relevant to the matter.

Lastly, in our conversation, you questioned the propriety of executive sessions held by the Agency to consider evaluations prepared and presented by consultants. In this regard, like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Public bodies, such as the board of a public benefit corporation, must conduct meetings open to the public, unless a topic may appropriately be discussed during an executive session. Paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the topics that may be considered during executive sessions.

Of likely relevance is section 105(1)(f), which permits a public body to inter into an executive session to discuss:

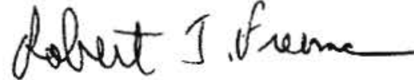
> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal or a particular person or corporation."

The extent to which the cited provision could have been asserted would have been dependent upon the nature of a discussion. For instance, if a discussion involved consideration of the financial history of a particular corporation, i.e., a bidder, I believe that an executive session would have properly been held.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be forwarded to agency 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:saw

cc: John Guinan
John E. Murray

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OML-AO-1683

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 15, 1989

Mr. Norman J. Goldman

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

Dear Mr. Goldman:

As you are aware, I have received your letter of October 31 and the materials attached to it.

According to your letter, notice had been given with respect to a meeting of the Town of Clifton Park Planning Board to be held with the Technical Advisory Committee. The meeting was scheduled to be conducted from 7:30 to 8:30 p.m. on the evening of October 3. The meeting began and ended late, at approximately 9:00 p.m. At that time, the members of the Technical Advisory Committee and others who attended the meeting left the building. You remained present to arrange the room for senior citizens. However, at 9:30 p.m., the Planning Board apparently reconvened and "held a meeting to discuss and determine its official comments on a proposed local law..." When you suggested that there had been no notice of the meeting, the Chairperson indicated that the gathering was a continuation of the meeting scheduled to commence at 7:30. You also raised the issue at a Town Board meeting during which the Chairperson of the Planning Board referred to comments that I had made indicating, in brief, that the notice provisions in the Open Meetings Law do not include requirements involving the publication of an agenda or a notification of the subjects to be discussed at a meeting.

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

First, as the Chairperson suggested, notice of the time and place of a meeting must be given prior to every meeting. Section 104 of the Open Meetings Law states in relevant part that:

> "1. Public notice of 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."

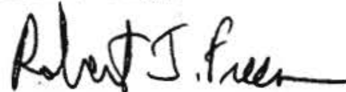
As such, there is no requirement that notice include reference to the subjects to be discussed at a meeting.

Second, from my perspective, resolution of the issue involves a question of fact. If indeed the later gathering was a continuation of the meeting scheduled to begin at 7:30, I do not believe that any additional notice was required to have been given.

However, if the gathering was a continuation of the scheduled meeting, the notice given regarding that meeting was, in my view, misleading, for, according to your comments, the notice indicated that the meeting would be held with the Technical Advisory Committee during a designated period. Further, the gap between the end of the discussion with the Committee and the beginning of the gathering held to discuss comments regarding a proposed local law appears to suggest that the scheduled meeting had ended. If there was an intent to end that meeting, and if the later gathering represented a second meeting rather than a continuation of the scheduled meeting, I would agree with your contention that the Board failed to give notice as required be section 104 of the Open Meetings Law.

I hope that I have been of some assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw
cc: Barbara Beach, Chairperson, Planning Board

STATE OF NEW YORK
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ROBERT J. FREEMAN

December 4, 1989

Mr. John F. Sheehan
Editor
Malone Evening Telegram
136 East Main Street
Malone, NY 12953

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

Dear Mr. Sheehan:

I have received your letter of November 14 in which you raised an issue concerning the Open Meetings Law.

Specifically, you wrote that you are "having some difficulty with Mayor Joseph Gokey's refusal to publicly notify anyone that Committee Meetings of the Village Board have been scheduled". As such, you added that "it is impossible for [you] to cover these Committees, and for the public to know what business is being transacted."

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".

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 members of the Village Board of Trustees, such as committees of the Board, 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, as a general matter, I believe that a quorum consists of a majority of the total members of a body (see e.g., General Construction Law, section 41). As such, in the case of a committee consisting of two, a quorum would be two, for one would not constitute a majority.

Second, the Open Meetings Law pertains to all meetings of public bodies. Section 102(1) of the Law defines the term "meeting" as "the official convening of a public body for the purpose of conducting public business", and 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)]. Consequently, in my view, with respect to the application of the Open Meetings Law, there is no distinction between a regular meeting, a special meeting or a work session, for example.

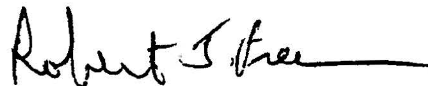
Third, with respect to notice of meetings, section 104 of the Open Meetings Law provides that:

> "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 week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations. Further, the notice requirements apply equally to all public bodies, including the Board of Trustees and the committees 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:jm

cc: Mayor Joseph Gokey, Village of Malone

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-1685

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ROBERT J. FREEMAN

December 4, 1989

Ms. Suzanne Lawrence
Chairperson
Mandalay School
Bayview 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.

Dear Ms. Lawrence:

In have received your letter of November 9, as well as the materials attached to it.

Your inquiry concerns the status of the Wantagh Education Liaison Committee under the Open Meetings Law. According to an agreement between the School District and the Wantagh United Teachers, the Committee considers issues of "District-wide educational concern, including proposed curtailment, abolition or proposed changes in the educational program," but it does not discuss "negotiable items." The agreement indicates that the Committee consists of members of the Board of Education, the Superintendent, the Assistant Superintendent for Curriculum and Personnel, the Assistant Superintendent for Business and Operations, the President of Wantagh United Teachers (WUT) and seven other WUT members designated by the Executive Board of WUT. Further, the agreement provides that the members of the Committee "shall serve at the will of the designating body, Board or WUT."

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies. The phrase "public body" is defined in section 102(2) of the Law to mean:

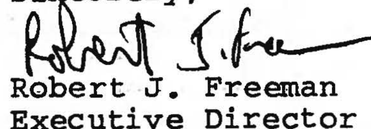
> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction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

Second, a memorandum attached to your letter states that the status of advisory bodies having no authority to take final action, but only the authority to advise, "has been unclear." It also indicates that I have advised that the Open Meetings Law applies "not only to committees and subcommittees of the board of education but also to citizens' advisory committees."

While early decisions rendered under the Open Meetings Law found that citizens' advisory committees were subject to the Open Meetings Law (see e.g., Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978), other more recent decisions rendered by the Appellate Division, Second Department, which includes Nassau County, indicate that entities having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, ___ AD 2d ___ (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989)]. It was also held that "groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies]' subject to the Open Meetings Law... "(Poughkeepsie Newspaper, supra, 69). On the basis of the decisions cited above, it appears that the Committee in question is not a public body required to comply with the Open Meetings Law. It is noted, however, that there are no decisions of which I am aware that deal specifically with entities that have the authority to recommend, but which include members of a governing body, such as a board of education. Nevertheless, at this juncture, once again, meetings of the Committee do not appear to be governed by the Open Meetings Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

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December 4, 1989

Mr. Frank J. Ginther

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

Dear Mr. Ginther:

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

You have asked for assistance "in obtaining the voting record of the Albany Port District Commission on the Lease Option Agreement between the Port Commission and Ultra Cogen Systems, Inc.". You indicated that the agreement was signed for the Port Commission by its Chairman, Guy N. Childs, on April 24, 1989.

In this regard, I offer the following comments.

First, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open meetings" requirement. Although the Freedom of Information Law pertains to existing records and generally does not require that a record be created or prepared [see Freedom of Information Law, section 89(3)], an exception to that rule involves votes taken by public bodies. Specifically, section 87(3) of the Freedom of Information Law has long required that:

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

Stated differently, when a final vote is taken by an "agency", which is defined to include a state or municipal board [see section 86(3)], such as the Commission, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

Second, in terms of the rationale of section 87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues.

Further, although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of section 87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law:

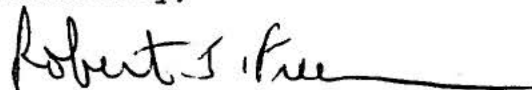
> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listing to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

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)].

In an effort to assist you, copies of the opinion will be sent to representatives of the Commission.

I hope that I 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: Guy N. Childs, Chairman
Frank W. Keane, General Manager

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 5, 1989

Mr. Ross Strober

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

Dear Mr. Strober:

I have received your letter of November 17, as well as the correspondence attached to it.

You have raised a series of issues concerning the implementation of the Open Meetings Law by the Board of Education of the Hauppauge School District.

Your first area of inquiry pertains to the status of committees designated by the Board. Each committee apparently includes at least one member of the Board of Education. In this regard, the Open Meetings Law is applicable to meetings of public bodies. 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 early decisions rendered under the Open Meetings Law found that citizens' advisory committees were subject to the Open Meetings Law (see e.g., Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978), other more recent decisions rendered by the Appellate Division, Second Department, which

includes Suffolk County, indicate that entities having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, ___ AD 2d ___ (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989)]. It was also held that "groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies]' subject to the Open Meetings Law... " (Poughkeepsie Newspaper, supra, 69). On the basis of the decisions cited above, it appears that the committees in question may not be public bodies required to comply with the Open Meetings Law. It is noted, however, that there are no decisions of which I am aware that deal specifically with entities that have the authority to recommend, but which include members of a governing body, such as a board of education. Nevertheless, at this juncture, once again, meetings of the committees in question do not appear to be governed by the Open Meetings Law based upon recent court decisions.

Second, you provided examples of what you characterized as "illegal meetings". One situation involved the preparation of a "moratorium for approval". You wrote that there is no record that the Board discussed the issue at either an open or a closed meeting and that "therefore, it is apparent that an illegal meeting must have occurred". The next situation pertained to an announcement by the Superintendent "that a new organizational pattern has been formed". The reorganization "had never been discussed or voted on by the School Board". As such, you alleged that a "secret meeting" must have taken place. A third situation concerns a statement by the President of the Board in which he indicated that he had the authority to amend a lease "because he had received a 'sense of the Board' over the telephone earlier that day". You added that there has been "no official meeting to discuss or vote on this topic". A fourth example concerns a purchase of sound equipment by a Board member on behalf of the Board. There is, however,"no record of a discussion or vote enabling him to do so."

In this regard, I offer several points.

It is emphasized initially that I have no knowledge of whether the Board held meetings or otherwise with respect to the allegedly "illegal meetings" that you described.

However, as a general matter, it is noted 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).

The court also stated that:

> "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 addition, in its consideration of the characterization of meetings as "informal", the court found 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. at 415).

Based on the foregoing, if indeed a majority of the Board met for the purpose of discussing public business, any such gatherings would in my view have constituted "meetings" subject to the Open Meetings Law that should have been preceded by notice given in accordance with section 104 of the Law and conducted open to the public to the extent required by the Law.

With respect to action effectively taken by means of telephone polling, 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.

I point out that the definition of "public body" [see Open Meetings Law, section 102(2)] refers to entities that are required to conduct public business by means of a quorum. In this regard, the term "quorum" is defined in section 41 of the General Construction Law, which has 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."

In short, 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. Similarly, a public body may in my opinion take action only in the context of a meeting during which a quorum is present, and only by means of an affirmative vote of a majority of its total membership.

The next area of inquiry pertains to "abuses of executive sessions", and you described several topics which were, in your view, discussed during executive sessions in a manner inconsistent with the Open Meetings Law.

Again, without knowledge of the actual discussions, I cannot advise that each executive session that you enumerated was inappropriately held. However, if your description of the subject matter is accurate, several, if not the great majority of the discussions should, in my view, have occurred in public.

It is emphasized 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.

Since the minutes that you enclosed indicate executive sessions are frequently held to discuss "personnel", I point out that under the Open Meetings Law as originally enacted, the "personnel" exception 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..."

Based on 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be 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.

Further, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session or "personnel", "litigation", "legal matters" or "negotiations", 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..." [<u>Doolittle v. Board of Education</u>, Sup. Ct., Chemung Cty., Oct. 20, 1981; see also <u>Becker v. Town of Roxbury</u>, Sup. Ct., Chemung Cty., April 1, 1983; please note that the Open Meetings Law was renumbered after <u>Doolittle</u> 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.

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 <u>the</u> pending, proposed or current litigation to be discussed during the executive session" [<u>Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill</u>, 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.

The last aspect of your letter pertains to technical violations or inaccurate minutes and include a variety of contentions. With respect to certain of your contentions, the Open Meetings Law does not specify who must take minutes; no reference is made in the Law to agendas or a public body's duty to prepare or follow an agenda; the Open Meetings Law does not refer to any requirement that a motion be seconded. Those issues in my view relate to rules of procedure that may have been adopted by the Board. Further, I know of no law that precludes a new member or a member absent from previous meetings from voting on issues arising at meetings during which they may vote and are present.

Other issues, however, in my view, relate to specific areas of law.

For example, section 106 of the Open Meetings Law 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 in my view that minutes need not consist of a verbatim account of what was said at a meeting. Further, although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken.

With respect to executive sessions, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law 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 <u>United Teachers of Northport v. Northport Union Free School District</u>, 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)]. 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. It is noted that one of the instances in which a Board must take action during an executive session arises under section 3020-a of the Education Law. Subdivision (2) of that section states in part that a school board "in executive session, shall determine" whether charges should be made against a tenured person.

Lastly, since its enactment in 1974, the Freedom of Information Law has contained an "open meetings" requirement with regard to voting by members of public bodies. Specifically, section 87(3) of the Freedom of Information Law states in relevant part that:

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

Consequently, when a school board takes action, a record must be prepared, i.e., by means of a roll call vote, that indicates the manner in which each member cast his or her vote. That record ordinarily should, in my opinion, be included as part of the minutes.

In an effort to enhance compliance, copies of this opinion will be sent to District officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Dr. Arnold B. Goldberg, Superintendent of Schools
Carol Platt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1688

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 12, 1989

Ms. Maryanne Lehrer
Trustee
Oceanside Board of Education
145 Merle Avenue
Oceanside, NY 11572

The staff of the Committee on 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. Lehrer:

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

As a member of the Board of Education of the Oceanside Union Free School District, you have requested an advisory opinion concerning the propriety of various topics discussed by the Board during executive sessions.

For example, at a meeting held on November 14, you indicated that an "executive session agenda" was distributed to Board members after it had entered into executive session. The items considered during the executive session included discussions of how the District "would compute the percentile rank on transcripts of [your] graduating seniors", security in an area near the high school where students (none of whom were identified) were congregating and creating a disturbance to neighbors, a request to change a procedure for reimbursing students who represent the District at special events, participation in a teacher exchange program, "the Board's reaction to having additional custodians trained in asbestos abatement and procedures", a report concerning an oil leak at the High School, a safety concern expressed by a parent regarding a school playground, and construction change orders. You also attached agendas of other executive sessions during which the subjects considered included an evaluation of a first and second grade "math pilot", weighted grades, the asbestos situation at the High School, Employee

Retirement System billings, and the agenda for future meetings. In addition, you forwarded a copy of a notice to the public concerning a meeting in which the agenda indicated that it was anticipated that the Board would move into an executive session to discuss "contract services and personnel matters".

In this regard, I offer the following comments.

First, as a general matter, it is noted 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)].

Second, it is emphasized 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. Further, the subjects to be considered in an executive session must be described in a motion to enter into an executive session that is introduced during an open meeting. 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.

Based upon a review of the grounds for entry into executive session, it is questionable in my view whether any of the topics to which reference was made earlier could properly have been discussed during an executive session. In short, those topics do not appear to have fallen within any of the grounds that permit a public body to enter into an executive session.

Further, since one of the attachments indicated that an executive session would be held to discuss contract services and personnel, I point out that, under the Open Meetings Law as originally enacted, the "personnel" exception 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..."

Based on 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.

Further, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session or "personnel", "litigation", "legal matters" or "negotiations", 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 "contract services", section 105(1)(e) 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. Not all discussions of "contract services" would necessarily involve collective bargaining negotiations.

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].

Similarly, with respect to a motion to discuss "litigation", it has been held that:

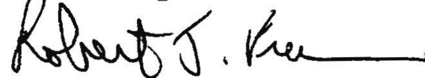
> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an

> 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.

I hope that I 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
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
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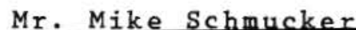
December 19, 1989

Mr. Mike Schmucker


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

Dear Mr. Schmucker:

I have received your letter of November 27 in which you raised issues concerning the implementation of the Open Meetings Law by the Board of Education of the East Islip Union Free School District.

According to your letter, at meetings of the Board:

> "there is a lot of business conducted at the start of the public portion of the open meeting without any discussion. After a brief opening, the board (5 members), district clerk, superintendent and four assistant superintendents adjourn immediately to Executive Session (on motion) to discuss matters concerning personnel, special education and possible litigation. After approximately thirty minutes, the group reassembles and votes on motion to resume public session. This is followed by a salute to the flag. Immediately, many items are presented requesting approval, which is usually (99+%) granted. There is no discussion by the board members and no input or questions from any one else in attendance. This suggests discussion/ resolution during executive session..."

In addition, you wrote that the Board enables the public to learn of its schedule of upcoming meetings by telephoning to receive a tape recorded message. A recent recorded message stated that the next meeting would be held at 7p.m., "at which time there will be immediate adjournment to executive session." Your second area of inquiry pertains to minutes of executive sessions and the Board's authority to vote during executive sessions.

In this regard, I offer the following comments.

It is suggested at the outset that although items might be discussed in public briefly, I do not believe that necessarily indicates that the Board considers issues during executive sessions in a manner inconsistent with the Open Meetings Law. Many public bodies receive materials in advance of meetings that can be reviewed and studied, thereby reducing the need to engage in lengthy discussions at meetings.

Nevertheless, first, in conjunction with the issues that you raised, I point out that the term "meeting" has been construed broadly by the courts. In a landmark decision rendered eleven years ago, the Court of Appeals confirmed 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, 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, 45 NYS 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:

> "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.

Further, 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].

It is also noted that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may appropriately be considered during an executive session.

Third, judicial interpretations of the Open Meetings Law indicate that motions to enter into executive sessions cannot merely describe the subjects to be discussed as "personnel", or "possible litigation", for example.

More specifically, in the Open Meetings Law as originally enacted, the "personnel" exception 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.

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, supra; 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].

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", 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, with respect to minutes, section 106 of the Open Meetings Law 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 executurtive session."

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting. Further, although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken.

With respect to executive sessions, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law 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 (9175); 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)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote.

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:saw

cc: Board of Education, East Islip School District

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 20, 1989

Mr. John Vagianelis
South Colonie Central Schools
100 Hackett Avenue
Albany, New York 12205

The staff of the Committee 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. Vagianelis:

I have received your letter of December 5, as well as the materials attached to it.

By way of background, you serve as the editor of Sandscript, the Colonie Central High School student newspaper. In that capacity and in conjunction with issues arising with respect to a Student Senate election, you requested records under the Freedom of Information Law in an effort to verify Student Senate election results. The records sought included election results and registration sheets signed by students. The registration sheets were, according to a Sandscript article, destroyed by Mr. Jack Cramer, the Student Senate advisor. When the High School principal, Mr. Gilkey, was asked "what action he was going to take in regard to the alleged destruction of the registration sheets," he indicated that the issue was "considered a personnel matter" and declined to comment.

Based upon related correspondence forwarded to this office, you have requested other records, some of which, according to the Superintendent of Schools, Dr. Thomas A. Brown, are not "official." Specifically, in response to your letter, Dr. Brown sought to clarify the scope of the Freedom of Information Law and wrote that:

> "Mr. Vroman, as Designated Records Officer for the District, only accesses those records which are maintained as official district records. Official district records are those maintained by the agency, meaning the school district, and are of the type that are directly associated with the district as a whole. Records are also kept by individual buildings that are pertinent to the normal operation of the building but are not forwarded for maintenance as official district records.
>
> "The visitor sign in sheet, the senate election verification sheets, and materials on the Harvard Book Award, may or may not be records that are maintained by the High School. A simple written request to the High School Principal should be able to produce the desired request if the records are maintained and available. There is, to my knowledge, no requirement that these kinds of records be maintained by either the District or an individual building.
>
> "Memorandums that are distributed as inter-agency communications are exempt from the Freedom of Information Law except for memorandums that provide instructions to staff that affect the public. Mr. Gilkey's personal memorandum to the guidance department was excluded under Section 89-2a of the Freedom of Information Law."

A second issue involves the Sandscript's right to cover and report on meetings of the Student Senate. The matter arose because the High School principal advised Sandscript "that co-curricular groups do have the option of excluding Sandscript reporters from covering a meeting or portion of a meeting. A Sandscript article indicates that the Student Senate makes decisions "which affect the student body" and "distribute[s] student monies."

In this regard, I offer the following comments.

First the Freedom of Information Law is applicable to all agency records. Section 86(3) of the Law defines the term "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."

A school district, a governmental entity performing a governmental function, is, in my view, clearly an "agency" subject to the requirements of the Freedom of Information Law. Further, the District, in my view, includes all school buildings and records kept in those buildings.

Second, the term "record" is defined expansively in section 86(4) of the Law 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."

The Court of Appeals, the state's highest court, has construed the definition as broadly as its specific language suggests. The first such 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)] and found that the documents constituted "records." 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 cross-over 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 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" 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 upon the specific language of the Freedom of Information Law and its judicial interpretation by the state's highest court, I believe that documents, whether characterized as "official" or otherwise, "kept" or "held" by the District, irrespective of their location, function, origin, or any absence of a duty to maintain them, constitute "records" that fall within the requirements of the Freedom of Information Law. Further, documents kept at various buildings within the District are, in my view, "records" subject to rights conferred by the Freedom of Information Law.

Third, 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 my opinion, records reflective of election results should be disclosed, for none of the grounds for denial could appropriately be asserted.

The voter registration sheets, if they exist, would likely be confidential. The first ground for denial in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Rights and Privacy Act (20 U.S.C. section 1232g). In brief, that Act provides that records identifiable to a student or students maintained by an educational agency or institution are confidential with respect to the public. Concurrently, the Act confers rights of access to records pertaining to a student to the parents of the student. While the Act might not have envisioned coverage of election registration records, it appears that it would preclude public disclosure of those records.

The Superintendent referred to inter-agency memorandums. Section 87(2)(g) of the Freedom of Information Law pertains to those records and 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..."

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. I believe that a memorandum transmitted among or between District officials or employees would constitute "intra-agency materials." However, the contents of the materials would determine the extent to which they must be disclosed or may be withheld.

The Superintendent also referred to section "89-2a of the Freedom of Information Law." Section 89(2) pertains to the authority to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." The fact that document is considered "personal" or that it may involve a personnel matter does not, in my opinion, necessarily involve a finding that records may be withheld.

While the standard in the Freedom of Information Law concerning privacy 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 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); Capital Newspapers v. Burns, 67 NY 562 (1986); 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, supra, Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981]. Several of the decisions cited above, for example, Farrell, Sinicropi and Geneva Printing, dealt with situations in which the determinations of disciplinary actions pertaining to particular public employees were made available. Further, one of the first decisions rendered under the Freedom of Information Law as originally enacted in 1974 dealt with reprimands of police officers. In granting access, it was found that:

> "To disclose these will not result in an unwarranted invasion of personal privacy; they are 'relevant-to the ordinary work of the-municipality.' In effect, they are 'final opinions' and

> 'final determinations' which the Legislature directed by made available for public inspection. Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let it be known, by implication, which others were not censured. Disclosure of the written reprimands will not harm the overall public interest" (Farrell, supra, 908-909)."

Similarly, in its discussion of the intent of the Freedom of Information Law, the Court of Appeals in the recent decision rendered in Capital Newspapers, supra, found that the statute:

> "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" (67 NY 2d at 566)."

Lastly, the right of Sandscript reporters, students and others to attend meetings of the Student Senate is questionable. The Open Meetings Law is applicable to meetings of public bodies, and section 102(2) of that statute 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."

Recent decisions rendered by the Appellate Division, Second Department, indicate that entities having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, ___ AD 2d ___ (1989);

Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989)]. It was also held that "groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies]' subject to the Open Meetings Law..." (Poughkeepsie Newspaper, supra, 69).

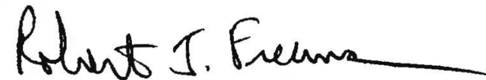
I am unaware of any judicial decisions rendered in New York that deals with the status of a student government body under the Open Meetings law. Similarly, I an unaware of whether the Student Senate in this instance has the power to act on behalf of all students and/or expend or appropriate public monies or monies generated from student activities or fees on behalf of all students.

While I am inclined to advise that a student senate or similar entity is not a "public body," it might be contended that it does "exercise the power of the sovereign (i.e., the Board of Education) if it serves as an extension of the administration and is authorized to purchase or expend monies that are public or generated through mandatory student fees or payments.

As you requested, a copy of this opinion will be forwarded to the Superintendent of Schools.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

cc: Dr. Thomas Brown, Superintendent of Schools

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December 21, 1989

Mr. John J. Coughlin

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

Dear Mr. Coughlin:

I have received your letter of December 2, as well as the correspondence attached to it.

You referred to a request for various records of the Deer Park Union Free School District made on September 21. In response to two aspects of the request, you were informed that the documentation constituted agency records "to which Freedom of Information Law is not applicable under Section 87 of the Public Officers Law". Thereafter you wrote to this office and sought an advisory opinion, which was prepared and sent to you on November 21, with copies forwarded to the District Clerk and Superintendent. In a second response to your request dated November 30, the Clerk alluded to the two aspects of your request referenced earlier and wrote that "No such document can be identified from the information presented". Consequently, you have contended that the School Board "has changed its reason for denial...".

In addition, a letter sent to you by the Clerk following an appeal indicated in part that "The Board of Education has denied your appeal...". Nevertheless, you wrote that "the school board has not taken any public vote on either of [your] request[s] even though state law requires that all board action must be taken by public vote and entered into the minutes the meeting".

In this regard, I offer the following comments.

First, with respect to the standard for seeking records, it is noted that when the Freedom of Information Law was enacted in 1974, it required that an applicant request "identifiable" records. That standard resulted in problems, for citizens often could not identify the records sought. If the applicant could not specify a requested record, the request would not have identified the record sought. However, the Freedom of Information Law was repealed and replaced with the current law in 1978. Section 89(3) of the Law now requires that an applicant "reasonably describe" the records sought. Judicial decisions interpreting that standard indicate that a request reasonably describes the records when the agency, based upon the terms of a request, can locate the records [see e.g., Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. Assuming that the District can locate the records, I believe that your request would have met the standard of reasonably describing the records. It is noted, too, that regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law and have the force of law, state that an agency's records access officer is responsible for assuring that agency personnel "Assist the requester in identifying requesting records, if necessary" [see 21 NYCRR section 1401.2(b)(2)]. Therefore, I believe that the records access officer has the duty to attempt to aid you in identifying the records.

Second, the initial response to your requests suggests that the Clerk was able to locate the records in question, but that such records could be withheld. I agree with your contention that the second response is inconsistent with the first.

Third, although its relevance under the circumstances in conjectural, I point out that Chapter 705 of the Laws of 1989, added new provisions to the Freedom of Information Law and the Penal Law that became effective on November 1. The amendment to the Freedom of Information Law, a new section 89(8), states that:

> "Any person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."

Lastly, with respect to the right to appeal a denial of a request, section 89(4)(a) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who

> shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

Further, section 1401.7(a) of the regulations promulgated by the Committee on Open Government states that:

> "The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law."

If the Board of Education has not delegated its authority to render determinations regarding appeals and performs that function, I believe that its discussion and action taken concerning your appeal should have occurred during a meeting. Further, minutes of any such action by the Board should appear in minutes required to have been prepared pursuant to section 106(1) of the Open Meetings Law. That 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."

In an effort to enhance compliance, copies of this opinion will be sent to District officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Ronald F. Paras, Superintendent
Geraldine Musachio, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-5873
OML-AO-1692

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 21, 1989

Mr. Arnold Pilsner

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

Dear Mr. Pilsner:

As you are aware, I have received your letter of December 6 and the materials attached to it.

You have raised a series of questions concerning the process leading to the adoption of a budget by the Nassau County Board of Supervisors (NCBS), particularly as the process might have involved Nassau Community College. You identified issues by "Comments" and "Advisory Questions" in relation to those comments and asked that "I respond to each question by number."

By way of background, as I understand the situation, you and others opposed certain aspects of a course in human sexuality offered at NCC. Due to concerns involving the course, the NCBS refused to vote on NCC's proposed 1989 budget. The budget, however, was subsequently approved following what you described as an exchange of information between NCBS and NCC. Although you have sought records "pertaining to information exchanged between representatives" of NCBS and NCC, neither of those entities have disclosed information or records to your satisfaction.

Comment A of your letter focuses upon the role of Mr. Edward Ward, who is identified in the correspondence attached to your letter as Executive Assistant to the Presiding Supervisor of the Town of Hempstead. I believe that the Presiding Supervisor is a member of NCBS, and it was confirmed in the correspondence that Mr. Ward met with Dr. Sean Fanelli, President of NCC, prior to the adoption of the budget.

You wrote that NCC claims that Mr. Ward "officially acted as a representative" of the NCBS. However, counsel to the NCBS, in your words, "consistently denies that Mr. Ward or anyone else was authorized to represent them at meetings" with NCC. As such, NCC claims that, as an agent of NCBS, its "interaction with Mr. Ward" constituted "inter-agency business" and that, therefore, records exchanged at the meetings could be withheld. You contend that, due to the claim of Counsel to NCBS, Mr. Ward "acted as a private citizen and was not conducting private inter-agency business."

Advisory Question 1 is whether, in my view, Mr. Ward acted as an agent of NCBS or as a private citizen.

In my opinion, although related to issues that you have raised concerning the Freedom of Information Law, the question does not specifically pertain to that statute; it involves Mr. Ward's role. In view of the conflicting views of this role and the absence of personal knowledge of the matter, I cannot in good faith offer an opinion in response to the question.

Advisory Question 2 is based upon the possibility that Mr. Ward acted as a private citizen. If that was so, you asked whether NCC is "obligated under the Freedom of Information Law to provide equal access to other private citizens to the records and information given to Mr. Ward.

As a general matter, it has been held that records accessible under the Freedom of Information Law should be made equally available to any person, with regard to one's status or interest [see e.g., M. 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)]. Nevertheless, it does not appear that Mr. Ward obtained records from NCC pursuant to a request made under the Freedom of Information Law. If he sought records under the Freedom of Information Law and the records were made available to him as a result of the request, I would agree with your inference that those records should be made available to anyone. However, in the context of the matter as I understand it, records that might have been received by Mr. Ward were not obtained in conjunction with a request made under the Freedom of Information Law.

Advisory Question 3 relates to NCC's refusal to answer your questions concerning its meetings with Mr. Ward due to its contention that they were "inter-agency" meetings," and you asked whether you could request that NCC "produce the records used at the meetings with Mr. Ward."

In this regard, I offer the following comments.

First, by means of a letter dated August 31, you requested the records described above and other information on the subject from NCC. It is noted that several aspects of your request could, in my view, be characterized as questions or attempts to elicit information (i.e., "How many meetings were held between representatives of" NCBS and NCC; and "For each meeting specify to place, date and time for each meeting held.") Here I point out that the Freedom of Information Law, in terms of its title, may be somewhat misleading.

The Freedom of Information Law is not a vehicle that requires agency officials to answer questions; rather, it is a statute that requires agencies to respond to requests for existing records and to disclose those records in accordance with its provisions. I point out, too, that section 89(3) of the Freedom of Information Law states in part that an agency is generally not required to create or prepare a record in response to a request. Stated differently, despite its title, the Freedom of Information Law is not necessarily an access to information law, but rather an access to records law. If, for example, no records exist that indicate the number of meetings held by representatives of NCBS or NCC, as the term "meeting" is used in the context of your inquiry, neither agency would, in my view, be obliged to prepare such records on your behalf.

Second, in response to your request, NCC's Freedom of Information Officer, indicated that a meeting was held by representatives of NCC with Mr. Ward. However, she appears to have suggested that the information sought did not exist in the form of a record or records and, as you indicated, that NCC considered Mr. Ward to have been a representative of NCBS. Specifically, Ms. Mascolo wrote that, "in the event that correspondence had resulted from that meeting (which was not the case), it also would not be accessible as falling within the exemption as provided in Section 87.2(g) of the Freedom of Information Law." Assuming that any such records were used or exchanged and that Mr. Ward could have been considered an "agency" official, I believe that those records would constitute inter-agency materials that fall within the scope of section 87(2)(g). The cited provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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 the records would determine the extent to which they would be accessible or perhaps deniable under the Law.

Third, since your inquiry involves records used at the meeting with Mr. Ward, it is noted that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. While that standard does not require an applicant to identify records with particularity, I believe that an applicant must provide sufficient detail to enable agency officials to locate the records. It is questionable, in my view, whether such a request would have reasonably described the records.

Under Comment B, you wrote that:

> "The Nassau County Board of Supervisors (NCBS) contends that neither Mr. Ward or anyone else was authorized to meet with Nassau Community College (NCC). Yet Mr. Mondello states that the NCBS gathered information from the college and made a thorough review of the data, and that this review convinced NCBS that NCC had made appropriate changes to their Family Life Course curriculum. However, not one piece of evidence, in the form of minutes or records is referred to, to demonstrate that the matter was discussed by NCBS. Furthermore, when the public budget meeting was resumed it was announced that the budget issue had already been resolved and then NCBS held a vote on the budget proposal without further public discussion. The public has no idea what NCC officially changed in its Family Life Court curriculum and therefore is uninformed and unable to comment or ask any questions as to what took place."

As such, you wrote that the public has been:

> "asked to accept that although all these activities took place that no minutes and/or records concerning the information gathered from NCC exists in any written form. We do not know when the verbal communication took place and how such a complicated and delicate issue could be discussed without the interaction of the members of NCBS?"

Based upon the foregoing, in Advisory Question 4, you asked whether "the discussion on the NCC budget by the Nassau Board of Supervisors prior to the final budget meeting constitute[d] an executive session and therefore violate[d] the Open Meetings Law."

From my perspective, the question is whether a "meeting," as that term has been construed under the Open Meetings Law, was conducted by NCBS. A "meeting," based upon the language of the Law and its judicial interpretation, involves a 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 [see Open Meetings Law, section 102(1); also 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)].

If, for example, the staff of NCBS or members of NCBS constituting less than quorum, or any combination thereof, met to discuss the budget, the Open Meetings Law would not, in my opinion, have applied. On the other hand, if a quorum of the NCBS convened, as a body, for the purpose of discussing the budget, I believe that such a gathering would have constituted a meeting subject to the Open Meetings Law. Further, if such a meeting was held, it should have been preceded by notice given in accordance with section 104 of the Open Meetings Law and convened open to the public.

Again, assuming that a "meeting" was held, as you pointed out, 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) of the Open Meetings Law specify and limit the topics that may properly be considered during an executive session. If indeed a meeting was held to discuss the matters of your interest, I do not believe that any ground for entry into an executive session could justifiably have been asserted.

If a meeting was held, it is likely that minutes should have been prepared. Subdivision (1) of section 106 of the Open Meetings Law 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 of summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

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 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.

Under Comment C, you wrote that "The data gathered from NCC was from all reports transmitted verbally to NCBS." In conjunction with the foregoing, you asked in Advisory Question 4 whether "information which is transmitted verbally and used to resolve a major public issue become[s] de facto a public record and therefore the parties transmitting the information can be called upon to make the data part of the public record by creating a written document for the public to read."

My response, for reasons discussed earlier, must be in the negative. The Freedom of Information Law pertains to existing records; it does not generally require agencies to create records.

Under Advisory Question 5, you raised the following question:

> "Is the deliberate act of NCC and NCBS to choose to pass information verbally so it would not become part of the public budget proceedings record in itself a violation of either the Freedom of Information Law or the Open Meetings Law?"

In my view, it is unlikely that the act that you described would constitute a violation of either the Freedom of Information Law or the Open Meetings Law. I believe that there may be a variety of activities and circumstances during which information is imparted or exchanged that relates to a decision but which is not discussed at a public proceeding. Often the professional staff of an agency confers prior to a meeting or hearing to lay the groundwork for action to be taken at a meeting of a governing body. Often a member of a public body having expertise or interest in a particular area may, as a representative of the body, play a significant role in the steps leading to the making of a decision or the adoption of an action or policy.

In short, while the Freedom of Information Law provides broad rights of access to records, I do not believe that verbal communications constitute records or necessarily result in a requirement that records be prepared. Similarly, although the Open Meetings Law generally requires that meetings involving the presence of a quorum of a public body to discuss public business must be open, gatherings of less than a quorum of a public body or of representatives of public bodies are not, in my opinion, "meetings" that fall within the scope of the Open Meetings Law.

I hope that I have been of assistance and that the foregoing serves to clarify your understanding of the Freedom of Information Law and the Open Meetings Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:saw

cc: Thomas Carroll, Counsel, Nassau Co. Bd. of Supervisors
Dr. Sean A. Fanelli, President, Nassau Community College
Owen B. Walsh, Chief Deputy County Attorney
Anna Marie Mascolo, Counsel, Nassau Community College

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 22, 1989

Ms. Gloria M. Rosenblum

The staff of the Committee on 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. Rosenblum:

I have received your letter of November 30.

You have asked that I confirm a converstaion in which it was advised that your client, the Parkview Mobile Home Owners Association, Inc., a not-for-profit corporation, is not subject to the Open Meetings Law. You added that the Association holds meetings of its members and Board of Directors at the Suffolk County Legislature Hearing Room in Riverhead. As such, you also asked whether the Association is "precluded from excluding non-members from its meetings by virtue of its use of Suffolk County or other municipality property."

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 the phrase "public body" to mean:

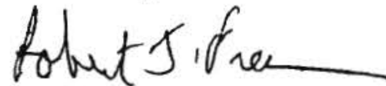
> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction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

Based upon the foregoing, the Open Meetings Law generally pertains to governmental entities. Since the association is a private, not-for-profit corporation rather than a governmental entity, I do not believe that its meetings are subject to the Open Meetings Law.

Second, there may be statutes or rules that deal with the use of government facilities and that require public access to functions conducted at those facilities [see e.g., Education Law, section 414(1)(c)]. Nevertheless, having contacted Counsel to the Suffolk County Legislature on your behalf, I was informed that there are no such rules involving the use of the location in question. Therefore, I do not believe that there is any requirement that meetings of the Association held in the County's Legislative Hearing Room must be open to the public.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:saw

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 22, 1989

Mr. J. Radley Herold
Corporation Counsel
City of Yonkers
Department of Law
City Hall
Yonkers, NY 10701

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

Dear Mr. Herold:

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

Your inquiry pertains to the propriety of a portion of the By-laws of the Yonkers Public Library that authorizes the Board of Trustees to conduct meetings by means of telephone conferences. According to the By-laws, a copy of which you forwarded, the Board consists of five members appointed by the Board of Education of the City of Yonkers (Article I, section 1). Article III, section 1, of the By-laws states in part that: "Three Trustees shall constitute a quorum in person or by telephone". That provision states further that: "Telephone conference Board meetings shall constitute a regular meeting for the purpose of dealing with emergencies or when it is not possible to have a quorum of the Board assembled in one place".

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 Board of Trustees is designated by Boards of Education, 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 Board of Trustees is, in my opinion, clearly required to comply with the Open Meetings Law.

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 or a meeting held by means of a telephone conference, 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. In this regard, 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 carry out its duties 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.

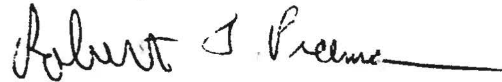
Lastly, I direct your attention to the legislative declaration of the Open Meetings Law, section 100, which states in part that:

> "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."

In sum, while I believe that Board members may consult with one another by phone, I do not believe that the Board could validly conduct meetings by means of telephone conferences or make collective determinations by means of telephonic communications.

I hope that I 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, Yonkers Public Library

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 26, 1989

Mr. Claude Phillips

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

Dear Mr. Phillips:

I have received your letter of December 13 in which you requested an advisory opinion.

According to your letter, the Board of Education of the Enlarged City School District of Troy conducted a special meeting in executive session "to discuss what action should be taken, if any, on an incident involving a Troy High School student playing scholastic sports after having been indicted on drug offenses". You added that it was revealed that, during the executive session, "the Board of Education took a vote on whether or not to support the Superintendent's decision of inaction in this matter."

Although it is your view that an executive session could properly have been held to discuss the issue, you contend that the Board should have reconvened in public for the purpose of voting. Further, you requested "a copy of the record of the vote taken to support the Superintendent's decision". Nevertheless, since the vote was taken during an executive session, you wrote that you "are expecting a denial".

In this regard, I offer the following comments.

First, when action is taken at a meeting of a public body, minutes must be prepared pursuant to section 106 of the Open Meetings Law. That provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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 in my view that minutes need not consist of a verbatim account of what was said at a meeting. Further, although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken.

With respect to executive sessions, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law 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

I hope that I 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, Troy Enlarged City School District

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 26, 1989

Mr. H. Philip Maynard, Jr.

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

Dear Mr. Maynard:

I have received your letter of December 11 in which you raised questions concerning the Open Meetings Law and the activities of a village board of trustees.

Your initial area of inquiry involves notice of meetings. In this regard, section 104 of the Open Meetings Law requires that a public body provide notice prior to all meetings. Specifically, the cited provision states that:

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

While the provisions quoted above do not specify whether notice must be given to a newspaper or a radio station, for example, it is clear that notice must be given to the news media. To give effect to the intent of the Law, I believe that notice should optimally be given to the news media outlet that is most likely to cover a meeting and/or provide news to those who may be interested in attending.

If the notice requirements "are continually violated", you asked "what recourse does the public have to insure the law will be upheld". The provisions involving the enforcement of the Open Meetings Law are found in section 107, which 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 or injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.
>
> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating action taken at a meeting of a public body."

Your remaining area of inquiry involves an incident that you explained as follows:

> "A local resident came to a village board meeting and requested a roadway to be paved. After much debate, the board of trustees turned down the residents request. Several days later, the road was paved by village employees and with village equipment. The mayor was asked by residents who authorized the paving of this roadway after the board of trustees denied the request. The mayor has publicly stated, that he had personally telephoned three village trustees and requested they approve the expense of the roadway. Said trustees allegedly approved the expense. To date, no trustee has acknowledged any authorization of road paving. Village tax dollars

> was spend without, (1) public notice (2) board approval. When questioned against of this situation, the mayor claimed the paving was an emergency and thus it was justified without any meeting."

In relation to the facts described above, you raised the following questions:

> "Is this action legal in the expenditure of taxpayers funds? Did this action violate the law? In the event it did constitute a violation what can a resident do to ensure it will not happen again?"

First, with respect to the legality of the expenditure of public monies, I lack the expertise or the authority to effectively respond. However, I do not believe that a public body may take action by means of a series of telephone conversations. In my view, the action that you described would be subject to invalidation by a court. Nevertheless, its action likely would remain valid and intact unless and until a court reaches a contrary conclusion.

With regard to the action taken by means of telephone calls, 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 or a meeting held by means of a telephone conference, 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. In this regard, 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 carry out its duties 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.

Lastly, I 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."

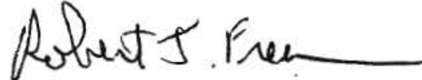
In sum, while I believe that Board members may consult with one another by phone, I do not believe that the Board could validly conduct meetings by means of telephone conferences or make collective determinations by means of telephonic communications.

Since you asked how a resident may ensure that similar events do not occur again, as noted earlier, section 107(1) of the Open Meetings Law permits an aggrieved person, i.e., a resident, to seek injunctive relief or a declaratory judgment. Further, in an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be sent to the Dannemora Village Board of Trustees.

Enclosed, as you requested, are copies of the Freedom of Information Law, the Open Meetings Law and an explanatory brochure dealing with both statutes.

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

Sincerely,



Robert J. Freeman
Executive Director

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 27, 1989

Mr. George T. Gander, Jr.

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

Dear Mr. Gander:

I have received your letter of December 15 in which you raised questions relating to the Open Meetings Law.

You asked initially whether there is any reason that you, as a Fire Commissioner of a fire district, could not tape record meetings of the Board of Fire Commissioners. Secondly, if the Board "holds a public hearing, to hear testimony in disciplinary proceedings against members of the fire district fire department", you asked whether you, as a commissioner or as a member of the public, may record the proceedings.

In this regard, I offer the following comments.

First, it is noted that the Open Meetings Law pertains to meetings of public bodies, and that section 102(2) of the Law defines "public body" to mean:

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

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)], a board of commissioners of a fire district is my view is clearly a public body subject to the Open Meetings Law.

Second, 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 or, as in this case, to elicit testimony concerning an issue.

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

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was 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 legisla-

> tive 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 any person may tape record open meetings of public bodies, including meetings of a board of fire commissioners.

Lastly, the answer may be different with regard to the ability to tape record a public hearing. Section 52 of the Civil Rights Law states in part that:

> "No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena

> or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state..."

Although the foregoing does not specifically refer to the ability to tape record, the prohibition contained in section 52 refers to other kinds of mechanical reproduction of public proceedings. In my view, if the hearing in question is public, and if testimony could not be compelled by subpoena or other compulsory process, any member of the public could record the proceedings. On the other hand, if the prohibition contained in section 52 does apply, I do not believe that the public would have the right to tape record the proceedings. Your ability to record such proceedings in your capacity as a Commissioner would in my opinion be dependent upon a grant of authority to do so conferred by the Board of Fire Commissioners as a body.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 27, 1989

Mr. Robert V. Wolf
East Hampton Star
153 Main Street
East Hampton, New York 11937

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

Dear Mr. Wolf:

I have received your letter of December 12, which relates to events involving the Bridgehampton School Board.

According to your letter, after the Board adjourned a recent monthly meeting, "the president asked the members to stay for another meeting." He added that the public was not invited to attend. In conjunction with the foregoing, you wrote that:

> "That started a commotion between the board and the press, [yourself] included.
>
> "Dr. LaMantia told [you] that [you] didn't understand the law.
>
> "As it turned out, the board may have discussed the resumes of applicants applying for the Bridgehampton superintendent position. However, it's hard to know for sure what actually happened. In addition to looking at resumes, Dr. LaMantia said the board asked him general questions about how to interview the candidates."

Based upon the facts described above, you raised the following questions:

> "How should the board have proceeded? Does a superintendent, or anyone, have special powers to close a meeting? Can the superintendent call the board to his office whenever he wants to discuss whatever he wants (as Dr. LaMantia maintained)? If the board is discussing the hiring of a superintendent, can it close the meeting? How specific must the board be when it calls an executive session (i.e., must they say 'reviewing resumes of five candidates' or can they say 'discussing superintendent search')? Is there any case law to verify your opinions?"

In this regard, I offer the following comments.

First, in my view, the gathering called at the request of the Superintendent was essentially a continuation of the regularly scheduled meeting and should have been treated as such. Further, under the circumstances, the fact that the Superintendent sought to convene a meeting did not, in my opinion, affect the status of the gathering under the Open Meetings Law.

It is emphasized 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 actions, 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).

The court also referred specifically to what might be described as preliminary gatherings, stating that:

> "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 addition, in its consideration of the characterization of meetings as "informal," the court found 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. at 415).

Based upon the judicial interpretation of the Open Meetings Law, a gathering of a quorum of a public body, held for the purpose of conducting public business, constitutes a "meeting" that falls within the requirements of the Open Meetings Law.

In the context of your letter, if the Board of Education convened for the purpose of conducting public business collectively, as a body, I believe that its gathering was a "meeting," irrespective of whether the Board met on its own initiative or at the request of the Superintendent.

Second, even if the subject matter considered by the Board could have been discussed during an executive session, any such executive session should, in my opinion, have been held as a part of a meeting.

By way of background, the Open Meetings Law is based upon a presumption of openness. Section 103(a) of the Law requires that all meetings of public bodies must be conducted open to the public except to the extent that one or more grounds for executive session may be applicable. It is noted that the phrase "executive session" is defined in section 102(3) to mean a portion of an open meeting during which the public may be excluded and that a public body must follow a procedure prescribed by the Law during an open meeting before it 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 of areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only...."

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

Third, if the Board discussed the hiring of a Superintendent, the specific nature of the discussion would deterine whether or the extent to which an executive session could properly have been held.

In the Open Meetings Law as originally enacted, the so-called "personnel" exception 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be 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.

Based on the foregoing, if, for example, the Board discussed the methods of interviewing candidates, the attributes that would be required of candidates for the position, or perhaps the steps to be taken in the process of searching for candidates, I do not believe that there would have been any basis for conducting an executive session, for those issues would not have involved a "particular person." On the other hand, if the Board reviewed and discussed the applications or merits of specific candidates, to that extent, an executive session could appropriately have been held, for the discussion would have involved the "employment history" of a "particular person" or a matter "leading to the appointment" of a "particular person."

Lastly, a motion for entry into executive session cannot merely cite the subject as "superintendent's search" or as a "personnel matter," for instance, without more. In a decision in which the court reviewed 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

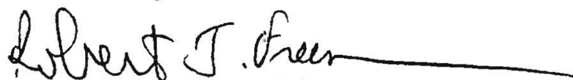
> identity of the person but should make it clear that the reason for the executive session is because their discussion involves a 'particular' person..." [Doolittle v. Board of Education, supra; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; please note that the Open Meetings Law was renumbered after Doolittle was decided].

Based upon the foregoing, although a motion for entry into an executive session held under section 105(1)(f) need not identify the person who is being discussed, it has been consistently advised that such a motion should contain two components. One would be reference to the fact that the discussion involves a "particular person"; the other involves reference to one or more of the topics described in section 105(1)(f). For example, a motion might be made to discuss "the employment history of a particular person," "a matter leading to the appointment of a particular person," or a "review of resumes of particular candidates for the position of superintendent."

As you requested, copies of this opinion will be forwarded to the persons identified at the end of 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:saw

cc: John Wyche
Manzer Doud
Raymond DeFeo
Gerald LaMantia

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ROBERT J. FREEMAN

December 27, 1989

Duncan S. Davie
Supervisor-Elect
Town of Oneonta

The staff of the Committee 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 Supervisor-Elect Davie:

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

In conjunction with our conversation on the subject, you have requested my opinion concerning "leaving doors open during a properly advertised meeting of a public body". If I recall our discussion, the issue is whether there is a requirement that the doors must be left open during an open meeting.

In this regard, I offer the following comments.

First, as you may be aware, section 103(a) of the Open Meetings Law states that every meeting of a public body shall be open to the general public, unless an executive session may properly be convened.

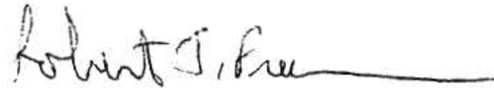
Second, section 102(3) of the Law defines the phrase "executive session" to mean "that portion of a meeting not open to the general public."

In neither of the provisions referenced above, nor in any other aspect of the Open Meetings Law, is there any language that specifically refers to doors being left open or closed. In my opinion, so long as it is or can be known that the public may attend a meeting, the doors to the meeting room can be open or closed.

If, for example, there is a need to close the doors to a meeting room within which an open meeting is being conducted, a sign or notice could be posted on a closed door indicating that the public may enter. Further, I believe that there are numerous situations in which open meetings may be held in rooms or buildings with doors that are closed, but which clearly authorize the public to enter. Doors may be closed because of noise or traffic outside a meeting room, or perhaps because the sound made in the meeting room is disruptive to others in a building. In some cases, a municipal building may consist of one room, and in those instances, it may be appropriate to close the doors due to weather conditions, while ensuring that the public is aware of its right to enter.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm