STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1873

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

January 3, 1991

Mr. Ronald Rich
Albany Health Associates
Eighty State Street
Albany, New York 12207

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

Dear Mr. Rich:

I have received your letter of December 27, as well as the materials attached to it.

You wrote that your firm serves as a health benefit consultant to a number of municipal employers, including school districts, and that the firm in certain instances has assisted those employers in forming "pooled arrangements for the purchase of health insurance through a multiple employer trust, a form of municipal cooperation agreement authorized under General Municipal Law section 119-o." You added that, in every such instance, "participation has been approved by the governing body of each component entity through the adoption of the trust agreement." You also indicated that a trust agreement typically specifies the membership of a board of trustees, which may consist of employer representatives only or both employer and union representatives, as well as the authority of the board. The sample agreement attached to your letter provides that the board of trustees created by the trust agreement may have title to property, negotiate with insurers, purchase group health insurance policies on behalf of public employers, determine the allocation of costs and premiums, direct that employers pay premiums, etc.

You have requested an advisory opinion concerning the status the boards of trustees described in your correspondence. In this regard, I offer the following comments.

First, 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."

Second, through a review of each of the components of the definition referenced above, I believe that it may be concluded that the boards of trustees in question constitute public bodies required to comply with the Open Meetings Law.

Such a board would generally be an "entity" that consists of "two or more members." Further, although the action or series of actions that created a board 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 board are "persons charged with [a] public duty to be performed or exercised by them jointly." Based on the foregoing, I believe that a board of trustees is required to exercise its duty pursuant to the quorum requirements set forth in section 41 of the General Construction Law.

In addition, a board of trustees, under the circumstances you described, in my view, conducts public business and performs a governmental function for a series of public corporations, such as municipalities and school districts.

In sum, I believe that each of the conditions required to determine that the boards of trustees constitute public bodies is present.

Lastly, although the nature of the entity at issue was different from the boards created by section 119-o of the General Municipal Law, it has been held that a board of trustees appointed by town supervisors to administer a trust is a public body required to comply with the Open Meetings Law [see Burgher v. Purcell, 109 Misc. 2d 531, 87 AD 2d 888 (1982)].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1874

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

January 7, 1991

Mr. Kevin J. Plunkett
Plunkett & Jaffe, P.C.
280 Park Avenue
New York, NY 10017

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

[redacted]

Dear Mr. Plunkett:

I have received your letter of December 27. In your capacity as Village Attorney for the Village of Dobbs Ferry, you have raised the following question:

> "When a Village Board votes to expend monies previously appropriated must the vote be conducted in public session or can it be conducted in executive session with minutes reflecting the action taken in executive session finalized within seven days?"

First, as you are aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that a discussion may properly be considered during an "executive session", a portion of an open meeting during which the public may be excluded. It is noted, too, that a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) of the Law specify and limit the topics that may be considered during an executive session.

[redacted]

Second, the introductory language of section 105(1) states that:

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

Based upon the final clause of the provision quoted above, a public body may generally vote during a proper executive session; however, any vote to appropriate public monies must be taken during an open meeting. As such, there may be situations in which a discussion may be conducted during an executive session, but where a public body may be required to return to an open meeting to vote to appropriate public monies in relation to the subject previously considered behind closed doors. However, if the action involves an allocation or expenditure of funds that have previously been appropriated, such an action could, in my opinion, be taken during a proper executive session.

Lastly, when action is taken during an executive session, subdivision (2) of section 106 of the Open Meetings Law requires that minutes be prepared. Further, subdivision (3) of section 106 requires that minutes of an executive session be made available, to the extent required by the Freedom of Information Law, within one week of the executive session.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1875

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

January 8, 1991

Mr. Robert Erdman
[redacted]

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

[redacted] Dear Mr. Erdman:

I have received your letter of December 24, as well as the materials attached to it. I point out that your correspondence did not reach this office until January 3.

Among the enclosures is a letter addressed to you by J. Frank O'Brien, Clerk of the Village of Atlantic Beach, in which he explained the requirements of the Open Meetings Law concerning notice of meetings. Also enclosed are copies of seven affidavits in which the Superintendent of Public Works asserted that be posted notice in a variety of locations prior to certain meetings of the Board of Trustees. It is your view that the affidavits indicate that the notices given with respect to five of seven meetings represent violations of the Open Meetings Law. It appears that your contention is based upon the fact that notices were posted less than seventy-two hours prior to the meetings.

You have requested my opinion concerning the matter. In this regard, I offer the following comments.

The provisions pertaining to notice of meetings are found in section 104 of the Open Meetings Law, which states that:

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

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

3. The public notice proviced for by this section shall not be construed to require publication as a legal notice."

Based upon the foregoing, 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 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 at a reasonable time prior to a meeting.

If, for example, a meeting is scheduled five days in advance, but notice is posted on the day of the meeting, such a delay in posting would, in my view, be unreasonable. However, if a meeting is scheduled two days in advance, and notice is posted on the day the meeting is scheduled, I believe that a public body would be acting in a manner consistent with the requirements of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Board of Trustees
J. Frank Brien, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6413
OML-AO-1876

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

January 8, 1991

Mr. Keith A. Wiggand
Citizens Against Rising Expenditures
P.O. Box 302
Glenmont, New York 12077

<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. Wiggand:

I have received your letter of January 4 prepared on behalf of a taxpayers' organization, Citizens Against Rising Expenditures.

According to your letter, representatives of your group sought to attend the organizational meeting of the Selkirk Fire District Board of Fire Commissioners. The meeting was held by quorum of the Board, and you believe that the public had the right to attend. Nevertheless, you were informed by a commissioner that the meeting was not open to the public. As a consequence, you submitted a request for minutes of the meeting under the Freedom of Information Law, "which would have otherwise been unnecessary" if the public had been permitted to attend.

You have requested an advisory opinion concerning the status of the Board under the Open Meetings Law, as well as the Freedom of Information Law. In this regard, I offer the following comments.

First, it is noted that 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."

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 in my view is clearly a public body subject to the Open Meetings Law.

Similarly, the Freedom of Information Law is applicable to agency records, and section 86(3) of that statute 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."

Once again, since a fire district is a public corporation, a governmental entity performing a governmental function, it is an agency required to comply with the Freedom of Information 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 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).

In view of the judicial interpretation of the Open Meetings Law, if indeed a majority of the Board met for the purpose of discussing public business, the gathering would in my view have constituted a "meeting" 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.

Lastly, with respect to minutes, section 106 of the Open Meetings Law prescribes what may be viewed as minimum requirements concerning the contents of minutes. Specifically, section 106 states that:

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

Based upon the foregoing, 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.

As you requested, copies of this opinion will be forwarded 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:saw

cc: Charles Fritts, Chairman, Bd. of Fire Commissioners
Glenn Lasher, Commissioner, Bd. of Fire Commissioners
Robert Wedell, Commissioner, Bd. of Fire Commissioners
Don Gager, Commissioner, Bd. of Fire Commissioners
Joseph Keller, Commissioner, Bd. of Fire Commissioners
Thomas Jeram, Attorney to the Board
Ken Ringler, Supervisor, Town of Bethlehem

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6434
OML-AO-1877

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

January 22, 1991

Mr. Bernard J. Blum
President
Rockaway Bay Sierra Club Task Force
[redacted]

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

Dear Mr. Blum:

As you are aware, I have received your letter of January 9.

You have asked that I "evaluate" the "style of voting for the new chair" of Community Board #14 in Queens. According to your letter, at a recent meeting "during time allotted for public speaking", you were discussing the issue of candidates in general terms when "the retiring chair directed that the microphone plug be pulled out to interrupt the expression of opinion". You have questioned whether that action represented a violation of "constitutional rights". Further, when the vote for chair began, a member of the Board suggested that a "ruling" by the New York City Corporation Counsel "permitted a secret form of balloting". You have asked whether there should have been a "record kept of how each Board member voted."

In this regard, I offer the following comments.

First, with respect to the issue of speaking at a meeting, I do not believe that there is any constitutional right to do so. Moreover, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, section 100), that statute is silent with respect to the issue of public participation. Consequently, unless a statute or rule provides direction to the contrary, if a public body does not want the

public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to permit public participation. If a public body does permit the public to speak, I believe that it may do so based upon rules that treat members of the public equally.

Further, although public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations," in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that such a rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. For example, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for five, or not at all, such a rule, in my view, would be unreasonable.

It is noted that section 2800(h) of the New York City Charter, which pertains to community boards, states in part that: "At each public meeting, the board shall set aside time to hear form the public...". While the Charter does not specify the manner or the amount of time that should be set aside for public comment, again, I believe that a community board may establish reasonable procedures or rules to implement section 2800(h).

I am unfamiliar with any rules that might have been adopted by the Community Board. Nevertheless, if the meeting to which you referred was open for discussion by members of the public, and if any person in attendance was allowed to speak, I do not believe that your commentary should have been prohibited.

Second, with regard to the preparation of a voting record, 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 a community board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

Third, in terms of the rationale of section 87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues.

Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of section 87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listing to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

I point out, too, that 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)].

Lastly, in a memorandum dated August 31, 1990, Michael Kharfen, Director of the Community Assistance Unit of the Office of the Mayor, direction was given concerning voting at community board meetings. In his memorandum, Mr. Kharfen wrote that the New York City Law Department "has recently re-examined the issue and has "determined that the use of secret ballots is inconsistent with [the Freedom of Information Law and the Open Meetings Law], and may not be continued". Consequently, it was stated that "Each Community Board must therefore record the vote of each member in the elections of officers, and list it in the minutes of that meeting". As such, I believe that the guidance given by New York City officials is consistent with this opinion.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Vincent Castellano, Chair
John Baxter, Rockaway Press

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1878

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

January 23, 1991

Mr. Howard Moshier
[redacted]

Dear Mr. Moshier:

As you are aware, your complaint made to the State Commission of Investigation has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to advise with respect to the Open Meetings Law.

The complaint form prepared by the Commission indicates that, while in attendance at a meeting of the Denmark Town Board, you "were denied the opportunity to ask a question".

In this regard, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, section 100), that statute is silent with respect to the issue of public participation. Consequently, unless a statute or rule provides direction to the contrary, if a public body does not want the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to permit public participation. If a public body does permit the public to speak, I believe that it should do so based upon rules that treat members of the public equally.

Further, although public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations," in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that such a rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned"

[see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. For example, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for five, or not at all, such a rule, in my view, would be unreasonable.

I am unfamiliar with any rules that might have been adopted by the Board concerning public participation at its meetings. Nevertheless, if the meeting to which you referred was open for discussion by members of the public, and if any person in attendance was allowed to speak, I do not believe that you could properly have been prohibited from speaking. I point out that, even when the public is allowed to speak, there is no law of which I am aware that would require a town board or its members to answer questions. While they may answer questions, I do not believe that they would be obliged to do so.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Denmark Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1879

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

January 25, 1991

Ms. Theresa C. Valada
Town Clerk
Town of Walton
109 Delaware Street
Box 308
Walton, NY 13856

The staff of the Committee on 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. Valada:

I have received your letter of January 14 in which you raised questions concerning minutes of meetings.

Specifically, in your capacity as Town Clerk of the Town of Walton, you raised the following questions:

> "What are the requirements in open meeting that verbatim minutes be prepared? What are the requirements, as clerk of the Board, to change check book balances as reported by the Supervisor, at an open meeting, entered in the minutes and at a following meeting be informed, by a councilman they were incorrect (ck.bk.bal.) and to add additional figures as a correction to the minutes."

In this regard, I offer the following comments.

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. It is implicit in the Law, however, that whether minutes are brief or expansive, they must accurately describe what transpired at a meeting.

With respect to a request to amend minutes, I do not believe that such a request by a member of the Board would require that minutes be altered. However, if a motion to amend the minutes is made and approved by the Board, such a motion and the result of the vote would be required to be included in minutes.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6448
OML-AO-1880

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

February 1, 1991

Mr. Richard Griola
[redacted]

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

Dear Mr. Griola:

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

According to your letter, in October of 1989, a member of the Cicero Town Board "raised an ethics question concerning the conduct" of another member of the Board, Ms. Patricia Rizzo. In September of 1990, you requested minutes of the meetings of the Town Ethics Board and "correspondence to and from" the Board concerning the matter. Although some information has apparently been disclosed, it is unclear whether the records in which you are interested exist. Nevertheless, if "an ethics investigation was done," it is your view that you are entitled to:

> "1. The written complaint wherein the allegation against Mrs. Rizzo was referred to the Cicero Ethics Board, as required by the ethics code.
>
> 2. Minutes of the Ethics Board meeting that investigated the charges against Mrs. Rizzo, as required by law.
>
> 3. A copy of the rendered decision from the Cicero Board of Ethics.

4. A copy of the record of the vote of each member taken at the Cicero Ethics Board meeting that determined the charges against Mrs. Rizzo, as required by law.

5. A copy of the public notice that advertised the public meeting wherein the investigation was conducted, as required by law."

You wrote that the records described above have been denied "in a de facto manner," and you asked that this office "intervene."

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law and the Open Meetings Law. This office can not enforce either of those statutes, nor is it empowered to compel an agency to grant or deny access to records. Nevertheless, in conjunction with the issues raised, 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. Two of the grounds for denial are, in my opinion, relevant to rights of access to the records sought.

A complaint or allegation transmitted from a member of the Town Board to the Town Board or to the Board of Ethics could be characterized as "intra-agency material." Section 87(2)(g) of the Freedom of Information Law pertains to such materials 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, 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. Based upon the foregoing, a complaint in the nature of that described above could in view be denied, for it does not consist of any of the kinds of material required to be disclosed pursuant to subparagraphs (i) through (iv) of section 87(2)(g).

Also relevant is section 87(2)(b), which enables an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although that standard is flexible and reasonable people may have different views regarding privacy, the courts have provided significant direction, particularly with respect to the privacy of public officers and employees. It has been held in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than others. Further, with respect to the Freedom of Information Law, it has generally been determined that records pertaining to public employees that are relevant to the performance of their duties are available, for disclosure in those instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Powhida v. City of Albany, 147 AD 2d 236 (1989); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981]. Conversely, to the extent that records or portions of records are irrelevant to the performance of one's official duties, it has been held that section 87(2)(b) may appropriately be asserted [see Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, November 22, 1988 and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or

did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that complaints or charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Since you requested the "decision" rendered by the Board of Ethics, I point out that the materials attached to your letter indicate that the Board cannot render a "decision"; rather the Board "shall render advisory opinions." Therefore, following its review of a complaint, for example, the Board provides advice. Based upon section 87(2)(g), a record containing advice or an opinion could in my view be withheld.

Second, at this juncture, I direct your attention to the Open Meetings Law. That statute 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."

A town board of ethics in my view is subject to the Law, for it is created by a town board, it consists of at least two members, it may conduct its business only by means of a quorum (see General Construction Law, section 41), and it conducts public business and performs a governmental function for a public corporation, a town. Further, the definition makes a specific reference to committees, subcommittees and "similar" bodies.

Although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally by conducted open to the public, section 105(1) of the Law lists eights grounds for entry for entry into executive session.

Relevant to the duties of a board of ethics 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.

With regard 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 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 no action is taken, there is no requirement that minutes of an executive session be prepared. It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. For reasons described earlier, records concerning the issue could apparently be withheld under the Freedom of Information Law.

Lastly, section 104 of the Open Meetings Law requires that every meeting of a public body be preceded by notice given to the news media and by means of posting. However, subdivision (3) of section 104 specifies that a public body is not required to pay to advertise a meeting or provide a legal notice. However, if a copy of a notice of the meeting in question exists, I believe that it would be available under the Freedom of Information Law.

I hope that the foregoing clarifies your understanding of the Freedom of Information Law and the Open Meetings Law. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:saw

cc: Jay L. McElvain, Chairman, Board of Ethics
Town Board
Carol Himes, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1881

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

February 4, 1991

Mr. Galen Seerup
School Board Member
Putnam Central School
Putnam Station, NY 12861

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

Dear Mr. Seerup:

I have received your letter of January 25 and appreciate your interest in compliance with the Open Meetings Law.

According to your letter, the Board of Education of the Putnam Central School District, upon which you serve, held an executive session "to discuss a memo that the Superintendent had sent to the Teachers after a Board desire to address certain results of test scores". You added that the teachers "wanted to discuss this memo with the Board but would only discuss it in executive session". It is your view "that since the topic was a part of the public record (both the test results and the memo), the parents had a right to hear what the Teachers had to say and it should have been discussed in a public meeting". Moreover, you indicated that the teachers stated that they "did not want to discuss individual teachers or personalities but wanted to talk about the test scores and Board test expectations".

You asked that I "comment on the legality of this executive session".

In this regard, by way of background, it is noted initially that section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, section 105(1) of the Law prescribes a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, the cited provision states in relevant part that:

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

As such, an executive session is not separate and distinct from an open meeting, but rather is a part of an open meeting from which the public may be excluded. In addition, it is clear that a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may appropriately be considered during an executive session.

Since the issues discussed might have related in some way to teachers, or what are often characterized as "personnel matters", 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)(f0 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 deal 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, promo-

> tion, 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 my opinion, a discussion of test scores and the Board's expectations regarding tests could not validly have been considered under section 105(1)(f) of the Open Meetings Law. Further, I do not believe that any other ground for entry into executive session could justifiably have been asserted based upon the facts that you provided.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-1882

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

February 5, 1991

Mr. Hans Luebbert
[redacted]

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

Dear Mr. Luebbert:

I have received your letter of January 23, as well as the materials attached to it. You asked that I review the materials and "render an opinion as to whether the Town of Newburgh board has violated the Open Meetings law of N.Y. State 15 times."

In brief, among the enclosures are copies of vouchers for meals served at restaurants to members of the Town Board. Several of the vouchers include reference to "work sessions", and news articles indicate that certain members of the Board contended that a "5 p.m. work session forces the members' dinner hour to be disrupted" and said that the dinner meetings were held after the Board completed its work. One article also indicates that the Board adopted "a resolution in 1988 or 1989 making it town policy that when the board was involved in work sessions for four hours or more, lunch or dinner would be provided following the work session. Ensuing articles indicate that members of the Board would reimburse the money spent on the meals to the Town.

In this regard, the ensuing comments pertain to the Open Meetings Law; they do not deal with the propriety of expending public money. That issue, as the news reports suggest, appears to be in the province of the Department of Audit and Control.

First, 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". In view of the definition of "meeting" and its judicial interpretation, the issue involves the intent of the Town Board, and whether the Board gathered at restaurants "for the purpose of conducting public business". If the intent was purely social, the

gatherings, in my opinion, would not have been "meetings" and the Open Meetings Law would not have applied. On the other hand, if the gatherings had a dual purpose, to socialize and to conduct public business, I believe that they would have constituted meetings, which, under those circumstances, would have been conducted in violation of the Open Meetings Law.

Second, I point out 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 Division 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, insofar as the Board gathered at restaurants with an intent to discuss public business, it is my view that those gatherings constituted "meetings" subject to the Open Meetings, even though there may have been no intent to take action. Further, any such meetings should have been preceded by notice given in accordance with section 104 of the Open Meetings Law. In addition, although restaurants are open to the public, as a general matter, entry into a restaurant most often involves the purchase of food. If a meeting of a public body is held in a restaurant, it is possible that many interested members of the public might feel constrained to enter without ordering food. As such, while the Open Meetings Law does not prohibit meetings from being held in a restaurant, I believe that such a site might represent an impediment to access to many who might otherwise want to attend. On the other hand, insofar as the Board gathered at restaurants to eat or to socialize without an intent to conduct public business, those gatherings in my view would have fallen beyond 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

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1883

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

February 6, 1991

Jerome A. Mirabito, Esq.
City Attorney
City of Fulton
Municipal Building
141 South First Street
Fulton, NY 13069-1765

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

Dear Mr. Mirabito:

I have received your letter of January 23 in which you request advice concerning the Open Meetings Law.

In your capacity as Corporation Counsel for the City of Fulton, you indicated that a question has arisen "as to whether the City of Fulton Fire and Police Commission can exclude members of the Common Council from executive sessions of the Fire and Police Commission". By way of background, you wrote that the Commission "is vested with the duty of hiring/firing/promoting members of the Fire and Police Departments", and that three members of the Common Council act as legislative representatives to the Commission but are not members of the Commission. Further, when the Commission conducts an executive session, "it excludes the Council members".

It is your view that the Commission has the right to exclude Council members from its executive sessions. I concur with your opinion. In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law is applicable to meetings of public bodies, and section 102(2) of the Law defines the phrase "public body" to include:

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

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

Therefore, the Commission in question is a "public body", as is the Common Council. Nevertheless, those entities are separate and distinct, and the members of the Common Council who serve as legislative representatives to the Commission are not members of the Commission.

Second, section 105(2) of the Open Meetings Law states that:

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

Based upon the provision quoted above, I believe that only the members of the Commission, which would be the public body conducting a meeting, have the right to attend executive sessions held by the Commission. While section 105(2) enables the Commission to permit the attendance of members of the Common Council at its executive sessions, I do not believe that it is obliged to authorize attendance by any person other than its own members. Stated differently, despite their governmental status, the members of the Common Council do not, in my opinion, have the right to attend executive sessions of the Commission, for they are not members of that public body.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1884

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

February 6, 1991

Mr. and Mrs. Howard Moshier
[redacted]

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

Dear Mr. and Mrs. Moshier:

I have received your letter of January 26 in which you referred to a complaint that was the subject of earlier correspondence.

In brief, in my response to you, it was advised that the Open Meetings Law does not confer a right to speak upon members of the public who attend meetings of public bodies. Nevertheless, it appears that I may have misinterpreted your remarks, for the issue apparently involved a hearing rather than a meeting. Specifically, you wrote that the issue pertains to "a public hearing on the budget of the Town of Denmark", and you indicated that, for two years, you "have not been allowed to make any comment at the public hearing on the budget". You added that others were permitted to speak, that only you were not afforded the opportunity to do so, and that it is your view the purpose of holding public hearings is to enable members of the public to express their views.

In this regard, I offer the following comments.

It is noted that the Committee on Open Government is authorized to advise with respect to the Open Meetings Law. Here I point out that the Open Meetings Law does not necessarily apply to a hearing, and that there is a distinction between a meeting and a hearing. A meeting generally involves a situation in which a quorum of a public body convenes for the purpose of deliberating as a body and/or to take action. A public hearing, on the other hand, generally pertains to a situation in which the public is given an opportunity to express its views concerning a particular issue, such as a zoning matter, a local law or, as in this case, a budget proposal.

Since the Open Meetings Law does not directly relate to public hearings, I have in the past spoken with attorneys for the Office of Local Government Services at the Department of State to learn more about the requirements concerning those hearings. As a general matter, the courts have held that a reasonable opportunity to be heard must be given to interested members of the public present a public hearing [see Lamb v. Town of East Hampton, 162 NYS 2d 94, 96 (1957); Rod v. Monserrat, 312 NYS 2d 377, 380 (1970)]. Therefore, if a hearing was conducted unreasonably, i.e., if persons present were not given a reasonable opportunity to speak, it would appear that the hearing was improperly conducted, and that its legality could be challenged by means of a proceeding brought under Article 78 of the Civil Practice Law and Rules.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Denmark

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6465
OML-AO-1885

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

February 8, 1991

Mr. William Wolar
[redacted]

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

Dear Mr. Wolar:

I have received your letter of January 30. You have asked "whether a public body, such as a school board, is permitted to have a closed vote at a public meeting."

It is noted at the outset that it is unclear whether your question involves public bodies' ability to vote behind closed doors during an executive session, or their ability to cast their votes by secret ballot. Consequently, I will attempt to deal with both of those issues. In this regard, I offer the following comments.

First, by way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, public bodies must conduct their meetings in public, except to the extent that the subject matter may be discussed in closed or executive sessions. 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, 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 in an executive session.

Second, 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). If no action is taken, there is no requirement that minutes of an executive session 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 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, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 626 (1982)]. Consequently, 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.

Since I am not familiar with each of the provisions of the Education Law and other statutes that relate to the functions of a school board, I cannot specify each situation in which a school board may vote during an executive session. However, the following situations are, in my opinion, most common. One involves a so-called 3020-a proceeding in which a board must vote in executive session to determine whether charges should be filed with respect to a tenured employee. The other generally pertains to situations involving particular students, for certain federal Acts prohibit the disclosure of information identifiable to students without the consent of the parents [see e.g., the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g]. Therefore, if, for instance, disciplinary action is taken concerning a particular student, I believe that a vote may be taken behind closed doors. Similarly, in situations in which the vote may identify a handicapped student, I believe that, due to requirements of federal law, a vote should occur in private. While there may be other situations in which a vote may be taken in an executive session of which I am not aware, those described above are in my opinion the situations that arise most frequently in which a board of education may vote during a closed session.

Third, I direct your attention at this juncture to the Freedom of Information Law, which governs rights of access to records. Since that statute 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 a school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. 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 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."

Lastly, in an Appellate Division decision, it was found that "The use of a secret ballot for voting purposes was improper". In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law (section) 87[3][a]; (section) 106[1], [2]" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 1987)].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6469
OML-AO-1886

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

February 14, 1991

Mr. Arthur Bechhoefer
Friends of Keuka Lake, Inc.
[redacted]

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

Dear Mr. Bechhoefer:

I have received your letter of February 1 in which you requested an advisory opinion.

According to your letter, on December 12, the Town Board of the Town of Jerusalem entered into an executive session after completion of its regular business to discuss pending litigation. Four persons who attended indicated that they understood that the Board "did not contemplate doing any further business following the executive session". However, the minutes of the meeting indicate that, after the executive session, the meeting was re-opended and the Board approved a motion to settle two lawsuits that had been discussed during the executive session. On January 8, you requested minutes of the meeting in question. In response to the request, you received draft minutes "without the proposed settlement of the lawsuits, even though the minutes showed that this proposed settlement was part of the resolution adopted by the board". Later, you made another request for the proposed settlement and related records. However, you wrote that you were "denied access to all of those documents until 4:00 pm, February 1, 1991, by the Attorney to the Town, notwithstanding the fact that [you] had made a proper, written request to the Town Clerk, who is the records access officer".

In this regard, I offer the following comments.

First, to put the issues in perspective, the Open Meetings Law generally requires that meetings of public bodies be conducted in public, unless there is a basis for entry into executive session. The phrase "executive session" is defined in section 102(3) of the Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive

session is not separate from a meeting, but rather is a part of an open meeting. Further, section 105(1) of the Law requires that a procedure be accomplished during an open meeting 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..."

Second, section 105(1) of the Open Meetings Law permits a public body to conduct an executive session to discuss "proposed, pending or current litigation". Therefore, the Board apparently had a valid basis for conducting an executive session.

Third, although the Board at its December 12 meeting approved a motion to settle litigation after its executive session, I believe that such a motion could have been acted upon either during the executive session or after the executive session. As section 105(1) suggests, a public body may vote during a proper executive session, unless the vote is to appropriate public money. Further, section 106(2) of the Law specifies that action may be taken during a proper executive session.

Fourth, with respect to minutes of meetings, section 106 of the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. 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, minutes must, at a minimum, consist of a "record or summary" of motions, proposals, resolutions and the like; I do not believe that minutes in this instance were required to have included the entirety of a proposed settlement.

Fifth, the duties of a records access officer are described in regulations promulgated by the Committee on Open Government [21 NYCRR section 1401.2(a)], which states in relevant part that the records access officer has "the duty of coordinating agency response to public requests for access to records". Therefore, while the records access officer is not necessarily required to provide direct access to records, he or she is responsible for ensuring that agency personnel act in compliance with applicable procedures.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies response to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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)].

I hope that I have been of assistance and the foregoing serves to enhance your understanding of the law.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Town of Jerusalem
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1887

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

February 20, 1991

Ms. Lillian Nicolaidis
[redacted]

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

Dear Ms. Nicolaidis:

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

You referred to a meeting of the Mahopac Library Board of Trustees that was held at the home of a member. The meeting was preceded by notice of the time that it was scheduled to be held, but the notice failed to indicate its location. You indicated that when you "learned that the Board meeting was to be held at someone's home, [you] opted not to attend". The other issue that you raised relates to benefits accorded to employees of the Library, particularly policies concerning leave time. You have requested assistance concerning the matters described.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law and the Open Meetings Law. Therefore, although I cannot comment concerning issues relating to employee benefits, I offer the following comments regarding the Open Meetings Law.

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. 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. Provided, however, notwithstanding the provisions of subdivision one of section ninety-nine of the public officers law, public notice of the time and place of a meeting scheduled at least two weeks prior thereto shall be given to the public and the news media at least one week before such meeting."

I point out that Article 7 of the Public Officers Law is the Open Meetings Law, and that the Open Meetings Law was renumbered. Section 99 is now section 104. Based on the terms of both the Open Meetings Law and section 260-a of the Education Law, the board of trustees of a public library, is, in my opinion, clearly required to comply with the Open Meetings Law.

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

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

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

Third, 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 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 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. As indicated earlier, section 260-a of the Education Law requires that notice be given at least one week prior to meetings of library boards scheduled at least two weeks in advance. If a meeting is scheduled less than a week an advance, again, notice of the time and place 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.

Fourth, 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 second floor room, I believe that the meetings should be held in the room that is most likely to accommodate the needs of people with handicapping conditions.

Lastly, I do not believe that a member's home is generally an appropriate location for a meeting of a public body. Aside from the issue of barrier-free access to physically handicapped persons, a home is not a public facility, and many have suggested that entry into a home to attend a meeting provides a sense of intrusion or intimidation. From my perspective, every law,

including the Open Meetings Law, should be implemented in a manner that gives effect to its intent. In my view, holding a meeting at a member's home would generally be unreasonable and inconsistent with the intent of the law.

In an effort to enhance compliance with the Open Meetings Law, copies of this opinion will be forwarded to the Board of Trustees and its acting director.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Pat Kaufman, Acting Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1888

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

February 25, 1991

Mr. Steven M. Schlussel
President
General Council of Homeowner Associations
of Port Washington
P.O. Box 1391
Port Washington, NY 11050

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

Dear Mr. Schlussel:

I have received your letter of February 7, as well as the materials attached to it. In your capacity as President of the General Council of Homeowner Associations of Port Washington, you have requested my comments concerning the implementation of the Open Meetings Law by the Port Washington School District Board of Education.

By way of background, you wrote that records provided by the District indicate that "two-thirds of all School Board meetings held during the past three years have been held on short notice", which "is usually given just a few days in advance on a bulletin board". Although the meetings held on short notice are characterized as "special" meetings, you have contended that those meetings "cover the full scope of running the school district". It is your view that notice of the meetings in question has been inadequate. Further, you referred to an administrative survey of the District prepared by the State Education Department in which it was found that the Board engaged in "excessive use" of executive sessions.

In this regard, I offer the following comments.

First, 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 conspicuously posted in

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media 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 an advance, again, notice of the time and place 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, as in the case of an emergency, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

As you are aware, the judicial interpretation of the Open Meetings Law indicates that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL section 104(1). Only respondent's choice in scheduling prevented this result.

"Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...

"In White v. Battaglia, 79 A.D.2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as the one at bar:

> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, merely posting a single notice would fail to comply with the Open Meetings Law, for the Law requires that notice be given to the news media and posted "conspicuously" in one or more "designated public locations" prior to meetings. Further, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice.

Second, having received minutes of Board meetings, executive sessions have been held to discuss "personnel", "specific personnel", "real estate", "negotiations", "a legal issue", "legal matters", "litigation" and "to confer with Board Attorney".

As you are aware, the Open Meetings Law contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

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

Therefore, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

Further, 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 <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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

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, Supreme Court, Chemung County, July 21, 19981]; 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].

Since "real estate" was cited in several instances, I point out that not every issue involving real estate may properly be discussed behind closed doors, for section 105(1)(h) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

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 references of executive sessions held by the Board to confer with its attorney, it is noted that the Open Meetings Law provides two vehicles under which a public body may meet in private. One 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 last issue 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)].

In my view, to the extent that a discussion between the Board and its attorney involved the seeking of legal advice by the Board and the rendition of legal advice by the attorney, the communications would have been privileged and, therefore, exempt from the Open Meetings Law. However, after legal advice has been given, and a public body deliberates with respect to an issue, the privilege is no longer applicable, and the deliberations must in my opinion be conducted in accordance with the Open Meetings Law. Stated differently, the deliberations must occur in public, unless there is a basis for entry into an executive session.

In an effort to enhance their understanding of and compliance with the Open Meetings Law, copies of this opinion will be sent to officials of the District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Dr. William B. Heebink, Superintendent
Larry Reich, Board Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6480
OML-AO-1889

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

March 5, 1991

Mr. William G. Murray
[redacted]

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

Dear Mr. Murray:

I have received your letter of February 8 in which you requested an advisory opinion.

According to your letter, at a meeting of the Lansingburgh Board of Education held on January 22, candidates were interviewed for the purpose of filling a vacancy on the Board. Following the interviews, the Board president, Kathleen M. Tivnan announced that the Board would hold an executive session to discuss negotiations. You wrote, however, that during the executive session, the candidates were discussed, votes were cast, and one of the candidates was selected. Further, the candidates were informed later in the week of the Board's decision. At the ensuing meeting held on January 29, "the name of the elected candidate appeared on the agenda", and a "roll call vote was held and the new member was sworn in". When you requested "a written accounting of the votes cast by each board member during the executive session" held on January 22, the request was denied. Further, the President of the Board wrote that "'formal' votes are taken at a meeting of an Executive Session and it would be inappropriate to disclose the positions taken by individual Board members in such a session."

In this regard, I offer the following comments.

First, the Open Meetings Law requires that a procedure be accomplished by a public body during an open meeting prior to conducting 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..."

Therefore, if the Board intended to discuss two subjects during its executive session, one of which involved a review of the relative merits of the candidates, I believe that its motion to enter into executive session should have so indicated. If there was an intent to discuss only "negotiations", the Board in my opinion should have returned to an open meeting following its consideration of that issue. Thereafter, a new motion to enter into executive session to discuss the candidates could have been made.

Second, I believe that a discussion of candidates' credentials could validly have been discussed during an executive session. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

Under the circumstances, the Board would have discussed a matter leading to the appointment of a particular person, a proper subject for consideration in an executive session.

Third, as a general rule, a public body 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) of the Law. If no action is taken, there is no requirement that minutes of the executive session 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 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)]. 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 my view, based upon the facts that you provided, the Board took final action at the executive session held on January 22. It is noted, too, that in a situation in which a board of education contended that it was not required to prepare minutes because it did not formally vote, but rather reached a "consensus", it was determined that:

> "The fact that respondents characterized the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute" [Previdi v. Hirsch, 524 NYS 2d 643, 646 (1988)].

Lastly, 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 a school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

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 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."

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 enhance understanding of and compliance with the Freedom of Information Law and the Open Meetings Law, a copy of this opinion will be forwarded to the President of the Board.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen M. Tivnan, President, Cansingburgh
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1590

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

March 7, 1991

Mr. Kevin F. Hilbert
[redacted]

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

Dear Mr. Hilbert:

I have received your letter of February 10 in which you requested an advisory opinion concerning the Open Meetings Law.

You have questioned the propriety of a discussion conducted in an executive session by the Clermont Town Board to consider "the designation of the town newspaper of record". Although the Board contended that the executive session was validly held on the ground that the discussion involved "contract negotiations", it is your view that there was no basis for closing the meeting.

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except when the subject matter may properly be discussed during an 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) of the Open Meetings Law specify and limit the subjects that may properly be considered behind closed doors.

Second, the only provision in the Open Meetings Law that refers to negotiations is section 105(1)(e), which permits a public body to enter into an executive session regarding collective bargaining negotiations involving public employee unions. A discussion concerning the designation of an official newspaper would not relate to collective bargaining. Therefore, section 105(1)(e) would not serve as a basis for conducting an executive session.

The only other ground for entry into executive session of possible significance is section 105(1)(f). That provision permits a public body to conduct an executive session to discuss:

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

Based upon the specificity of the language quoted above, it does not appear that section 105(1)(f) could properly have been asserted to enter into executive session. It is noted that section 64(11) of the Town Law refers to the authority of a town board to "designate" an official newspaper. According to an ordinary dictionary definition of the term, "designate" means to make known, to stipulate, or to specify. Section 105(1)(f) pertains to matters leading to the "appointment" or "employment" of a particular person or corporation (among other matters not apparently pertinent to the facts). In my view, as those terms are generally used, they would not be analogous to the designation of a newspaper. As such, section 105(1)(f) would not in my view likely have served as a proper 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Clermont

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6494
OML-AO-1891

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

March 7, 1991

Mrs. Lilly Haliasos
[redacted]

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

Dear Mrs. Haliasos:

I have received your letter of February 14, which concerns access to minutes of meetings of the West Hempstead School District Board of Education.

According to your letter, the Board has adopted a policy that effectively precludes the public from gaining access to minutes of meetings "until two weeks after they have been adopted". You added that, since board meetings are held once a month, the minutes are not available "for almost 6 weeks after a given meeting".

In this regard, as you are aware, the issue has been addressed previously concerning the Board's policy. Based upon the ensuing comments, I believe that it is inconsistent with law.

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 vote thereon; pro-

> vided, 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. The Open Meetings Law is silent with respect to the approval of minutes, and the language of section 106(3) is clear, in that minutes must be made available "within two weeks of the date of such meeting".

Second, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved," "draft" or "non-final," for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Third, reviewing the issue from a different vantage point, the Freedom of Information Law makes no distinction between drafts as opposed to "final" documents. The Law pertains to all agency records, and section 86(4) defines that term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms,

papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Due to the breadth of the language quoted above, once a document exists, it constitutes a "record" subject to rights of access, even if the record is characterized as "draft" or is unapproved. Further, as a general matter, minutes consist of a factual rendition of what transpired at an open meeting. On that basis, I believe that they are accessible [see Freedom of Information Law, section 87(2)(g)(i)]. Further, minutes often reflect final agency determinations, which are available under section 87(2)(g)(iii), irrespective of whether minutes are "approved". Additionally, in the case of an open meeting, during which the public may be present and, in fact, may tape record the meeting [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], there would appear to be no valid basis for withholding minutes, whether or not they have been approved.

As you requested, copies of this opinion will be forwarded to Mr. Guercio, the Board's attorney, and Mr. Ver Pault, the President of the Board.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Gregory Guercio
Alfred Ver Pault

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1892

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

March 7, 1991

Mr. R. Kelly
[redacted]

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

Dear Mr. Kelly:

I have received your letter of January 29, which for reasons unknown, only recently reached this office.

According to your letter, you reside in a New York City Controlled Mitchell Lama project, and your question is whether the board of directors at your complex may vote by means of secret ballot.

In this regard, as you may be aware, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. If those statutes were applicable, the board would be precluded from engaging in secret ballot voting. Nevertheless, I do not believe that either statute would apply.

The Open Meetings Law pertains 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."

As such, the Open Meetings Law is generally applicable to governmental bodies. It is my understanding that boards of directors of Mitchell Lama housing projects are subject to the Private Housing Finance Law and perhaps other provisions of law and that, therefore, they fall outside the scope of the Open Meetings Law.

In an effort to learn more of the matter, I have contacted the Department of Housing Preservation and Development on your behalf. It was suggested that I forward your letter to Assistant Commissioner Robert Klehammer, who has the resources and expertise to offer an appropriate response.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Klehammer, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6492
OML-AO-1893

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

March 7, 1991

Mr. Vincent Trocchia
[redacted]

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

Dear Mr. Trocchia:

I have received your letter of February 26 in which you requested advice in your capacity as a member of the West Hempstead School District Board of Education. The issue involves your contention that minutes of Board meetings must be available to the public within two weeks of the meetings.

In this regard, as you are aware, the issue has been addressed previously concerning the Board's policy. Based upon the ensuing comments, I believe that it is inconsistent with law.

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 vote thereon; pro-

> vided, 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. The Open Meetings Law is silent with respect to the approval of minutes, and the language of section 106(3) is clear, in that minutes must be made available "within two weeks of the date of such meeting".

Second, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved," "draft" or "non-final," for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Third, reviewing the issue from a different vantage point, the Freedom of Information Law makes no distinction between drafts as opposed to "final" documents. The Law pertains to all agency records, and section 86(4) defines that term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms,

papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Due to the breadth of the language quoted above, once a document exists, it constitutes a "record" subject to rights of access, even if the record is characterized as "draft" or is unapproved. Further, as a general matter, minutes consist of a factual rendition of what transpired at an open meeting. On that basis, I believe that they are accessible [see Freedom of Information Law, section 87(2)(g)(i)]. Further, minutes often reflect final agency determinations, which are available under section 87(2)(g)(iii), irrespective of whether minutes are "approved". Additionally, in the case of an open meeting, during which the public may be present and, in fact, may tape record the meeting [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], there would appear to be no valid basis for withholding minutes, whether or not they have been approved.

As you requested, a copy of this opinion will be forward to Alfred C. Ver Pault, President of the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alfred Ver Pault

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOML-AO-1894

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

March 8, 1991

Ms. Helene Woodford
[redacted]

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

Dear Ms. Woodford:

I have received your letter of December 29 which, for reasons unknown, did not reach this office until February 21. Please accept my apologies for the delay in response.

According to your letter, you and others attended a meeting of the Perth Town Board on December 26 in order to hear the Board's discussion of an addition to a trailer park adjacent to your property. You wrote that, at approximately 8:30 p.m., the Supervisor "stated that the meeting would be adjourned until 8 p.m. on January 8, 1991". Believing that the meeting had ended, you and others left the meeting. However, later in the evening, you received a call from a neighbor, who said that the Supervisor "had adjourned the meeting twice after [you] had left waiting for the two reporters who had also been present to leave", and that the Board then met with two men who "were there to inquire about building a re-cycling plant in Perth". You added that the nature of the discussion was confirmed by people who remained at the meeting.

It is your view that the Board acted in violation of the Open Meetings Law, and you requested an opinion on the matter.

In this regard, I offer the following comments.

First, from my perspective, when it is announced that a meeting is adjourned, or when a motion to adjourn is carried, it is reasonable to assume that a meeting has been completed and that a public body has ended its gathering. In this instance, if it was stated that the meeting had been adjourned and the Board would next meet on January 8, and it was known by the Board that

it would confer with representatives of the re-cycling plant later that evening, those ensuing discussions in my view would have constituted a "meeting" that should have been conducted in accordance with 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 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 remained present 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 a person other than a member of the Board [see Goodson-Todman Enterprises Ltd. v. City of Kingston Common Council, 550 NYS 2d 157 (1990)].

In short, if my interpretation of the facts is accurate, the discussion by the Board with representatives of the recycling plant should have been conducted as a continuation of the initial meeting. Further, the act of adjournment in my opinion would have misled the public into believing that the business of the Board had ended for that evening.

Third, the discussion with representatives of the recycling plant might be viewed as a closed session held in a manner inconsistent with the Open Meetings Law. As a general matter, 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...."

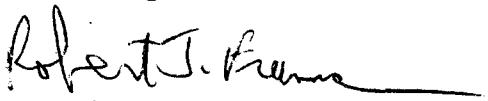
In view of the foregoing, it is clear in my opinion that an executive session is not separate and distinct from an open meeting, but rather that it is a portion of an open meeting during which the public may be excluded. It is also clear that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss a subject listed in paragraphs (a) through (h) of section 105(1) of the Open Meetings Law as appropriate for discussion behind closed doors.

Based upon your description of the subject matter discussed, I do not believe that an executive session could properly have been held, for none of the grounds for entry into executive session would apparently have applied.

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

cc: William Zierak, Supervisor
Walter Kowalczyk, Councilman
Edward Kruger, Councilman
Gary Herba, Councilman
Michael Quinn, Councilman
Eleanor Korona, Town Clerk
Lee Ann Schmidt, The Recorder
Gary Elliott, The Leader Herald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6508
OML-AO-1895

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

March 11, 1991

Hon. Joseph B. Moskaluk
Town Supervisor
Town of Gallatin
RD 1 - Box 457
Pine Plains, NY 12567

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

Dear Supervisor Moskaluk:

Your letter of February 28 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 serves, is authorized to advise with respect to the Open Meetings Law, and the Secretary asked that I respond to you on her behalf.

You have requested an opinion concerning section 106 of the Public Officers Law, and you expressed particular interest in subdivision (2) of that provision. In this regard, I offer the following comments.

Section 106 pertains to minutes of meetings of public bodies 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
>
> 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). If no action is taken, there is no requirement that minutes of an executive session 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.

I point out that 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 one week or two weeks, as the case may be, and that if the minutes have been been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Lastly, 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 a school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

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 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."

Further, in an Appellate Division decision, it was found that "The use of a secret ballot for voting purposes was improper". In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law (section) 87[3][a]; (section) 106[1], [2]" [Smithson v. Ilion Housing Authority, 130 Ad 2d 965, 967 (1987)].

I hope that I have been of assistance and appreciate your interest in compliance with the Open Meetings Law. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6506
OML-AO-1896

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

March 11, 1991

Mr. R.C. Smith
[redacted]

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

Dear Ms. Smith:

I have received your letter of February 20.

According to your letter, you are conducting research in preparation of a book on "the [redacted] case, the only legal action under the Education for all Handicapped Children Act of 1975 to reach the Supreme Court". In conjunction with your research, you wrote that you have examined files pertinent to the case maintained by the Hendrick Hudson School District for period of 1978 to 1982 after having obtained a waiver from the [redacted] family. Nevertheless, you indicated that you have been unable to find any reference in School Board minutes or other records to "a vote at any point by the board of education, either to defend against the [redacted] suit at the district court level, or to appeal the case to higher courts later". You pointed out that members of the Board with whom you have spoken "recall going into executive session to discuss those matters and have no recollection of ever taking a formal vote."

Based on the foregoing, you raised the following questions:

> "(1) Were board of education in New York State required during the years mentioned above to vote to take actions involving expenditure of public funds for legal defense in suits brought against them by parents desirous of getting more service for their children in school? If so, could these votes be recorded elsewhere than in the formal school board minutes and, if so, am I entitled to see them?

> (2) Am I entitled to a break-out of the expenses of the Hendrick Hudson School District in the Rowley case, including a separate listing of costs of counsel and any expenses that might have been incurred for travel, hotel stays or entertainment of school board members or anyone else involved in court hearings of other business associated with the case?"

In this regard, I offer the following comments.

First, putting the matter in perspective, the Freedom of Information Law pertains to all records of an agency, such as a school district. Further, section 86(4) of that statute defines the term "record" to include:

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

Based upon the foregoing, information, in whatever physical form, maintained by an agency, would constitute a "record" subject to rights conferred by the Freedom of Information Law.

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

Of relevance to the inquiry is the first ground for denial, section 87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is the Family Educational Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of

the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under the Buckley Amendment define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

As such, assuming that the records in question include information personally identifiable to a student, they would be confidential, unless the parents of students waive their right to confidentiality, which apparently is so in this instance. Under the circumstances that you described, the Buckley Amendment does not appear to be an impediment to your ability to obtain records, for the parents of the student apparently authorized the District to disclose to you.

Third, I believe that in order to take action, the Board was required to do so by means of an affirmative vote of a majority of its total membership. My belief is based in part upon section 41 of the General Construction Law, which, since 1909, has imposed certain requirements concerning a quorum upon public bodies. The cited provision states that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of 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 opinion, the provision quoted above permits a public body, such as a board of education, to perform and exercise its duties only at a meeting conducted by a quorum of the body, a majority of its total membership, and only by means of an affirmative vote of a majority of its total membership. Further, under section 41 of the General Construction Law, a public body may carry out its powers and duties only at a meeting held upon reasonable notice to all the members.

Fourth, the Freedom of Information Law generally pertains to existing records. Section 89(3) of that statute provides in part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

Based upon the foregoing, subdivision (3) of section 87 requires that agencies prepare certain records. Relevant to your inquiry, that provision states in part that:

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

Therefore, the Freedom of Information Law generally precludes secret ballot voting by members of public bodies and affirmatively requires that a voting record be prepared when final votes are cast.

While a record of votes by the Board pertaining to a particular student would ordinarily be confidential insofar as it includes information personally identifiable to a student, due to

the receipt of a waiver of confidentiality from the parents of the student, I believe that such a records must have been prepared pursuant to section 87(3)(a) of the Freedom of Information Law, and that you would have the right to obtain them.

Although I believe that records of votes taken by members of the Board of Education must be disclosed, ordinarily in the form of minutes, it is unclear whether minutes must exist. As a general matter, when a public body takes action, whether during an open meeting or an executive session, minutes reflective of the nature of the action taken, the date and the vote of the members must be recorded (see Open Meetings Law, section (106). Nevertheless, when a matter is "exempted", the Open Meetings Law does not apply. Specifically, section 108 of the Open Meetings Law states in relevant part that:

> "Nothing contained in this article [the Open Meetings Law] shall be construed as extending the provisions hereof to...
>
> 3. any matter made confidential by federal or state law."

Therefore, when a board of education discusses a topic identifiable to a particular student derived from education records, the Open Meetings Law would not apply, for the topic would involve a matter made confidential by federal law. Further, in such a circumstance, the Open Meetings Law would apparently not require the preparation of minutes. Whether there is such a requirement in the Education Law in unknown to me.

In sum, while it is unclear whether records characterized as minutes must exist in conjunction with the Open Meetings Law, as discussed earlier, I believe that the Freedom of Information Law would require the preparation of voting records pursuant to section 87(3)(a) of that statute.

Lastly, bills, vouchers, contracts, receipts 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. Again, although records reflective of expenditures would by confidential to the extent that they would or could identify a student, a waiver from the parents would remove that barrier. 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 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 Minerva, supra, the issue involved a request for copies of both sides of cancelled checks made payable to a municipality's attorney. Although the court held that the front sides of the checks, those portions indicating the amount paid to the attorney, must be disclosed, it was found that the backs of the checks could be withheld, for disclosure might indicate how the attorney "spends his 'paychecks.'" Most recently, it was found that records concerning payment to a law firm by an agency that "reveal the date, general nature of service rendered and time spent" are accessible [Knapp v. Board of Education, Canisteo Central School District, Supreme Court, Steuben County, November 23, 1990].

Since the Freedom of Information Law generally pertains to existing records, if no "break out" of expenses exists, the District would not be required to prepare such a record on your behalf. However, I believe that individual records, such as bills or vouchers, for example, would be available in conjunction with the preceding commentary.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles Eible, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1897

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

March 12, 1991

Mr. Dean J. Utegg
[redacted]

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

Dear Mr. Utegg:

I have received your letter of February 25 in which you requested an opinion concerning the Open Meetings Law.

You wrote that the Ripley Central School District Board of Education "is currently working on the proposed budget for school year 1991-92". Although the development of the budget was discussed by the Board in public in previous years, you indicated that "all of their deliberations are being held in executive session". You have questioned the propriety of the Board's practice.

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. Nevertheless, two of the grounds for entry into executive session may be pertinent.

Section 105(1)(e) permits a public body to enter into an executive session regarding "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law is commonly known as the "Taylor Law" and it deals with the relationship between public employees (i.e., school districts) and public employee unions. As such, section 105(1)(e) pertains to collective bargaining negotiations. If the District is currently negotiating with a union, some of its discussions concerning the budget may relate to and be intertwined with collective bargaining negotiations. To that extent, it is likely that section 105(1)(e) could be asserted as a basis for conducting an executive session.

The other ground for entry into executive session of likely significance is section 105(1)(f), the so-called "personnel" exception. By way of background, there is both legislative history and judicial precedent concerning that provision, which has been clarified since the initial enactment of the Open Meetings Law.

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that section 105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs which can be accomplished by according to seniority, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In neither case in such circumstances would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to section 105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "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" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering of the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of [section] 100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f. of [section] 100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe discussions relating to budgetary concerns could appropriately be discussed during an executive session.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1898

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

March 14, 1991

Ms. Muriel Rossie
[redacted]

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

Dear Ms. Rossie:

I have received your letter of February 27 in which you raised a series of issues concerning the implementation of the Open Meetings Law by the Board of Education of the Chenango Forks School District.

The initial area of inquiry concerns the manner in which resolutions are adopted and the content of minutes. For example, you wrote that the "dialogue" at meetings "frequently went like this: Superintendent: '#4. I'm not recommending this at this time...#5 If you want to discuss it its O.K. It's 38 grand - O.K. with me...#8 These are mailings I'm sending out'....and so forth."

The other issue involves the propriety of executive sessions held by the Board.

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, section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies 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
>
> 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 reflect a "record or summary" of action taken to all motions, proposals, resolutions and any other matters upon which votes are taken. While I believe that materials may be incorporated by reference in minutes, I believe that minutes are intended to indicate the nature of action taken in order that the public and agency officials can rely upon a description of events in the future.

I point out, too, that 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). If no action is taken, there is no requirement that minutes of an executive session 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 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, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 626 (1982)]. Consequently, 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.

Third, with respect to executive sessions, 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 subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Therefore, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

Further, 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 matters", "negotiations", "labor relations" or "legal matters", 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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

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, Supreme Court, Chemung County, July 21, 19981]; 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 "labor relations" or "negotiations", the only ground for entry into executive session that would apparently be relevant 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. Not all discussions involving "labor relations" or "negotiations" would pertain to 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].

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 liti-

> gation 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 or matters involving "legal ramifications" could be reflective 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 or a legal issue involved.

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 an effort to enhance their understanding of 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6518
OML-AO-1899

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

March 14, 1991

Mr. Thomas A. Conniff
Cusack & Stiles
Attorneys at Law
61 Broadway
New York, NY 10006

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

Dear Mr. Conniff:

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

You wrote that your firm represents the Student Activities Corporation at Queens College, which was created in 1973 as a not-for-profit corporation. By way of background, you indicated that:

> "Pursuant to an agreement with the Board of Higher Education of the City of New York, now known as the Board of Trustees of the City University of New York, the Student Activities Corporation is to fund programs for the student body at Queens College of an educational, recreational, social or cultural nature and to operate and fund the cafeteria, book store and other auxiliary enterprises which serve the needs of the students at Queens College.
>
> "The Board of Higher Education agreed to collect student activities fees and student government activity fees and to transfer these funds to the Student Activities Corporation for distribution in accordance with the agreement.

> "The Student Activities Corporation is managed by a Board of Members who are selected from various student constituencies at the College and includes two (2) Faculty Members."

The question is whether, in my opinion, the Student Activities Corporation (hereafter "the Corporation") constitutes a "public body" subject to the Open Meetings Law.

In this regard, I offer the following comments.

As you are aware, 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."

I am unaware of any judicial decisions that deal with the status of entities similar to the Corporation that have been rendered under the Open Meetings Law. Nevertheless, for the following reasons, if the actions of the Corporation represent necessary or required steps in determining the manner in which mandatory student fees are distributed at a public educational institution (such as Queens College), I believe that it is a public body that falls within the scope of the Open Meetings Law.

First, presumably the Board of the Corporation consists of two or more members.

Second, I believe that the Board of the Corporation is required to conduct business by means of a quorum, whether or not there is any specific requirement concerning a quorum in by-laws or the act that created it. I direct your attention to section 41 of the General Construction Law, which defines "quorum" as follows:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of

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

Based upon the provision quoted above, whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that the Board of the Corporation must conduct business by means of a quorum, section 41 of the General Construction Law imposes such a requirement. In addition, even if section 41 of the General Construction Law is inapplicable, section 707 of the Not-for-Profit Corporation Law requires that action may be taken only by a quorum of directors of such a corporation.

Third, it appears that the Corporation conducts public business and performs a governmental function for Queens College, which is clearly a governmental entity, for its duties in my opinion are reflective of a governmental function. In essence, it appears that the Corporation performs a function for Queens College that would otherwise be performed by officials of the College. If my assumptions are accurate, the Corporation would constitute a public body subject to the Open Meetings Law.

Further, the fact that the entity in question not-for-profit corporation is not in my opinion determinative of its status under the Open Meetings Law. By means of analogy, under the Freedom of Information Law, the companion statute to the Open Meetings Law concerning access to government records, the state's highest court, the Court of Appeals, found that volunteer fire companies are subject to the Freedom of Information Law [see Westchester-Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. It is noted that a volunteer fire company is a not-for-profit corporation that performs its duties for a municipality by means of a contractual relationship. Even though a

volunteer fire company is not itself government or a governmental entity, the court found that it performs what traditionally might be considered a governmental function and therefore falls within the scope of the Freedom of Information Law.

In so holding, the Court found that:

> "We begin by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible'... For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579)."

If the relationship between Queens College and the Corporation is similar to that of a volunteer fire company and a municipality, it would appear that the Corporation, despite its not-for-profit status, would be an "agency" required to comply with the Freedom of Information Law.

I point out that in a decision pertaining to a foundation associated with a public educational institution, it was also claimed that the records fell outside the scope of the Freedom of Information Law because they were maintained by a "private, not-for-profit corporation". The records sought involved the Kingsborough Community College Foundation; Kingsborough is an institution of the City University of New York. In rejecting that contention, the Court stated that:

> "The activities of the Foundation... amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College. Even though the Foundation is set up as a not-for-profit corporation, as it is such an integral part of the College allowing it to stand as a separate entity would subvert the purpose of FOIL. I am in accord with the petitioner in rejecting as irrelevant, for the purposes of applying the FOIL, a distinction as to whether the Foundation is an independent, voluntary organization which provides public service to an agency of local government, rather than an 'organic arm of government' as the vehicle for the performance of the purposes and objectives of that agency. (Westchester Rockland Newspapers, Inc. v. Kimball, 50 NY 2d 575 [1980]). Even if the requested records were determined to be private documents of the Foundation, they are nevertheless records in the possession of a governmental agency and as such maintained by a governmental agency under Public Officer's Law Section 86(3)(4). (Capital Newspapers v. Whalen, 69 N.Y. 2d 246 [1987]).
>
> "It is without question that the '...FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government...(citations omitted) (Capital Newspapers v. Whalen, supra, at 252). In the instant case the respondents have failed to meet their burden of demonstrating that the requested

> material is within the bounds of some 'specific statutory protection' and therefore 'the Freedom of Information Law compels disclosure not concealment'...(Westchester News v. Kimball, supra, at 580)" [Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988].

As such, there is precedent indicating that a not-for-profit entity associated with a public educational institution constitutes an "agency" subject to the Freedom of Information Law.

I believe that the Corporation should be viewed in much the same fashion. If the Corporations exists due to its relationship with the College, and if the College would perform the functions of the Corporation if the Corporation had not been created, it could be concluded in my opinion that such an entity conducts public business and performs a governmental function for the College.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1900

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

March 15, 1991

Ms. Barbara Weed
[redacted]

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

Dear Ms. Weed:

I have received your letter of March 4, in which you requested advice "about an incident" that occurred recently in your town.

According to your letter, the Supervisor of the Town of Saratoga and the remaining four members of the Town Board met on the evening of February 25 to conduct "a special meeting to address the town's solid waste management problem", a subject of interest to you. The purpose of the meeting was "to learn of a solid waste management alternative that has been offered to the Town". Prior to the meeting, you were told by the Supervisor that "he planned to hold a closed meeting and [you] were not welcome to attend". You wrote that, to your knowledge, the meeting was never publicized and notice was not posted. Although you were initially allowed into the meeting room, you wrote that the Supervisor "evicted" you, stating that it was not an open meeting and that "as long as he determined it to be an informal meeting where no record of the meeting is kept, that it is not a public meeting and [you would] be barred from sitting in on it".

You have raised questions concerning the propriety of holding the meeting in private, notice requirements, and requirements pertaining to minutes of meetings. In this regard, I offer the following comments.

First, 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. Therefore, I believe that the gathering in question was a meeting subject to the requirements of the Open Meetings Law.

Second, 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. Further, in my view, since the Supervisor is one among five members of the Town Board, he could not unilaterally declare the meeting closed. It is also clear that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held only to discuss a subject listed in the Open Meetings Law as appropriate for discussion behind closed doors. Based upon the subject matter considered, I do not believe that any of the grounds for entry into executive session would have applied.

Third, 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 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, to the extent that the Board made motions or proposals or took action, I believe that minutes would have been required to have been prepared. 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.

Lastly, 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 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 different from those contained in the Open Meetings Law.

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 notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time an 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 imposed by the Open Meetings Law can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded 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 Saratoga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6524
OML-AO-1901

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

March 15, 1991

Hon. Manuel M. Martinez
Supervisor
Town of Geddes
1000 Woods Road
Solvay, NY 13209

<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 Martinez:

I have received your letter of February 28 in which you requested an advisory opinion.

Having attended my presentation at the recent meeting of the Association of Towns, you expressed the belief that "anything that is discussed in Executive Session, such as labor negotiations, should not, and cannot be discussed with anyone else". The issue has arisen due to the possibility that information was inappropriately disclosed in the course of negotiations with representatives of town employees.

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is permissive. Stated differently, although a public body "may conduct an executive session" to discuss certain matters [see Open Meetings Law, section 105(1)], there is no requirement that an executive session must be held, even when a basis for entry into executive session exists. Similarly, even when there is a ground for entry into executive session, an affirmative vote of the majority of a public body's total membership must be carried as a condition precedent to conducting an executive session. If such a motion fails to carry, an issue might be discussed in public, even though there might have been a valid reason for conducting an executive session.

Second, the Open Meetings Law is generally silent with respect to the disclosure of information considered during an executive session. Consequently, there is nothing in the Open Meetings Law that would prohibit a person present at an executive

session from disclosing information discussed at the executive session. Further, there may be instances in which a public body must disclose the result of an executive session. Section 106(2) of the Open Meetings Law pertains to minutes of executive sessions and states that:

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

Further, section 106(3) requires that minutes of executive session be prepared and made available, to the extent required by the Freedom of Information Law, within a week of an executive session. I point out that if a public body merely discusses a subject during an executive session, but takes no action during the executive session, there is no requirement that minutes of the executive session be prepared.

It is also noted that the grounds for entry into an executive session appearing in section 105(1) of the Open Meetings Law are not necessarily consistent with the grounds for denial of access to records appearing in section 87(2) of the Freedom of Information Law. In some cases, although the discussion of a particular topic might justifiably be conducted during an executive session, records related to that topic would not necessarily fall within any ground for denial in the Freedom of Information Law. For instance, if a public body discusses the possible appointment of a particular individual to a position, an executive session would likely be proper, for section 105(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

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

Since such a discussion would involve matters "leading to the appointment...of a particular person", an executive session would in my view be appropriate. Nevertheless, if a public body chooses to appoint an individual to a position, records reflective of the appointment would be made available as minutes re-

quired to be prepared under section 106 of the Open Meetings Law. Moreover, section 87(3)(b) of the Freedom of Information Law requires each agency to maintain and make available a payroll record indicating the name, public office address, title and salary of all officers or employees of the agency. As such, even though a discussion resulting in the appointment of an individual to a position might be closed under the Open Meetings Law, a record indicating the appointment of the individual would be accessible under the Freedom of Information Law.

The foregoing is not intended to suggest that disclosures of information acquired during executive sessions are proper. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, speak freely and develop strategies in situations in which some degree of secrecy is permitted, and inappropriate disclosure could work against the interests of the public body as a whole and perhaps the public generally.

Lastly, section 805-a of the General Municipal Law states in part that no municipal officer or employee shall "disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests". That prohibition is found in the provisions relating to considerations of ethics. While I am unaware of whether a more precise response could be given, you might want to raise the issue with the New York State Temporary Commission on Local Government Ethics. The Commission is located at 54 North Central Avenue, Elmsford, NY 10523.

I hope that my comments serve to enhance your understanding 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

FOIL-AO-6531
OML-AO-1902

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

March 19, 1991

Ms. Marie A. Coville
Town Clerk
Town of Schroeppel
Box 9B - RD #1
Route 57A
Phoenix, NY 13135

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

Dear Ms. Coville:

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

Your initial area of inquiry involves a meeting recently held by the Village of Phoenix Board of Trustees and the Schroeppel Town Board. You included a copy of the notice posted by the Phoenix Village Clerk, which stated that:

> "Please take notice that a meeting of the Village of Phoenix Board of Trustees with the Town of Schroeppel Board will be held in the Sweet Memorial Building on Thursday, February 28, 1991 at 7:00 pm, to consider terms for the water and sewer supply to the PUD north of the village."

Although Town residents contacted you prior to the meeting to ask whether a joint meeting has been scheduled, you were not notified of any such meeting by the Town Board, and the Board apparently gave no notice of the meeting. You added that a member of the Town Planning Board contacted a member of the Town Board and was told that "it was a meeting just for the Village Board and the Town Board". It is also your understanding that the Town Board members "all sat around the Village Table with the Village Board members".

In this regard, the Open Meetings Law applies to meetings of public bodies, and 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 vote or 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 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 others, such as Village officials. I point out that it has been held that joint meetings held by two or more public bodies are subject to the Open Meetings Law [Oneonta Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)].

It is noted, too, that in a recent decision, it was that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the council was asked to attend by a city official who was not a member of the city council [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the gathering in question might have been held at the request of the Village, I believe that it was a meeting, assuming that a quorum of the Board was present for the purpose of conducting public business, which appears to have been so.

With respect to notice, 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 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 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 an 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, 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, unless there is a basis for entry into an executive session. Paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may properly be discussed during an executive session. Under the circumstances described in your letter, it appears that none of the grounds for entry into executive session would have applied.

The second area of inquiry involves a request for payroll records and the custody of Town records generally.

First, section 30(1) of the Town Law states that the town clerk "[s]hall have the custody of all the records, books and papers of the town". Therefore, even though you, as town clerk, may not have physical possession of some town records, I believe that you have legal custody of the records.

Second, as we discussed, a payroll record of Town employees must be prepared and made available. Section 87(3) of the Freedom of Information Law states in relevant part that:

"Each agency shall maintain...

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6541
OML-AO-1903

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

March 22, 1991

Mr. Patrick E. Poleto
[redacted]

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

Dear Mr. Poleto:

I have received your letter of March 4 and the correspondence attached to it.

According to the materials, following your request for minutes of "workshop meetings" held by the Brunswick Town Board, you were informed by the Town Clerk that "recorded minutes are not taken at workshops". You have requested information concerning "requirements of taking minutes by the town clerk at town board meetings".

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, such a gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, regardless of its characterization. Further, so long as a work session is conducted in accordance with the requirements of the Open Meetings Law, I believe that votes could be taken at those gatherings. Moreover, in my opinion, since the Open Meetings Law applies equally to a work session and a 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 artificial.

Second, with respect to minutes of "work sessions", 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, occur during work sessions, I believe that minutes must be prepared indicating those actions and made available to the public.

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, a record, presumably minutes, must be prepared that indicates the manner in which each member cast his or her vote.

A copy of this opinion will be forwarded to the Town Clerk.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joan Rasmussen, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1904

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

March 26, 1991

Mr. Edward Januszewski
President
Citizens Review Board
61 Church Street
Amsterdam, NY 12010

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

Dear Mr. Januszewski:

I have received your letter of March 8 in which you requested an advisory opinion relating to the Open Meetings Law.

In your capacity as President of the City of Amsterdam Citizens Review Board, you have raised questions concerning the effect of the Open Meetings Law upon provisions of the City Charter pertaining to the Board. Section 19.12 of the Charter established the Board, which consists of three residents who are elected at large at a general election. The duties of the Board include the authority to:

> "A. To determine into all complaints against any elected or appointed officer or employee of the City of Amsterdam or against any specific procedure or any agency of city government, providing that such complaint is made in writing to the Chairman over the notarized signature of the complainant.
>
> B. To seek solutions privately, if possible, to problems alleged by a complaint by encouraging and assisting negotiations between the parties involved.
>
> C. To conduct informal hearings, cases where a complaint appears to have merit, at which the officer or employee against whom the complaint is made shall have opportunity to answer the complaint.

> D. To advise the Mayor or Common Council of any action the Citizens Review Board recommends in response to any complaint the board finds justified.
>
> E. To refer to any appropriate law enforcement, administrative or regulatory body any alleged misfeasance, nonfeasance of malfeasance by any officer or employee of the city of Amsterdam.
>
> F. To conduct investigations of any department, board, bureau, officer, or other agency of the city..."

In this regard, I offer the following comments.

First, 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."

Since the Board was created by law, I believe that it constitutes a public body required to comply with the Open Meetings Law.

Second, the Open Meetings Law requires that meetings of public bodies be conducted open to the public, unless there is a basis for entry into an executive session. Paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may properly be considered during executive sessions. I point out, too, that section 105(1) prescribes a procedure to be accomplished prior to conducting an executive session. 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..."

Third, I believe that three of the grounds for entry into executive session are likely relevant to the work of the Board. Those provisions authorize the holding of executive sessions to consider:

> "b. any matter which may disclose the identity of a law enforcement agent or informer;
>
> c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed...
>
> f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Based upon the foregoing, although the Board is in my view subject to the Open Meetings Law, I believe that it is permitted to conduct closed sessions to discuss the kinds of sensitive matters described in your letter.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6549
OML-AO-1905

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

March 28, 1991

Mr. Philip E. Zegarelli
Vice President
Manufacturers Hanover Trust Company
270 Park Avenue
New York, NY 10017

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

Dear Mr. Zegarelli:

I have received your letter of March 13, as well as copies of letters that you addressed to Vincent Iaconis, President of the Pocantico Hills Central School District. You have requested my comments concerning issues raised in those letters.

As you are aware, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. While certain issues raised in the materials relate to those statutes, others do not. Consequently, my remarks will be restricted to those areas that fall within the scope of the Committee's advisory jurisdiction.

According to one of the letters, although you attended a meeting of the Board of Education on March 4, "no mention was made nor announcement made that the entire school board had decided to attend the upcoming Pocantico Hills PTA meeting of Tuesday, 5 March 1991". You added that the President and other members of the Board "clearly spoke as officers and members of the school board" at the gathering with the PTA, and you contend that the Board engaged in a "moral, ethical and legal breech of the Open Meetings Law...".

In this regard, the Open Meetings Law applies to meetings of public bodies, and 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 vote or 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 correspondence, if the Board 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 others, such as the PTA.

It is noted, too, that in a recent decision, it was that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the council was asked to attend by a person who was not a member of the city council [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the gathering in question might have been held at the request of the PTA, I believe that it was a meeting, assuming that a quorum of the Board was present for the purpose of conducting public business, which appears to have been so.

The other issue relates to the propriety of mailings by the District and the contents of those publications. It appears that, in response to questions raised by you and others, the Board sought an opinion on the matter from its attorney, David Shaw. Although Mr. Shaw's opinion was disclosed, you requested a copy of the Board's "initiating request" to him, for it is your view "that Mr. Shaw was not provided with a summary of the relevant points [you] have consistently outlined to the School Board in order to enable Mr. Shaw to render a 'good faith' and unbiased opinion". You also wrote that "[w]ithout a copy of the outgoing or initiating request [you] cannot tell what the basis of Mr. Shaw's opinion is related to".

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

From my perspective, two of the grounds for denial may be relevant to rights of access to the record in question.

The initial 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 section 4503 of the Civil Practice Law and Rules, which concerns communications made pursuant to an attorney-client relationship and confers confidentiality with respect to those communications under certain circumstances.

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

Based on the foregoing, assuming that the privilege has not been waived, and that the record involves a request for legal advice from the Board's attorney, I believe that it 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 it has been stressed that the attorneyclient 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; 131 AD 2d 806 (1988)].

The other ground for denial of significance is section 87(2)(g), which permits an agency to withhold records that:

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

If the memorandum from the Board to Mr. Shaw does not consist of any of the categories of information described in subparagraphs (i) through (iv) of section 87(2)(g), it appears that it could be withheld.

Lastly, I point out that the Freedom of Information Law is permissive; although an agency may withhold records under appropriate circumstances, it may choose to disclose [see Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)]. Therefore, the Board could opt to waive the attorney-client privilege or determine to disclose intra-agency materials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Vincent Iaconis, Presidnet, Board of Education
Dr. Robert Morrison, Superintendent
David Shaw, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1906

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

March 28, 1991

Ms. Susan P. Hammond
[redacted]

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

Dear Ms. Hammond:

I have received your letter of March 11 in which you requested an advisory opinion "on the appropriateness of an action taken by the Town Board with regard to the Open Meetings Law."

According to your letter, on February 28, three of the four members of the Schroeppel Town Board "met with the Village Board and the Mayor of the Village of Phoenix ostensibly at the request of the Village Board to discuss a matter that was (and is) currently before both boards". Although notice of the meeting was posted at the Village Hall, "none was posted at the Town Hall", nor did notice appear in the newspaper. You added that no motions were made at the meeting and no action was taken.

In this regard, I offer the following comments.

First, the Open Meetings Law applies to meetings of public bodies, and 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 vote or 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 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 others, such as Village officials. I point out that it has been held that joint meetings held by two or more public bodies are subject to the Open Meetings Law [Oneonta Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)].

It is noted, too, that in a recent decision, it was that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the council was asked to attend by a city official who was not a member of the city council [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the gathering in question might have been held at the request of the Village, I believe that it was a meeting, assuming that a quorum of the Board was present for the purpose of conducting public business, which appears to have been so.

Second, with respect to notice, 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 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 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 an 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, 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, unless there is a basis for entry into an executive session. Paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may properly be discussed during an executive session. Under the circumstances described in your letter, it appears that none of the grounds for entry into executive session would have 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Schroeppel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1907

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

March 28, 1991

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

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

Dear Mr. Goetschius:

I have received your recent letter, which reached this office on March 15.

Your comments concern the implementation of the Open Meetings Law by the Board of Education of the Greenburgh Eleven Union Free School District. As you are aware, many of the issues that you raised were considered in an advisory opinion prepared at your request on January 10, 1990. Rather than reiterating the advice contained in that opinion, I will forward a copy to the Board for its reconsideration in an effort to enhance the members' understanding of the Open Meetings Law. Nevertheless, for purposes of emphasis, I offer the following comments.

First, section 105(1) of the Open Meetings Law requires that a public body accomplish a procedure before it may conduct an executive session. 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 upon the foregoing, a motion to enter into an executive session must be made and carried, during an open meeting, prior to entry into an executive session. For that reason, it has been advised that, in a technical sense, a public body cannot schedule an executive session in advance of a meeting.

Second, as indicated earlier, section 105(1) requires that a motion to conduct an executive session include reference to the subject or subjects to be discussed. While the Board might know what it intends to discuss, I believe that it is the intent of that provision to enable the public to know that there is indeed a proper basis for holding an executive session. Further, a public body cannot conduct an executive session to consider the subject or its choice; rather, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may properly be discussed behind closed doors. With respect to the degree of specificity of such a motion, I refer you and the Board to the earlier opinion, which includes a lengthy discussion of that issue.

Lastly, with regard to minutes, section 106 of the Open Meetings Law provides that:

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

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.

I point out that 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.

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). If no action is taken, there is no requirement that minutes of an executive session 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 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. Therefore, it is likely rare that a school board will have prepared minutes of its executive sessions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1908

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

April 2, 1991

Mr. Charles Woznick
Superintendent of Schools
Oystersponds Union Free School District
In Orient
Orient, NY 11957

The staff of the Committee 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. Woznick:

As you are aware, I have received your letter of March 22 and the correspondence attached to it.

You have requested advice concerning the appropriate manner to "list executive sessions on the agenda", and you asked "[w]hat should be explained to members of the audience when they question the particular executive session". The issues apparently arose because a resident has "asked for specific names of personnel when the Board moved to go into executive session". In addition, he questioned the propriety of an executive session held to discuss the manner in which caps and gowns were distributed to students.

In this regard, I offer the following comments.

First, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public

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

As indicated in the language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

Further, it has been consistently advised that, in a technical sense, 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; note: the Open Meetings Law was renumbered after Doolittle was decided].

Based upon the foregoing, I do not believe that an agenda indicating that a public body will conduct an executive session technically complies with the Open Meetings Law. However, the problem could easily be solved in my opinion by indicating in an agenda that a motion will be made to enter into executive session to discuss whatever the topic or topics might be.

Second, 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 matters", "negotiations", "labor relations" or "legal matters", 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 per- mitted 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 recom- mended 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, employ- ment, 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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

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, supra; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

A discussion involving caps and gowns generally would not in my opinion represent an appropriate topic for consideration in an executive session. However, if the issue involved the manner in which a particular member of staff carried our his or her duties in handling the distribution of caps and gowns, it is likely that the focus would have been on a "particular person" and that an executive session would have been proper.

With respect to "negotiations", 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 involving "labor relations" or "negotiations" would pertain to 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].

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 or matters involving "legal ramifications" could be reflective 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 or a legal issue involved.

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].

As you requested, enclosed are copies of explanatory pamphlets that describe the Open Meetings Law and the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6555
OML-AO-1909

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

April 3, 1991

Mr. Howard W. Ostrander
Mt. Upton, NY 13809

<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. Ostrander:

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

In brief, according to your letter, there has been controversy in the Town of Guilford concerning the number of justices there should be and whether there is a need to have a court clerk. In conjunction with those issues, a request was made under the Freedom of Information Law for "records of cases processed, recessed by docket number for year 1989 and 1990 to date, showing cases processed" within and outside the Town. Further, you specified that "Request is for total No. of cases only. Also by which judge". The request was initially denied, and you appealed. Although the appeal "has never been approved or denied", the town attorney advised you and the town clerk that "court dockets should be available". Nevertheless, you wrote that "Justice Vosburgh has denied any access to the dockets in his possession even after members of the town board had requested he do so...".

You added that in:

> "February 1991, a meeting of the town board was held without any notice to public to audit books of the Justice Vosburgh, at which Mr. Vosburgh and his wife were present and a discussion of the court activities took place. It is our opinion at this meeting, the town board agreed to appoint the wife of Justice Vosburgh to the position of Court Clerk to serve both justices even though paragraph 100.3 of Title 22 Judiciary

> states that a judge shall also refrain from recommending a relative for appointment or employment to another judge serving in the same court. Also, that prior approval of the chief administrator of the courts was not obtained.
>
> "At the February regular town meeting a motion was made, seconded and passed without any discussion by board members or our being allowed to present our concerns."

You have asked that this office "investigate this matter".

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. This office has neither the staff nor the resources to conduct an investigation, nor it is empowered to compel an agency to comply with law. Nevertheless, I offer the following comments and suggestions.

First, the Freedom of Information Law pertains to agency records, and section 86(3) of that statute defines the term "agency" to include:

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

In turn, section 86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

As such, the Freedom of Information Law does not apply to the courts or court records.

Second, the foregoing is not intended to suggest that court records are not public. On the contrary, as you are aware, various other statutes often grant substantial rights of access to those records. For instance, section 255 of the Judiciary Law generally requires court clerks to make available records in their possession; section 255-b of the Judiciary Law requires that "A docket-book, kept by a clerk of a court, must be kept

open during the business hours fixed by law, for search and examination by any person". Further, section 2019-a of the Uniform Justice Court Act specifies that "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public...".

Under the circumstances, it is suggested that you contact either the Office of Court Administration, who has general oversight of the court system, or the Commission on Judicial Conduct. The Office of Court Administration is located at the Empire State Plaza, Agency Building 4, Albany, NY 12223. The Commission on Judicial Conduct is located at 801 Second Avenue, New York, NY 10017.

Third, with respect to the unannounced meeting, I direct your attention to the Open Meetings Law. That statute pertains to meetings of public bodies, and 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 Division which dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

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

With regard to notice, 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."

While subdivision (3) of section 104 indicates that a public body need not pay to publish a legal notice prior to meetings, notice nonetheless must be given to the news media and posted prior to all meetings. In the case of a meeting scheduled at least a week in advance, I believe that the intent of section 104(1) is to ensure that the news media possess a notice of such a meeting a minimum of seventy-two hours prior to the meeting. Mailing a notice seventy-two hours before the meeting would in my view subvert the intent of the notice requirement, for the notice may not be received with adequate time to publicize a meeting. In short, if notice is mailed, I believe that mailing should occur far enough in advance that it could reasonably be expected to be delivered at least seventy-two hours before the meeting.

Finally, 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. In addition, 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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6566
OML-AO-1910

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

April 5, 1991

Ms. Mary C. Hayes
[redacted]

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

Dear Ms. Hayes:

I have received your letter of March 25 in which you requested a clarification of the Open Meetings Law.

In your capacity as a newly designated member of the Village of Northville Planning Board, you asked whether a "work session" is subject to the requirements of the Open Meetings Law and, if so, whether minutes of those gatherings must be prepared.

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 a public body meets to discuss public business, such a gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, regardless of its characterization. Further, so long as a work session is conducted in accordance with the requirements of the Open Meetings Law, I believe that votes could be taken at those gatherings. Moreover, in my opinion, since the Open Meetings Law applies equally to a work session and a 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 artificial.

Second, with respect to minutes of "work sessions", 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, occur during work sessions, I believe that minutes must be prepared indicating those actions and made available to the public.

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, a record, presumably minutes, must be prepared that indicates the manner in which each member cast his or her vote.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 1911

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

April 5, 1991

Ms. Debbe Gaskins
[redacted]

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

Dear Ms. Gaskins:

I have received your letter of March 20 in which you raised a series of requestions concerning the procedure for entry into executive sessions and the subject matter that may appropriately be considered during executive sessions.

In this regard, I offer the following comments.

First, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

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

As indicated in the language quoted above, a motion to enter into an executive session must be made by a member of a public body 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.

Second, 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 matters", "negotiations", "contracts" 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 <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. As such, a proper motion might be: "I move to enter into an executive session to

discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

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, Supreme Court, Chemung County, July 21, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; note: the Open Meetings Law was re-numbered after Doolittle was decided].

With respect to "contracts" or "negotiations", 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 involving "labor relations" or "negotiations" would pertain to 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].

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 or matters involving "legal ramifications" could be reflective 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 or a legal issue involved.

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].

You also asked whether "negotiating a police contract in executive session [would] qualify as action requiring minutes that must be made available to the public".

With regard to minutes, section 106 of the Open Meetings Law provides that:

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

In view of the foregoing, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. While a public body may choose to prepare detailed or verbatim minutes, the Law does not require that they be so expansive. 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. In the context of your question, if negotiations are ongoing and no action is taken or agreement reached, I do not believe that minutes of an executive session would be required.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOM2-AO-1912

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

April 9, 1991

Mr. Travis B. Plunkett
Senior Legislative Associate
New York Public Interest Research
Group, Inc.
184 Washington Avenue
Albany, NY 12210

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

Dear Mr. Plunkett:

As you are aware, I have received your letter of March 15 in which you requested an advisory opinion concerning the propriety of an executive session held by the State Board of Elections.

According to your letter, while in attendance at a meeting of the Board held on March 12, a motion was made to enter into an executive session. Although you assumed that the executive session would involve discussions of "final determinations on cases pending before the Board", you wrote that its Deputy Executive Director, W. Michael Losinger, "also announced that the Board would discuss 'litigation' while in executive session". You added that you believed that the term "litigation" related to "potential litigation strategy the Board might take in response to a recent order issued by the New York State Supreme Court which requires the Board to implement a voter registration program in state agencies".

You wrote that, on the following day during a discussion with Mr. Losinger, he told you that while in executive session, the Board discussed "whether or not to accept an offer extended by New York City to give the Board a large number of postage pre-paid voter registration forms for use in implementing the aforementioned voter registration program". Although Mr. Losinger indicated that the matter was part of a discussion about litigation, it is your view that "New York City's offer to the

Board is clearly a topic relating to how the Board will implement this voter registration program". You added that the Board discussed several issues relating to the implementation of the program during the open portion of the meeting, "including where voter registration assistance would be provided and when the program would be fully operational".

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, a meeting of a public body, such as the Board, must be conducted in public, except to the extent that the subject matter under consideration may appropriately be discussed during an executive session. Paragraphs (a) through (h) of the Open Meetings Law specify and limit the subjects that may validly be considered in an executive session.

Second, relevant under the circumstances is section 105(1)(d), which permits a public body to enter into executive session to discuss "proposed, pending, or current litigation". In construing section 105(1)(d), it has been held that "[T]he purpose of the foregoing exception was to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings" [Concerned Citizens to Review the Jefferson Valley Mall v. Town Board of the Town of Yorktown, 83 AD 2d 612, 613; appeal dismissed, 54 NY 2d 957 (1981); see also Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the judicial construction of section 105(1)(d), a public body may conduct an executive session under that provision to discuss its "litigation strategy". Therefore, insofar as the Board considered litigation strategy in conjunction with the lawsuit in question, the executive session in my opinion would have been validly held. However, the discussion of New York City's offer to the Board, although perhaps related to the lawsuit, did not apparently involve consideration of the Board's strategy in the lawsuit. If my assumption is accurate, that portion of the executive session would appear to have been inappropriately held.

Lastly, for future reference, 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 the 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, to be discussed during the executive session. Only through such an identification will the purpose 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)].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: W. Michael Losinger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6571
OML-AO-1913

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

April 9, 1991

Mr. Michael Kharfen
Director
New York City Office of the Mayor
Community Assistance Unit
51 Chambers Street
New York, New York 10007

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

Dear Mr. Kharfen:

I have received your letter of March 29 in which you requested a "clarification concerning the requirement that New York City Community Boards conduct their elections of officers by open ballot."

Specifically, you referred to a statement in a decision rendered by the Appellate Division, Fourth Department, in which the Court held that: "When action is taken by a formal vote at open or executive sessions, the Freedom of Information Law and Open Meetings Law both require open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)]. Your question relates to "the definition of 'open voting', and if it requires that people attending meetings of public bodies must see how its members vote, or if it is sufficient to simply see them vote" (emphasis yours). As such, you asked whether "the use of signed paper ballots in the election of Community Board officers during an open meeting would meet the definition".

In this regard, I do not believe that the issue has been specifically addressed judicially. It might be contended, based upon the legislative declaration appearing at the beginning of the Open Meetings Law, that the public has the right to "observe" the manner in which members of public bodies vote at open meetings. The first sentence of the declaration states that:

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

While the ability to "observe the performance of public officials" might be construed to confer the right to "see how members of public bodies vote, it is clear in my view that situations arise in which the public has no right to see or watch how members of public bodies cast their votes. As you are aware, section 105(1) of the Open Meetings Law permits a public body to vote during an executive session properly held, except that "no action by formal vote shall be taken to appropriate public moneys". Further, section 106(2) of the Law pertains to minutes of executive sessions and refers to "action that is taken by formal vote" during executive sessions. Although section 87(3)(a) of the Freedom of Information Law read in conjunction with the Open Meetings Law requires that a record be prepared indicating how each member cast his or her vote, a vote taken in executive session occurs behind closed doors. Therefore, the public has the right to know how members of public bodies voted, but there would be no right to watch the members while they cast their votes.

Based upon the foregoing, it is my view that the use of "signed paper ballots" used to vote would be permissible.

I hope that I 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-1914

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

April 9, 1991

Hon. Edward Friedman
Councilman
Town of Ramapo
[redacted]

<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 Councilman Friedman:

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

In your capacity as a member of the Ramapo Town Board, you wrote that certain Town officials other than members of the Board routinely attend executive sessions. Recently, however, an issue arose in which you believed that the only persons in attendance at the Board's executive session should have been the members of the Board. As such, you raised a series of questions concerning attendance at executive sessions.

In this regard, I offer the following comments.

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 only persons who have the right to attend an executive session are the members of the public body conducting the meeting. Concurrently, the "public body" may authorize others to attend.

In my view, the public body under the circumstances would be the Town Board. I do not believe that a town supervisor or any individual member of a town board could unilaterally determine to permit attendance at an executive session by persons other than board members. Rather, I believe that the board as a whole, presumably be means of a majority vote, would determine whether persons other than board members could attend an executive session.

I believe that the preceding commentary is consistent with the provisions of the Town Law. Specifically, section 63 states in relevant part that: "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board".

I hope that I 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-6575
OML-AO-1915

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

April 11, 1991

Mr. Matthew Lee
Director and Editor
Inner City Press/Homesteaders
P.O. Box 416
Hub Station
Bronx, NY 10455

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

Dear Mr. Lee:

I have received your letter of March 28 addressed to the Committee on Open Government. As indicated above, the staff of the Committee is authorized to advise on its behalf.

In conjunction with the materials attached to your letter, you asked that certain agencies be advised of their responsibilities under the Freedom of Information Law.

The first issue appears to involve a failure on the part of agencies to respond to requests in a timely manner. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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)].

A second issue involves minutes of meetings of public bodies. With regard to minutes, section 106 of the Open Meetings Law provides that:

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

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. While a public body may choose to prepare detailed or verbatim minutes, the Law does not require that they be so expansive. 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.

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, a record, presumably minutes, must be prepared that indicates the manner in which each member cast his or her vote.

The third issue involves contracts awarded by an agency and related materials, as well as other unspecified records. In this regard, 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. As such, the nature of records and the effects of their disclosure are the factors used in determining rights of access. In my view, several of the grounds for denial may be relevant to such determinations.

With respect to contracts and related records, of greatest significance is section 87(2)(c), which enables an agency to withhold records that:

> "if disclosed would impair present or imminent contract awards or collective bargaining negotiations..."

After a contract has been signed, disclosure would not impair the process by which it is reviewed or awarded. As such, contracts, as well as proposals must, in my view, generally be made available if those agreements have been consummated [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (1980)].

Also relevant may be section 87(2)(g), which enables 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.

Lastly, although I am unaware of the nature of the records in question, you referred in your request to "squatters" and others. In this regard, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy".

As you requested, copies of this opinion will be forwarded to the agencies in receipt of your requests.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: District Manager, Community Board #3
Appeals Officer, Community Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6585
OML-AO-1916

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

April 12, 1991

Ms. Martha L. Weale
[redacted]

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

Dear Ms. Weale:

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

According to your letter, on March 15, you requested minutes of a meeting of the Village of Addison Board of Trustees held on February 11. However, the clerk refused to honor your request. You added that the minutes of the meeting were amended to correct an error in a figure and approved at a meeting held on April 1.

You have asked that I prepare an opinion "on the fact that February 11th minutes which had to contain data regarding Proposition #1 relative to purchase of a pumper fire truck for a ballot for the March 19th election were not approved by the Village Board 'til April 1, 1991".

In this regard, your letter does not contain sufficient information to comment with respect to the specific matter quoted above, other than that minutes were apparently not approved until some six weeks after a meeting. Nevertheless, I offer the following remarks concerning minutes, their contents and requirements relating to their disclosure.

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 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. The Open Meetings Law is silent with respect to the approval of minutes, and the language of section 106(3) is clear, in that minutes must be made available "within two weeks of the date of such meeting".

Second, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved," "draft" or "non-final," for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Third, reviewing the issue from a different vantage point, the Freedom of Information Law makes no distinction between drafts as opposed to "final" documents. The Law pertains to all agency records, and section 86(4) defines that term "record" to mean:

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

Due to the breadth of the language quoted above, once a document exists, it constitutes a "record" subject to rights of access, even if the record is characterized as "draft" or is unapproved. Further, as a general matter, minutes consist of a factual rendition of what transpired at an open meeting. On that basis, I believe that they are accessible [see Freedom of Information Law, section 87(2)(g)(i)]. Further, minutes often reflect final agency determinations, which are available under section 87(2)(g)(iii), irrespective of whether minutes are "approved". Additionally, in the case of an open meeting, during which the public may be present and, in fact, may tape record the meeting [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], there would appear to be no valid basis for withholding minutes, whether or not they have been approved.

As you requested, copies of this opinion will be forwarded to the parties identified in your letter, and to the Village Clerk.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Editor, The Addison Post
Larry Wilson, The Star Gazette
Editor, The Leader
Peter Weale
Dan Sheridan, Editor, Steuben Courier/Advocate
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1917

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

April 17, 1991

Ms. Barbara Weinschenk
[redacted]

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

Dear Ms. Weinschenk:

I have received your letter of April 3, as well as related materials.

According to your letter, the Warren County Board of Supervisors in February established an "Ad Hoc Committee on the Proposed Convention Center consisting of three of its members". It is your belief that the Committee in question has held meetings without providing notice of the time and place of those meetings. You added that the County Administrator has indicated that he does not believe that meetings of the Committee must be conducted in public. Further, you forwarded a copy of a memorandum prepared by the County Attorney in which it was advised that the Committee is not a public body subject to the Open Meetings Law.

In this regard, I offer the following comments.

It is noted at the outset that recent decisions indicate generally that entities consisting of persons other than members of public bodies 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, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

Nevertheless, with respect to committees consisting of members of public bodies, 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" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee 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 three, for example, a quorum would be two.

Further, 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)].

Lastly, 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 and, in my opinion, the committee in question.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Harold E. Robillard, Clerk/Administrator
T.M. Lawson, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1918

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

April 24, 1991

Mr. Kevin F. Hilbert
[redacted]

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

Dear Mr. Hilbert:

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

According to your letter:

> "In the Fall of 1990, the members of the Clermont Town Board met at the residence of one town board member to discuss and prepare the budget for the upcoming fiscal year. One board member said that no town business was conducted. A second member said that this type of work session is done on the county level and the public is not permitted to attend."

In this regard, I offer the following comments.

First, 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.

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, 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 a meeting could, in my view, be properly conducted during an executive session pursuant to section 105(1)(f).

In an effort to enhance the understanding of the Open Meetings Law, a copy of this opinion will be forwarded 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Clermont Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1919

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

April 24, 1991

Mr. James Heizman
[redacted]

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

Dear Mr. Heizman:

I have received your letter in which you raised a question concerning the Open Meetings Law.

Since two people were "turned away" when they attempted to attend a "policy committee" meeting, you asked whether "Board of Education Committee meetings" must be conducted open to the public.

In this regard, I offer the following comments.

It is noted at the outset that recent decisions indicate generally that entities consisting of persons other than members of public bodies 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, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

With respect to committees consisting of members of public bodies, 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" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee 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 three, for example, a quorum would be two.

If the entity in question is a public body, its meetings must be conducted open to the public to the extent required by the Open Meetings Law. In brief, the Law is based upon a presumption of openness. Stated differently, meetings must be held open to the public, unless the subject matter of discussion may appropriately be considered during an executive session. Paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify the grounds for entry into executive session.

Lastly, if the entity is not a public body but holds its meetings on school property, section 414 of the Education Law may require that its meetings be held in public. That provision enables a board of education to authorize school property to be used for certain purposes, such as:

> "For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public" [section 414(1)(c)].

Enclosed is a copy of 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6592
OML-AO-1920

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

April 24, 1991

Ms. Marie A. Coville
Town Clerk
Town of Schroeppel
Box 9B - RD #1
Route 57A
Phoenix, NY 13135

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

Dear Ms. Coville:

I have received your letter of April 8 in which you raised a series of questions in your capacity as Town Clerk of the Town of Schroeppel.

The first concerns an executive session held by the Town Board on April 4. You wrote that, on the next day, the acting supervisor told you that the Board "had decided to give [your] full time deputy a certain duty...". However, the Board apparently took no minutes reflective of its action, and you asked how you "handle this as no minutes are ever kept".

Before responding to your specific question, it is my opinion that the discussion of the matter in question likely should not have been held during an executive session. In my view, the only ground for entry into executive session of possible relevance would have been section 105(1)(f). That provision permits a public body to conduct an executive session to discuss:

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

Insofar as the Board discussed policy relating to the duties of a person or persons serving as deputy clerk, I do not believe that there would have been a basis for conducting an executive session. On the other hand, to the extent that the discussion focused on a "particular person" and whether that person was qualified to perform certain duties, I believe that the executive session was properly held.

With respect to your question, in my opinion, minutes reflective of the Board's decision should have been prepared, and that as clerk, you have the duty to prepare them. As you are aware, section 30(1) of the Town Law specifies that the town 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...". In my opinion, section 30 of the Town Clerk is intended to require the presence of the clerk to take minutes in situations in which motions and resolutions are made and in which votes are taken.

To give effect to both the Open Meetings Law and section 30 of the Town Law, which imposes certain responsibilities upon a town clerk, it is suggested that there may be three options available when a matter is discussed and voted upon in executive session. First, the Town Board could permit you to attend an executive session in its entirety. Second, the Town Board could deliberate during an executive session without your presence. However, prior to any vote, you could be called into the executive session for the purpose of taking minutes in conjunction with the duties imposed by the Town Law. And third, the Town Board could deliberate toward a decision during an executive session, but return to an open meeting for the purpose of taking action.

Further, the Open Meetings Law includes requirements concerning minutes and the time within which they must be prepared and made available. 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."

Under the circumstances, assuming that there is an accurate rendition of the Board's action, it is suggested that you prepare minutes indicating the nature of the action taken, the date, and the vote of each member.

Your second question involves "the current rule on tape recorders" and how long tape recordings of meetings must be kept.

In this regard, the Freedom of Information Law is applicable to all agency records, and 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.

Further, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more 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, NYLJ, December 27, 1978].

Finally, it is noted 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 with the Commissioner's consent. Having contacted the Education Department, I have been informed that tape recordings of meetings must be retained for a period of four months after transcription and/or approval of minutes.

Third, you asked whether you must keep a list of those numbers of the public who request records or require them to complete a form when requesting records. There is no requirement that any such list be prepared. Further, although an agency may require that members of the public request records in writing, the regulations promulgated by the Committee on Open Government state that records may be made available pursuant to an oral request. In short, there is no specific requirement that a list or other record be prepared to identify those who made requests under the Freedom of Information Law.

Your final question involves the number of "deputy supervisors" there may be. In this regard, since the issue does not involve the Freedom of Information Law or the Open Meetings Law, I have neither the expertise nor the authority to provide advice.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1921

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

May 2, 1991

Mr. Peter Fanelli
[redacted]

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

Dear Mr. Fanelli:

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

According to your letter:

> "On February 27, 1991 at a meeting of the Town of Poughkeepsie, N.Y. Town Board an item scheduled for discussion was the presentation of a bill by Royde and Soyka, Consulting Engineers for work performed on behalf of the Town relative to the Tri-Municipal Sewer expansion.
>
> "Residents objected to the payment of those additional funds as the billed work performed appeared to fall within the scope of the contract originally negotiated. As a matter of fact, the work for which they had already received payment did not appear to be complete.
>
> "It was surprising when Supervisor David Hinkley announced that the question of payment would be determined in executive session because the issue fell under the realm of 'personnel matters'.

> "It is unclear how broadly the State interprets the definition of personnel. One might have reasonably expected a paid employee to fall into this category but not an independent contractor such as an engineer, in this case, or an electrician or other tradesperson.
>
> "After the executive session the Board immediately voted to pay the bill with no explanation."

You have questioned the propriety of the executive session held by the Board.

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent the subject matter under consideration falls within the grounds for entry into an executive session. Paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may properly be discussed during an executive session.

Second, it is emphasized that the term "personnel" appears nowhere in the Open Meetings Law. Although that term is often referenced, I believe that its use is misleading, for some matters concerning personnel may properly be discussed during executive sessions, while other matters may not; further, the exception that is generally cited to discuss personnel matters is not restricted to the issues involving employees, whether current or prospective.

The so-called "personnel" exception, section 105(1)(f), permits a public body to conduct an executive session to discuss:

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

In the context of the situation described, to the extent that the discussion involved the firm's employment, credit or financial history, or perhaps a matter leading to its dismissal, which appears to have been unlikely, I believe that the executive session was properly held. On the other hand, insofar as the dis-

cussion involved other considerations or whether to approve payment and did not involve the subject matter described in section 105(1)(f), in my opinion, there would not have been a basis for conducting an executive session.

I hope that the I have been of assistance and that the foregoing serves to clarify your understanding of the Open Meetings Law. In an effort to enhance compliance, a copy of this opinion will be forwarded to the Town Board.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Poughkeepsie

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4604
OML-AO-1922

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

May 3, 1991

Mr. Tony Bullock
Supervisor
Town of East Hampton
159 Pantigo Road
East Hampton, NY 11937

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

Dear Mr. Bullock:

I have received your letter of April 16 in which you raised a question concerning the Open Meetings Law. I point in good faith that I have also received correspondence from Helen S. Rattray and Jack Otter of the East Hampton Star relating to your letter and in which they, too, raised questions involving the Open Meetings Law, particularly in conjunction with activities of the East Hampton Town Board. Copies of this opinion and that prepared at the request of the Star will be sent to you and the Star.

With respect to the question that you raised, by way of background, you wrote that "[a]s with many town boards throughout the State, most of [y]our practices are the result of traditional ways of doing things handed down for many years". You added that the East Hampton Town Board conducts regularly scheduled, formal meetings during which votes are taken and minutes are prepared by the clerk; work sessions, which are also known as informal meetings or "brown bags", which the clerk generally does not attend or take minutes; and special meetings.

You wrote that the question relates to the Board's work sessions and indicated that:

> "The specific problem at issue here stems from the practice of going into executive session on Tuesday afternoon following the open portion of our work sessions. No minutes of these meetings are taken. No resolutions are adopted.

> The Town Clerk is not present. No roll call is taken. In short, no record really exists of the work sessions at all. They are, however, public, open meetings, held on a regular schedule and attended regularly by the press and noted in the calendar of the official newspaper."

Based on the foregoing, you raised the following question:

> "May the Town Board by voice vote after stating the nature of the items to be discussed, convene an executive session at the conclusion of a regularly scheduled work session?"

In this regard, although the question is brief and straightforward, several issues are involved. In this regard, I offer the following comments.

First, the problem in my view emanates from tradition, which may be longstanding, but which may not be consistent with law. 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 a public body meets to discuss public business, such a gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, regardless of its characterization. Further, so long as a work session is conducted in accordance with the requirements of the Open Meetings Law, I believe that votes could be taken at those gatherings. Moreover, in my opinion, since the Open Meetings Law applies equally to a work session and a 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 artificial.

Second, with respect to minutes of "work sessions", 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, occur during work sessions, I believe that minutes must be prepared indicating those actions and made available to the public. It is also noted that section 30 of the Town Law requires the clerk to "attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting...". Therefore, if there is a possibility that any of the events required to be recorded under section 106 will occur at a work session (including a motion to enter into executive session), I believe that the clerk must be present for the purpose of taking minutes.

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 (again, including a vote on a motion to conduct an executive session), a record, presumably minutes, must be prepared that indicates the manner in which each member cast his or her vote.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Helen S. Rattray
Jack Otter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1923

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

May 6, 1991

Mr. Richard Klein
[redacted]

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

Dear Mr. Klein:

I have received your letter of April 19 in which you asked whether you are "entitled to observe an obtain details of certain Allegany County - Cattaraugus County meetings."

By way of background, you indicated that Allegany County "is seeking a Solid Waste Disposal arrangement". You added that:

> "More than one vendor of Solid Waste Disposal is active in this area, including Allegany County itself, Cattaraugus County, and CID, a commercial firm.
>
> "Allegany County is meeting with Cattaraugus County about the disposal of waste. [You] have examined the minute books, and there are mentions of meetings, closed, both as Executive Sessions and as Lawyer-Client consultations. No subjects are given. [You] have witnessed the approval of payment authorization for 'committee day' pay but find no mention of the meetings in the public record."

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 include:

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

Based on the foregoing, a county legislature and committees or subcommittees consisting of members of a county legislature would in my view constitute public bodies required to comply with the Open Meetings Law. Further, if a quorum of a public body convenes for the purpose of conducting public business, such a gathering would constitute a meeting that falls within the requirements of the Open Meetings Law.

Second, as a general matter, the Open Meetings Law is based on a presumption of openness, and meetings must be conducted open to the public. However, the Open Meetings Law provides two vehicles under which a public body may meet in private. One is the executive session, a portion of an open meeting that may be 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)].

In my opinion, to the extent that a discussion between a public body and its attorney involves the seeking of legal advice, the communications would be privileged and, therefore, exempt from the Open Meetings Law, unless the privilege is waived. If a committee of a county legislature is meeting with its attorney and representatives of a different county or a firm, for example, I do not believe that the discussion would be privileged, for the presence of the representatives of the other county or the firm would constitute a waiver of the attorney-client privilege.

Further, after legal advice has been given, and a public body deliberates with respect to an issue, the privilege is no longer applicable, and the deliberations must in my opinion be conducted in accordance with the Open Meetings Law. Stated differently, the deliberations must occur in public, unless there is a basis for entry into an executive session.

With regard to the Open Meetings Law generally and the authority to conduct executive sessions, I point out that 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..."

In addition, 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, and an executive session must be preceded by a motion that indicates the subject or subjects to be discussed during an executive session.

Lastly, section 106 of the Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements concerning the contents of minutes. Subdivision (1) of section 106 pertains to minutes of open meetings and states that:

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

In view of the foregoing, minutes of meetings must, at a minimum, contain the types of information described above. It is emphasized that there is nothing in the law that precludes a public body 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; pro-

> vided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

It is noted that if 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 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 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.

I hope that I 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. Delores Cross
Hon. Don Winship

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1924

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

May 6, 1991

Ms. Ellen G. Desmond
[redacted]

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

Dear Ms. Desmond:

I have received your letter of April 12, as well as the materials attached to it. Please note that your correspondence did not reach this office until April 23.

You have requested an advisory opinion concerning compliance with the Open Meetings Law by the Bayport-Bluepoint School District Board of Education. It is your view that the Board has engaged in "repeated violations of the Open Meetings Law" and you focused upon a number of specific incidents, several of which relate to discussions of matters pertaining to the District's budget during executive sessions. Other issues involve the location of meetings and the sale of "district real estate".

In this regard, I offer the following comments.

First, 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 or building that is accessible to handicapped persons rather than a second floor room or building, I believe that the meetings should be held in the room or building that is most likely to accommodate the needs of people with handicapping conditions.

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media 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 an advance, again, notice of the time and place 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, as in the case of an emergency, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Third, having reviewed minutes of Board meetings, executive sessions have been held to discuss "personnel", "specific personnel", "real estate", "negotiations", and "legal matters".

As you are aware, the Open Meetings Law contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

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

Therefore, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

Further, 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 "legal matters", for example.

It is noted at the outset that the word "personnel" appears nowhere in the Open Meetings Law, and that 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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

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, Supreme Court, Chemung County, July 21, 19981]; 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].

As section 105(1)(f) relates to matters concerning the budget review process, issues of policy, such as those involving the allocation of public moneys, must in my opinion generally be discussed in public. Discussion of the abolishment of position, for example, could not likely be considered during an executive session. In brief, only when an issue focuses upon a "particular person" in conjunction with one or more of the topics specified in section 105(1)(f) can an executive session be properly held pursuant to that provision.

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 legal matter or 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].

Since you referred to a matter involving "real estate", I point out that not every issue involving real estate may properly be discussed behind closed doors, for section 105(1)(h) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

In short, the topics that may be discussed during executive sessions are limited. Further, based upon case law, the motions for entry into executive sessions should not be vague.

Lastly, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law section 105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to section 106(2). If no action is taken, there is no requirement that minutes of an executive session 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 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, modi-

fied 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 and understanding of 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education, Bayport-Blue Point School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6609
OML-AO-1925

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

May 6, 1991

Mr. Bernard J. Blum
President
Rockaway Bay Sierra Club Task Force
[redacted]

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

Dear Mr. Blum:

I have received your letter of April 11, as well as the materials attached to it. Please note that your correspondence did not reach this office until April 22.

You asked that I "evaluate the argument" made by Vincent S. Castellano, Chairman of Community Board No. 14, in a letter to Nicholas Garaufis, Counsel to the Queens Borough President, concerning the requirements imposed by the Freedom of Information Law relative to voting by members of community boards. You also raised a question concerning the adequacy of notice given prior to a "special meeting" of the Community Board.

In this regard, contentions concerning the possibility that members of community boards may elect their offices by secret ballot have been the subject of several opinions, and I do not believe that there is any need to reiterate points offered previously. However, I would like to address some of Mr. Castellano's comments.

In what is characterized as issue 4 in his letter, Mr. Castellano wrote that:

> "The members of Community Board 14 believe that disclosing a vote is 'an unwarranted invasion of personal privacy'. Refer to FOIL section 89.2(b)(iv). It specifically refers to 'personal hardship'."

The provision to which Mr. Castellano alluded represents one among a series of examples of unwarranted invasions of personal privacy and specifically refers to:

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it..."

From my perspective, the manner in which a member of a public body casts his or her vote in the performance of that person's official duties is clearly relevant to the work of the agency, in this case a community board. Further, in view of the general intent of the Freedom of Information Law to ensure governmental accountability, there is in my opinion hardly a matter more significant to accountability than enabling the public to know how its representatives vote on a given issue, even if the issue relates to the selection of leadership of a governmental entity. In addition, there are numerous judicial decisions that pertain to the privacy of public employees. In brief, the courts have held that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. Moreover, with respect to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of their official duties are available, for disclosure in such 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, supra; Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, supra]. Again, I believe that the vote cast by a member of a community board is clearly relevant to the performance of that person's duties.

Mr. Castellano also referred to a number of opinions that authorized secret ballot voting and questioned "the sudden switch in policy". As indicated in earlier correspondence, the "open vote" provision of the Freedom of Information Law has been in effect since that statute was enacted in 1974. Insofar as policies might have authorized community boards to elect officers via secret ballot, those policies were in my view inconsistent with a requirement imposed by a statute. In my opinion, there has been no "sudden switch in policy"; rather, there has been a recent recognition of a requirement of law.

With respect to notice of meetings, section 104 of the Open Meetings Law prescribes notice requirements applicant 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 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 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.

It is noted that the Open Meetings Law does not require that the notice include reference to an agenda or the topics to be discussed. Further, although the Law requires that notice be provided to the news media, there is no requirement that the news media must publish or publicize notice of a meeting.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Nicholas Garaufis, Counsel to the Borough President
Vincent S. Castellano, President
Michael Kharfen, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1926

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

May 6, 1991

Ms. F.J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of April 19.

According to your letter, the Board of Trustees of the New York City Teachers' Retirement System conducted a meeting on March 28. Having requested the minutes of the meeting, you wrote that they were not available. You have asked that I address the issue and send copies of my response to the executive director of the Retirement System and to the Adler Reporting Service.

In this regard, I offer the following comments.

First, the Open Meetings Law provides direction concerning minutes, their contents and the time within which they must be prepared and disclosed. 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 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 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.

While there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved, 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.

Second, since you referred to a reporting service, it appears that the Retirement System has engaged a firm to prepare a verbatim record of its meeting. Here I point out that subdivisions (1) and (2) of section 106 of the Open Meetings Law prescribe what may be viewed as minimum requirements concerning the contents of minutes. While a verbatim transcript may be prepared, minutes need only consist of the information described in those subdivisions.

As you requested, a copy of this opinion will be forwarded to the Retirement System's executive director. I choose not to forward a copy to the reporting service, for the Board of Trustees, rather than the service, is the entity responsible for complying with the Open Meetings Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald S. Miller, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1927

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

May 7, 1991

Ms. Helen S. Rattray
Mr. Jack Otter
The East Hampton Star
153 Main Street
P.O. Box E
East Hampton, NY 11937

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

Dear Ms. Rattray and Mr. Otter:

I have received your letter of April 22, which you prepared after receiving a copy of a request for an advisory opinion by Tony Bullock, Supervisor of the Town of East Hampton. In brief, Supervisor Bullock's inquiry involved the status of "work sessions" under the Open Meetings Law and requirements concerning the preparation of minutes.

You have raised a series of issues concerning executive sessions held by the Town Board. Specifically, you wrote that:

> "It has long been the practice of the board to hold informal meetings on Tuesday mornings and, at the conclusion of 'public' business, close the doors for executive sessions without voting or announcing the topics of discussion.
>
> "On March 26, during a special meeting of the board, an executive session was called. When asked, the board cited a 'personnel matter' as the reason for closing its doors. Town Councilman Tom Ruhle later reported that the discussion had centered on the allocation of office space, specifically how board members would share the recently vacated town assessor's office. The

> fact that two secretaries did not get along was mentioned. The board was not discussing matters leading to the hiring, firing, promotion or demotion."

In addition, on another matter, you indicated that:

> "The board was considering the purchase of a wetland lot whose owner hoped to build on the land, after the local Zoning Board of Appeals had recommended the town purchase the lot. The owner sent an attorney to the Town Board to make his case for allowing development. At the request of a Star reporter, and the agreement of the attorney, Supervisor Bullock allowed the press to remain. But when the presentation was finished, the board kicked out the press, to discuss whether or not to acquire the lot.
>
> "It was well-known by both parties that the town was considering purchasing the parcel and it seems inconceivable that disclosure of the board's reasoning could substantially affect the value. Last Friday, with no prior public discussion, the board passed a resolution rejecting the recommendation to purchase the lot."

You also wrote that:

> "The board routinely discusses employees' requests for leaves of absence in executive sessions. Is there any justification for that, especially if the request is not because the person has AIDS or is doing a lousy job?"

In this regard, I offer the following comments.

First, in the opinion prepared at the request of Supervisor Bullock, it was advised that the Open Meetings Law does not distinguish among what may be characterized as formal meetings, informal meetings, work sessions or special meetings. In brief, in a decision affirmed later by the Court of Appeals more than a decade ago, it was essentially held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law

[see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The decision focused upon so-called "work sessions" and similar gatherings and specified that such gatherings are meetings, even if there is no intent to vote or take action, and irrespective of the manner in which the gatherings are denominated.

Second, section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Therefore, an executive session is not separate from an open meeting; rather, it is part of an open meeting.

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:

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

Therefore, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

Further, 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 matters", for example.

It is noted that the word "personnel" appears nowhere in the Open Meetings Law, and that 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 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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

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, Supreme Court, Chemung County, July 21, 19981]; 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].

In the context of the situations described in your letter, I do not believe that discussions concerning the allocation of space could justifiably have been considered during an executive session. As suggested earlier, the language of section 105(1)(f) is quite specific and unless an issue focuses upon a particular person or persons in conjunction with one of more of the topics described in that provision, it cannot be asserted as a basis for conducting an executive session. It is possible that a dispute between staff members might in part involve a discussion of their

employment histories or perhaps matters leading to disciplinary action. To that extent, an executive session might properly be held. However, a discussion of "personalities", without more, would not likely qualify for consideration in executive session. Similarly, with respect to requests for leaves of absence, the nature of the discussion would determine whether or the extent to which an executive session could validly be held. An application for leave due to health related matters could in my view be discussed behind closed doors; other, more routine matters likely could not.

Lastly, not every issue relating to the transfer of real property could appropriately be discussed in executive session. I direct your attention to section 105(1)(h), which permits a public body to enter into executive session to discuss:

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

Based upon the foregoing, the question is whether publicity would "substantially affect" the value of the property. When the location of a parcel and the parties are known to the public, it is doubtful in my view that, under those circumstances, public discussion would substantially affect the value of the property. On the other hand, if, for example, the Town is seeking to purchase a parcel, the location of which is unknown to the public, an executive session might properly be held, for publicity in that instance might have a significant impact upon its value.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Tony Bullock, Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6612
OML-AO-1928

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

May 8, 1991

Mr. Myron Wander
[redacted]

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

Dear Mr. Wander:

As you are aware, I have received your letter of April 22.

You alluded to a telephone conversation in which we discussed certain issues relating to matters brought before a town board of ethics. You have asked that I "confirm" the following points in conjunction with consideration of "a question of violation" of a town code of ethics:

> "1. The Board of Ethics must prepare written Minutes of its meetings on the possible violation and the Minutes must be made available to the extent required by the Freedom of Information Law.
>
> 2. The Board of Ethics makes its recommendations to the Town Board, and the Town Board then makes the determination as to whether the Code of Ethics was violated.
>
> 3. The Town Board must prepare written Minutes of its meetings on the matter and the Minutes must be made available to the extent required by the Freedom of Information Law.
>
> 4. The Town Board must make its determination public.

> 5. A request can be made to the Town Board for this determination under the Freedom of Information Law and the Town Board must comply with the request within five (5) business days."

First, I believe that municipal boards of ethics generally perform in an advisory capacity. While a board of ethics might deal initially with a complaint or allegation that a code of ethics has been violated, I believe that the board would be authorized to advise or recommend to a governing body, such as a town board. The governing body would then be authorized to render a final determination.

Second, I direct your attention to the Open Meetings Law. That statute 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."

A town board of ethics in my view is subject to the Law, for it is created by a town board, it consists of at least two members, it may conduct its business only by means of a quorum (see General Construction Law, section 41), and it conducts public business and performs a governmental function for a public corporation, a town. Further, the definition makes a specific reference to committees, subcommittees and "similar" bodies.

Although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally by conducted open to the public, section 105(1) of the Law lists eights grounds for entry for entry into executive session.

Relevant to the duties of a board of ethics 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.

With regard 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 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 no action is taken, there is no requirement that minutes of an executive session be prepared. It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. For reasons to be discussed in the ensuing commentary, records concerning a proceeding before a board of ethics or a town board might justifiably be withheld under the Freedom of Information Law, depending upon the contents of those records.

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. Two of the grounds for denial are, in my opinion, relevant to rights of access to the records sought.

A recommendation in the form of minutes of an executive session held by a board of ethics and transmitted to a town board could be characterized as "intra-agency material." Section 87(2)(g) of the Freedom of Information Law pertains to such materials 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, 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. As such, minutes reflective of a recommendation offered to a town board by a board of ethics could in my view likely be withheld as intra-agency material.

Also relevant is section 87(2)(b), which enables an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although that standard is flexible and reasonable people may have different views regarding privacy, the courts have provided significant direction, particularly with respect to the privacy of public officers and employees. It has been held in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than others. Further, with respect to the Freedom of Information Law, it has generally been determined that records pertaining to public employees that are relevant to the performance of their duties are available, for disclosure in those instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Powhida v. City of Albany, 147 AD 2d 236 (1989); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981]. Conversely, to the extent that records or portions of records are irrelevant to the performance of one's official duties, it has been held that section 87(2)(b) may appropriately be asserted [see Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, November 22, 1988 and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

Therefore, if a town board renders a final determination to the effect that the code of ethics has been violated or that a public officer or employee has engaged in misconduct, I believe that minutes reflective of that determination, including the name of the officer or employee involved, must be disclosed. However, if it is found that the officer or employee has not violated the

code of ethics or otherwise engaged in misconduct, any such finding could in my view be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, unless the name of the person and his or her involvement in the proceeding had previously been disclosed.

Lastly, assuming that a determination is accessible under the Freedom of Information Law and is contained in minutes of a meeting, as indicated earlier, minutes must be prepared and made available in accordance with the time limitations described in section 106(3) of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6615
OML-AO-1929

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

May 13, 1991

Mr. Thomas D. Mahar, Jr.
Town Attorney
Town of Poughkeepsie
P.O. Box 3209
Dutchess Turnpike
Poughkeepsie, NY 12603

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

Dear Mr. Mahar:

I have received your letters of April 23 and April 26 in which you requested advice concerning the Open Meetings Law.

In the first letter, the question involves the Poughkeepsie Town Board's obligation to maintain minutes of an executive session, for you indicated that there are differences of opinion among the members "as to whether or not minutes must be kept when the Board, in effect, reaches agreement on a particular subject". You added that it is the Board's practice to enter into executive session, discuss an issue and return to an open meeting to vote on the issue, and the problem "is the concept of consensus". You wrote that "[o]ne school of thought is that the consensus must be tantamount to final action and the other school of thought is that general agreement, subject to vote in public session, is not consensus".

The second letter raises a related issue, for it pertains to a "straw vote" that is taken "to ascertain the various councilpersons' position in regard to certain issues and to determine whether or not additional discussion is needed". You pointed out that "the 'straw vote' is merely in the form of an opinion poll, non-binding, and each and every member is free, once in public session, to vote any way they want to after additional discussion".

In this regard, I offer the following comments.

From my perspective, the provisions of both the Freedom of Information Law and the Open Meetings Law are pertinent to the issues raised. First, as you are aware, section 106 of the Open Meetings Law pertains to minutes of meetings and states in relevant part that:

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

Second, in one of the few instances in the Freedom of Information Law that requires that records be maintained, section 87(3)(a) provides that:

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

Based upon the foregoing, 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 a town board, a record must be prepared that indicates that manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

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. 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 and states that:

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

While I am not suggesting that the Board engages in secret ballot voting, I point out that 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)].

There is only one decision of which I am aware that deals specifically with the notion of a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated further that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

In the context of the situations that you described, when the Board reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may be unaware of the members' views on a given issue. If indeed a consensus represents action upon which the Board relies in carrying out its duties, or when, in your words, the Board "in effect, reaches agreement on a particular subject", I believe that the minutes should reflect the actual votes of the members.

In contrast, the "straw vote", as you described it, is not binding and does not represent members' action that could be construed as final; rather, it appears to represent a means of ascertaining whether additional discussion is warranted or necessary. Since the "straw vote" does not apparently represent a final action or final determination of the Board, I do not believe that minutes including the votes of the members would be required to be prepared.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Garlock

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6624
OML-AO-1930

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

May 16, 1991

Mr. Ronald F. Kovacs
[redacted]

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

Dear Mr. Kovacs:

I have received your letter of April 26, as well as the correspondence attached to it. You have questioned the manner in which the West Islip School District has responded to requests made under the Freedom of Information Law, and it is your view that District officials have "routinely...given incorrect and/or incomplete responses in an untimely manner" and have adopted "an approach that continually relies on misinterpretations and questionable sources of delay".

You have requested advice in order to ensure that District officials respond appropriately to requests. You also requested that I "[a]sk the District to provide a complete accounting of their actions relative to these requests and advise them that unacceptable actions will not be tolerated in the future." Although advice will be offered in the ensuing commentary, it is emphasized that the Committee on Open Government and its staff are authorized to advise with respect to the Freedom of Information and Open Meetings Laws. This office cannot compel an agency to account for its actions, nor is it empowered to require that an agency grant or deny access to records or that entities hold open meetings.

The initial item of correspondence attached to your letter, which is dated March 22, involves notices of meetings, and you asked that the District "advise [you] of the specifics of [its] compliance with [the Open Meetings Law], detailing the frequency and locations of past and future postings of committee and subcommittee meetings". In addition, you requested records concerning the time and place of "all presently scheduled committee and subcommittee meetings, i.e., Finance, Public Relations, Middle School, Citizens Advisory, etc."

In response to the request, Ms. Barbara D. Milne, the District's records access officer, indicated that the Finance Committee meets each Wednesday before the Board meetings at 7:30 p.m., that all other committee meetings are scheduled "when necessary", and that the dates and times of those meetings "will be posted in the Library, Post Office and District Office". In a later response, Ms. Milne wrote that certain committees are not subject to the Open Meetings Law.

Since it is your view that the Open Meetings Law is applicable to "all school board appointed committees and subcommittees, I point out that there appears to be a distinction in the applicability of the Law with respect to committees and subcommittees consisting of members of the Board of Education, as opposed to other entities, such as citizens advisory committees.

Recent decisions indicate generally that entities consisting of persons other than members of public bodies 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, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

With respect to committees consisting of members of public bodies, 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" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee consisting of members 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 three, for example, a quorum would be two.

When the Open Meetings Law is applicable, notice must be given prior to meetings in accordance with section 104 of the Law. That provision states in relevant part that:

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

> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto..."

It is also noted that if an entity, such as a citizens advisory body, which is not subject to the Open Meetings Law, holds its meetings on school property, section 414 of the Education Law may require that its meetings be held in public. That provision enables a board of education to authorize school property to be used for certain purposes, such as:

> "For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public" [section 414(1)(c)].

With respect to the specifics of your request of March 22, if the district maintains records indicating the times and locations of previous meetings, whether held pursuant to the Open Meetings Law or otherwise, I believe that those records would be available. Such items would consist of factual information accessible under section 87(2)(g)(i) of the Freedom of Information Law. With respect to future meetings, unless there is an existing schedule of the times and locations of those meetings, Ms. Milne's response appears to have been proper. When the dates of those meetings are scheduled, the District's obligation involves providing notice as required by section 104 of the Open Meetings Law.

The second issue involves access to certain bills and the manner in which District officials responded to your requests.

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Therefore, if an agency does not maintain requested records, it can neither grant nor deny access to those records. Further, section 89(3) of the Freedom of Information Law states in part that an agency generally need not create a record in response to a request. As such, insofar as your requests involved information or records that did not exist or were not yet in possession of the District, I do not believe that the Freedom of Information Law would have been applicable or that District officials would have been obliged to create or prepare records on your behalf.

Lastly, with respect to the timeliness of responses to requests, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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)].

I hope that I have been of assistance and that the foregoing serves to clarify your understanding of the Freedom of Information and Open Meetings Laws. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Owen Johnson
Dr. William P. Bernhard
Barbara D. Milne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1931

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

May 16, 1991

Mr. Angelo A. Ulacco
[redacted]

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

Dear Mr. Ulacco:

I have received your letter of April 29 in which you questioned the propriety of certain practices of the Spencer Town Board under the Open Meetings Law.

According to your letter:

> "The executive meetings take place before the regular meetings. During the executive meetings there are certain people who attend who have no business being there. The regular meetings start at 7:30pm-8:00pm. During the regular meetings when a person asks a question(s), he or she is never given a direct answer(s). The town board members do not read the minutes of the meetings, nor the bills or the communications. When old business or new business is brought up, the town board members do not speak loud enough for the public to hear" (emphasis yours).

In this regard, 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 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] [now section 105 as renumbered] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session

> only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981].

Third, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, section 100). Therefore, I believe that a meeting must be held in a manner that enables those in attendance to hear the Board's comments and deliberations. However, the Open Meetings Law is silent with respect to the issue of public participation. Consequently, if a public body does not want the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to permit public participation. If a public body does permit the public to speak, I believe that it may be so based upon rules that treat members of the public equally.

Lastly, although a public body may choose to read aloud minutes and other documentation, there is no statutory requirement that it must do so. If there is such a requirement, it would be based upon the Town Board's rules of procedure, rather than the Open Meetings Law or other statute.

As you requested, a copy of this opinion will be forwarded to the Town Supervisor.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Supervisor, Town of Spencer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1932

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

May 20, 1991

Mr. Adolph Wojnarowski
[redacted]

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

Dear Mr. Wojnarowski:

I have received your recent letter in which you asked whether you "have the privilege of video taping the proceeding of [your] grievance" before a local board of assessment review.

In this regard, it is noted at the outset that the Open Meetings Law is silent with respect to the issue, and there is no other law or rule that governs the use of recording devices at meetings. Further, while there are no judicial decisions involving the use of video equipment, several decisions have been rendered concerning the use of tape recorders at meetings.

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.

Lastly, legislation has been introduced to amend the Open Meetings Law to confer the right to photograph, broadcast or record meetings by means of audio or video equipment in an orderly manner. The legislation has been approved in the Assembly and is pending in the Senate.

I hope that I 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 Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1933

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

May 28, 1991

Mr. Alan M. Simon
Town Attorney
Town of Ramapo
237 Route 59
Suffern, NY 10901

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

Dear Mr. Simon:

I have received your letter of May 8 in which you requested advice concerning the Open Meetings Law.

In your capacity as Ramapo Town Attorney, you referred to an advisory opinion rendered on April 9 at the request of Hon. Edwin Friedman, a member of the Town Board. In brief, that opinion dealt with the attendance of persons other than members of the Town Board at executive sessions. You wrote, however, that "at a workshop, no votes are taken", and that, in view of that factor, "it appears difficult to apply the standards set forth in section 105(2)" of the Open Meetings Law. As such, you wrote that "[t]he question as posed should have been posed at a 'workshop' meeting", and you have sought my views on the matter.

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 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, 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, such a gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, regardless of its characterization. As such, I believe that a 'workshop' must be conducted in accordance with the requirements of the Open Meetings Law, any any policy concerning the absence of voting at workshops would be self-imposed, rather than based on any legal requirement. In short, I believe that votes could be taken at those gatherings. In my opinion, since the Open Meetings Law applies equally to a workshop and a 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 artificial.

Second, since a workshop is a meeting, the Board has the authority, when appropriate, to conduct executive sessions. However, as you are aware, a motion and vote must be accomplished in public before an executive session may be held [see section 105(1)].

Third, with respect to minutes of "workshops", 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, including motions to conduct executive sessions, occur during workshops, I believe that minutes must be prepared indicating those actions and made available to the public.

In short, I do not believe that characterizing a gathering as a workshop alters the Board's responsibilities under the Open Meetings Law or necessitates a change in the advice rendered on April 9.

I hope that I 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-1934

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

May 28, 1991

Mr. William A. Resch III
[redacted]

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

Dear Mr. Resch:

I have received your letter of May 8, as well as the correspondence attached to it.

According to your letter, you and another citizen appeared before the Perinton Town Board and asked the Board to establish a "Site Selection Committee...to smooth the process of location of group homes and other facilities" established under the Mental Hygiene Law. In response to your request, the Town Supervisor wrote that it is the Board's "opinion and decision" that there is no need to establish the kind of committee to which you referred. It is your view that the Supervisor's letter suggests that "discussions between the Board members and the Supervisor resulted in a decision that such a Site Selection Committee was unnecessary". Further, when you questioned the Supervisor on the matter, you "found that neither the discussion nor the making of the decision took place at a public, announced meeting".

You have asked whether "their actions were proper" under the Open Meetings Law.

In this regard, I offer the following comments.

First, independent of your letter, I received a telephone call from the Town Attorney, Mr. Robert Place. Mr. Place indicated that the Board never discussed the issue collectively, as a body, and he characterized the Board's position as a "non-decision".

Second, as I understand the situation, despite your request to the Board, there was no motion or resolution before the Board at any time concerning the establishment of a site selection committee. If there had been a motion or official act by the Board regarding the issue, any vote or decision on the subject would in my view have been required to have been considered and voted upon in the context of an open meeting of the Board. However, in this instance, in response to a suggestion or request, there was no requirement that the Board take any affirmative action or vote. In short, it appears that neither the Board as a whole nor its members individually were sufficiently interested in the proposal to take the matter further. As such, it appears that the proposal "died" or was simply put aside. If that was so, I do not believe that the Board would have been required to conduct a meeting or vote in consideration of the matter. In essence, it appears that the Board did not engage in any collective gathering or decision, as that term is ordinarily used; rather its "decision" was the result of the absence of any action.

If the facts as I have presented them are accurate, the Open Meetings Law in my opinion would not have been applicable, nor would the Board's treatment of the issue have been improper.

I hope that I 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. James E. Smith, Supervisor
Robert Place, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1935

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

May 28, 1991

Mr. & Mrs. Gerald L. Goodman
[redacted]

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

Dear Mr. and Mrs. Goodman:

As you are aware, your letter of April 7 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. I have also received your letter of May 8, which deals with the same subject matter. The Committee is authorized to advise with respect to the Open Meetings Law.

Your correspondence relates to a regularly scheduled meeting of the Phelps Town Board held on May 6. Since the issue before the Board involved a matter of public concern, the possibility of constructing a recycling center, you wrote that the meeting was "widely touted in papers, radio and TV", and approximately 120 people sought to attend "to relate to the board [y]our concerns about the proposal...". According to the materials, the Board generally meets in a small room that would not accommodate such a large crowd, but there is "a large meeting room upstairs". Although you and others asked that the meeting be moved to the larger room, you wrote that the Supervisor refused.

You have requested information and assistance concerning the issue. In this regard, I offer the following comments.

First, the intent of the Open Meetings Law is clear. Section 100 of the Law, the legislative declaration, states that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state by fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and deci-

> sions 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."

Second, in my view, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. Under the circumstances, since the Board had a choice of two locations in the Town Hall to conduct its meeting, and since one of those locations would have accommodated most if not all who sought to attend, the Board's refusal to move the meeting to the larger room was, in my opinion, unreasonable. Stated differently, based on the facts that you presented, I believe that the Board should have moved the meeting to the larger room. It is noted, too, that section 103(a) of the Open Meetings Law states in part that "[e]very meeting of a public body shall be open to the general public...".

Third, as indicated in the legislative declaration, the public has the right to "attend and listen" to the deliberations and discussions that occur at open meetings. I point out, however, that the Law is silent with respect to public participation. As such, while it might have been your desire to express your points of view, I do not believe that the Board would have been obliged to permit the public to participate at the meeting. Although the Board may permit the public to speak at meetings, it is not required to do so.

In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6654
OML-AO-1936

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

May 29, 1991

Ms. Victoria V. Lawson
[redacted]

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

Dear Ms. Lawson:

I have received your package of materials which focuses upon the activities and budget of the Greenburgh 7 Central School District. Your note appears on a letter addressed to the Commissioner of Education in which you asked that the State Education Department prepare a report concerning various complaints by residents relating to the District.

In this regard, as you are aware, the jurisdiction of the Committee on Open Government is limited and involves advising with respect to the Freedom of Information and Open Meetings Laws. Many of the issues raised in the materials pertain to compliance with the Education Law and the State's real property tax structure. While the Freedom of Information Law and Open Meetings Law may in some instances relate to those matters, compliance with those statutes is tangential to the subjects of your complaints.

You appear to be particularly interested in relationships between school district administrations and teachers' unions and the process by which collective bargaining agreements are negotiated. Although one of your goals apparently involves opening up the negotiating process, I point out that section 105(1)(e) of the Open Meetings Law permits public bodies to enter into executive sessions to conduct or discuss collective bargaining negotiations. Similarly, section 87(2)(c) of the Freedom of Information Law enables agencies to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations". As such, much of the information in which you are interested may, under existing law, be shielded from the public.

Since you referred to meetings held in a second floor room that is "not accessible", it is noted that 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 second floor room, I believe that the meetings should be held in the room that is most likely to accommodate the needs of people with handicapping conditions.

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: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1937

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

May 29, 1991

Patrick M. Snyder, P.E., Esq.
407 Cortland Savings Bank Building
1 North Main Street
Cortland, New York 13045

<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. Snyder:

I have received your letter of May 17 in which you raised a question concerning the Open Meetings Law.

According to your letter, at a recent meeting of Low Level Radioactive Waste Siting Commission, it was announced that the Commission planned to meet for a "training session". You added that:

> "[t]he purpose of the meeting is reportedly to educate the two new members of the Commission on how the proposed sites were selected and other related matters, but a quorum of the members would be present. The public was to be excluded."

You attached a tentative agenda of the session, which suggests that a variety of topics will be presented by staff.

You have requested my views concerning the status of the session under the Open Meetings Law. In this regard, I offer the following comments.

First, it is emphasized that the definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals 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, 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.).

Second, based on the foregoing, if the intent of the session is to enable staff to make presentations while the members sit merely as observers, it is unlikely in my view that the gathering could be characterized as a meeting. However, if the intent is that the Commission will discuss, exchange ideas and knowledge, collectively, as a body, the gathering would in my view constitute a meeting subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Low Level Radioactive Waste Siting Commission
Douglas Eldridge, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6677
OML-AO-1938

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

June 7, 1991

Mr. Alan Siegel
[redacted]

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

Dear Mr. Siegel:

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

Your initial comment involves an unsuccessful attempt to obtain information from the Department of Correctional Services concerning safety measures employed by the Department relative to inmates treated at hospitals. Specifically, your question is how "we...know we are safe when we, by happenstance, visit a hospital at the same time that inmates might be there being treated". Although the determination of your appeal included an assurance that "adequate safety precautions are taken when inmates are transported to public hospitals for treatment", the materials requested were denied on the ground that disclosure "may present a danger to the life or safety of inmates, staff or the general public".

The basis for the denial was section 87(2)(f) of the Freedom of Information Law, which enables an agency to withhold records when disclosure would "endanger the life or safety of any person...". While I am not familiar with the contents of the records in question, the denial appears to have been appropriate.

Your remaining area of inquiry pertains to a policy adopted by the Schodack Town Board. In brief, the policy refers to regular meetings and "workshop sessions". In the case of regular meetings, "periods will be set aside for public comment". With respect to workshops, the policy states that "the Town Board does not expect to pass resolutions or take other official action". For that reason, "there normally will not be a public comment period at workshop sessions". The policy states further,

however, that "[s]hould it become necessary at any workshop session to enact a resolution or take other official action, a comment period will be allowed to provide members of the public with an opportunity to address the subject matter of the specific resolution or action".

You have asked whether "the restriction on public address [is] proper in light of the Open Meetings Law." In this regard, I offer the following comments.

First, it is emphasized that the definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals 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, 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).

Based upon the direction given by the courts, if a quorum of the Town Board meets to discuss public business, such a gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, regardless of its characterization. As such, in terms of the Open Meetings Law, there is no distinction between a regular meeting and workshop session.

Second, although the Open Meetings Law provides the public with the right to attend open meetings and listen to the deliberative process, the Law is silent with regard to public participation. Therefore, a public body is not required to permit the public to speak or otherwise participate at meetings, whether they are characterized as "regular meetings" or "workshop sessions". Certainly a public body may choose to permit public participation, and when it does so, it has been advised that it may permit the public to speak in accordance with reasonable rules or policies that treat the members of the public equally.

In short, I believe that the Board's policy, which authorizes the public to speak during certain kinds of meetings, exceeds the requirements of the Open Meetings Law. Therefore, in my view, it is proper.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1939

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

June 11, 1991

Mr. Richard W. Blakeslee
[redacted]

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

Dear Mr. Blakeslee:

I have received your letter of June 3 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, the Brookhaven Town Board on May 21 approved "an inter-municipal waste management agreement with the Town of Hempstead". On the following day, "the town commenced the broadcast of a series of paid commercial television and radio spots extolling the 'benefits' of the deal". In those commercials, "they publicize the availability of a booklet that explains the deal". It is your belief that commercials and printed materials take several days or longer to produce and you have contended that "the town board authorized the production of this material, and its concomitant expenditure approved, prior to their public vote on May 21, 1991". You contend further that:

> "[t]his means that the Board knew what action it was going to take on the Trash for Ash deal in advance of the May 21, 1991 meeting, raising the strong likelihood that the town board met in private -- in a meeting that was not open to the public -- to discuss the Trash for Ash deal and how each member was going to vote. Such a meeting would be in violation of New York State's Open Meetings Law..." [emphasis yours].

While your conclusion may be accurate, I do not believe that is necessarily so. In this regard, I offer the following comments.

First, 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).

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. Therefore, if indeed a majority of the Board met for the purpose of discussing the matters described in your letter, any such gathering, in my view, would have constituted a meeting subject to the Open Meetings Law.

Second, however, often the groundwork for taking action at a meeting is preceded by activities other than meetings. For example, the Supervisor, her staff or other members of the Board might have met individually with Town employees or others for the purpose of developing plans for action to be potentially approved later. Similarly, in preparation for action, memoranda and other materials are often distributed to members of public bodies prior to meetings in order to enable the members to become familiar with the issues and to make the deliberative process more efficient. In those kinds of situations, no quorum of the Board would have convened, and the Open Meetings Law would not have been applicable.

In sum, as suggested at the outset, the quick action by the Board does not in my opinion necessarily indicate that the Board met as a body to discuss the issues collectively. If you are aware of additional facts, perhaps more precise advice could be offered.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6681
OML-AO-1940

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

June 12, 1991

Mr. Bernard J. Blum
President
Rockaway Bay Sierra Club Task Force
[redacted]

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

Dear Mr. Blum:

I have received your letter of May 31. As in the case of previous correspondence, your inquiry deals with the "potential for circumvention of secret ballot prohibition in open government laws" by a public body, such as Community Board #14.

In your letter, you described the following scenario involving the election of a chairperson:

> "Hypothetically let three alternatives be voted on by secret ballot. There is a clear winner but two become invalidated in some manner (or drop out) and there is a vote of acclamation for the choice obtained be secret ballot.
>
> "Complaints are made that the choice was by secret ballot and that there was no roll call vote. The agency maintains that the previous two alternatives have been invalidated (or dropped out) and votes again for the alternative chosen by secret ballot but this second time it votes in roll call style."

You questioned whether "the secret ballot prohibition [has] been circumvented given that the two other alternatives or any other alternatives did not run the second time to challenge the choice obtained by secret ballot".

In my view, if there had been no "clear winner" and two of three candidates dropped out, a vote by acclamation, including the names of those who might have abstained, would be appropriate. However, if there was a "clear winner", a failure to record the votes of the members of a public body might be inconsistent with the requirements of "open government laws".

From my perspective, the provisions of both the Freedom of Information Law and the Open Meetings Law are pertinent to the issues raised. First, as you are aware, section 106 of the Open Meetings Law pertains to minutes of meetings and states in relevant part that:

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

Second, in one of the few instances in the Freedom of Information Law that requires that records be maintained, section 87(3)(a) provides that:

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

Based upon the foregoing, 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 a community board, a record must be prepared that indicates that manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

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. 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 and states that:

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

As indicated in earlier correspondence, 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)].

There is only one decision of which I am aware that deals specifically with the notion of a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated further that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

In the context of the situation that you described, when a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous rati-

fication does not indicate how the members actually voted, the public may be unaware of the members' views on a given issue. If indeed a consensus represents action upon which a public body relies in carrying out its duties, I believe that the minutes should reflect the actual votes of the members.

Lastly, you asked whether there should be a "new election when Mr. Castellano [the individual elected as Chairperson] has challengers". I cannot answer the question. Further, there are many elections in which an individual is chosen unopposed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Community Board #14

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1941

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

June 12, 1991

Ms. Erica Zurer
Community School Board 13
355 Park Place
Brooklyn, NY 11238

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

Dear Ms. Zurer:

I have received your letter of June 5 in which you requested an advisory opinion concerning the applicability of the Open Meetings Law.

In your capacity as a member of Community School Board 13 in Brooklyn, you referred to "the matter of SBM/SDM teams in the New York City Public Schools". According to your letter:

> "[t]hese teams, made up of teachers, administrators, other staff and parents, make decisions on school based staffing, curriculum, etc. that are binding. The teams are supposed to be elected by their various peers. These teams currently are not mandated to follow open meeting procedures. Many parents throughout the City have experience being 'locked out' of decisions that effect their schools. Mr. Lawrence Becker, the Chancellor's lawyer, informed [you] last year that SBM/SDM teams are not covered by open meeting requirements."

In this regard, 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."

It is noted that recent decisions indicate generally 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, event about governmental matters is not itself a government function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Nevertheless, according to your letter, the members of the teams are chosen by means of an election process and they "make decisions...that are binding". If that is so, the teams in my opinion would constitute "public bodies" required to comply with the Open Meetings Law.

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

First, presumably a team consists of two or more members.

Second, it appears that a team is required to conduct business by means of a quorum, whether or not there is any specific requirement concerning a quorum in by-laws, for example, or the act that created them. I direct your attention to section 41 of the General Construction Law, which defines "quorum" as follows:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly

> held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the provision quoted above, whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that the teams must conduct business by means of a quorum, section 41 of the General Construction Law imposes such a requirement.

Third, it appears that the teams conduct public business and perform a governmental function for the New York City school system or perhaps community districts, which are clearly governmental entities, and their duties in my opinion are reflective of a governmental function. If my assumptions are accurate, the teams would constitute public bodies subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence Becker, Counsel to the Chancellor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1942

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

June 13, 1991

Ms. Judi Enck
Sr. Environmental Associate
New York Public Interest
Research Group, Inc.
184 Washington Avenue
Albany, New York 12210

The staff of the Committee on 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. Enck:

I have received your letter of June 10 in which you raised a question concerning the applicability of the Open Meetings Law.

Attached to your letter is an announcement concerning the Northeast Regional Solid Waste Composting Conference, which will be held in Albany on June 24 and 25. The Conference will be hosted by the Department of Environmental Conservation, the Solid Waste Composting Council and the Procter & Gamble Company, and the announcement indicates that "[t]his conference is by invitation only...". Since you and others "are having a difficult time getting invited", you asked whether "this [is] a violation of the Open Meetings Law."

Based upon the following commentary, I do not believe that the Open Meetings Law is applicable.

The Open Meetings Law pertains to meetings of public bodies. Section 102(1) of the Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". The phrase "public body" is defined in section 102(2) to mean:

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

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

As such, typical public bodies include such entities as city councils, town boards, the Senate and Assembly, the Public Service Commission and the like.

In this instance, although many of the participants may be public officials or serve as members of public bodies, no particular public body is involved or will apparently conduct public business collectively, as a body. Similarly, it does not appear that a quorum of any public body intends to convent for the purpose of conducting public business as a body. Therefore, the conference would not be a "meeting" of a "public body".

In short, based upon my understanding of the conference, the Open Meetings Law is inapplicable and the public would have no right to attend.

I hope that I have been of assistance and that the foregoing serves to clarify your understanding of the Open Meetings Law.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1943

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

June 13, 1991

Mr. Bruce Grecke
Councilman
RD 2, Box 303
Dover Plains, NY 12522

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

Dear Mr. Grecke:

I have received your letter of June 7, as well as a letter addressed to me dated April 1. Although the initial letter was addressed properly, for reasons unknown, it did not reach this office. It is noted that correspondence is answered chronologically, in the order in which it is received, and that a letter of April 1 would have been answered within two to three weeks of its receipt. In addition, having reviewed our log of incoming mail, there is no reference to your letter of April 1.

In your capacity as a member of the Dover Town Board, you referred to events occurring at a meeting held on March 11, and a news article concerning the meeting. The headline focused upon the propriety of an executive session held by the Board, and the article states in part that:

> "The board entered into a closed door session to discuss personnel matters, at the request of Jeane Lane, a member of the town's zoning board of appeals. After the session, the board announced it would provide a separate filing cabinet for the ZBA and keys to the town hall for its members. The ZBA currently shares files with the town's planning board.
>
> "Robert J. Freeman, executive director of the state's committee on open government, said the board should not have

> entered into executive session to discuss the use of file cabinets. He said that should have been discussed in open session."

It is your opinion that "[t]he newspaper was dead wrong in emphasizing the Z.B.A. issue" and you added, particularly in view of the minutes of the meeting, that "the main thrust [of the executive session] was developing a court strategy, followed by the secondary issue that was full of sound and fury and signifying nothing."

You have asked that I review the minutes of the meeting, a copy of which you enclosed, and "render [a] decision" on the matter.

In this regard, I offer the following comments.

First, while you may disagree with the emphasis in the news article, I believe that the staff of the newspaper has the capacity if not the right to determine what is newsworthy and what should be emphasized. Although you may disagree with its thrust, I do not believe that the newspaper could be characterized as "dead wrong" in its emphasis, for that is a matter of judgment and opinion.

Second, neither the Committee on Open Government nor its staff has the authority to render "decisions" concerning the Open Meetings Law. The statutory duty of this office under the Open Meetings Law involves the ability to advise.

Third, the minutes of the meeting relating to the executive session in question state in relevant part that:

> "Councilman Steven Vincent stated Attorney Thomas Whalen has to leave soon and moved the board go into executive session to discuss the litigation matters as well as the personnel matter of Zoning Board of Appeals problems, this motion was seconded by Councilman Arthur Wood: Supv. George Raimo - Aye Cnclman Alan Benson - Aye Cnclman. Bruce Grecke - Aye Cnclman. Steven Vincent - Aye Cnclman. Arthur Wood - Aye
>
> "The board was joined in executive session by Attorneys George and Thomas Whalen and later by Zoning Board of Appeals Chairman Frederic Wagner and Z.B.A. members Jeane Lane and Caroline Reichenberg."

While I believe that the Board had a valid basis for discussing litigation during the executive session, it does not appear that a "personnel matter" was discussed. While certain officials might have had complaints regarding the use of filing cabinets or keys to the Town Hall, those kinds of issues, as I understand them in the context of your letter, should likely have been discussed in public.

One of the problems, in my view, involves the vagueness of the motion to enter into executive session and the use of the term "personnel". For purposes of clarification, I offer the following comments.

As you are aware, the Open Meetings Law contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

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

Therefore, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

Further, 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 "litigation", for example.

It is noted at the outset that the word "personnel" appears nowhere in the Open Meetings Law, and that 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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

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, Supreme Court, Chemung County, July 21, 19981]; 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, it has been suggested that a motion to conduct an executive session under section 105(1)(f) include two components, inclusion of the term "particular", and reference to one or more of the topics appearing in that provision. For example, a motion to discuss "the employment history of a particular person" (without identifying the person) would be proper. Further, a motion of that nature would enable Board members and others to know that the subject to be discussed qualifies for executive session.

While the issues involving file cabinets and entry into the Town Hall might have been raised by or on behalf of Town officials, as I understand the matter, it would not have fallen within the scope of section 105(1)(f).

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. Insofar as the executive session involved a discussion of the Town's strategy in litigation, I believe that it was properly held.

Lastly, 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].

I hope that I 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-1686
OML-AO-1944

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

June 17, 1991

Ms. Audrey L. Glover
[redacted]

Dear Ms. Glover:

I have received your letter of June 6, the materials attached to it, and tape recordings of certain events involving the Town of Kirkwood. The focus of your correspondence is the proposed construction of an incinerator in Broome County.

It is unclear whether you are seeking advice or comment relative to the correspondence or the content of the tape recordings. However, in an effort to enhance your understanding of the Freedom of Information and Open Meetings Laws, I offer the following remarks.

First, as a general matter, the Freedom of Information Law pertains to existing records. Therefore, to the extent that your requests involved records that are not maintained by the Town, the Freedom of Information Law would be inapplicable. Further, section 89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, if, for example, transcripts of meetings or discussions between Town officials and officials of the Broome County Resource Recovery Agency have not been prepared, neither the Town nor the Resource Recovery Agency would be obliged to prepare transcripts on your behalf.

Second, certain aspects of your correspondence consist of "interrogatories". While agency officials may answer questions, the Freedom of Information Law is not a vehicle that provides the public with the right to cross-examine public officials or elicit answers to questions. Again, that statute pertains to existing records. While it requires agencies to respond to requests for records and furnish records to the extent required by law, it does not compel officials to respond to interrogatories. Similarly, although persons may express their views at public hearings, I am unaware of any statute that requires public officials to answer questions at those hearings.

Third, since you referred to minutes and transcripts of meetings, the term "meeting" in the context of the Open Meetings Law refers to a gathering of a quorum of a public body for the purpose of conducting public business. A gathering between a representative of Town government and persons representing other entities would likely not constitute meetings subject to the Open Meetings Law, for no quorum of any public body (i.e., the Town Board) would have convened.

Fourth, when a public body does conduct a meeting, 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 no action is taken, there is no require-

ment that minutes of an executive session be prepared. It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law.

Lastly, you questioned the propriety of an executive session held to discuss litigation. In this regard, 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.

I am returning your audiocassette, which is enclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Carolyn W. Fitzpatrick, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1945

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

June 18, 1991

Ms. Jacqueline E. Luppa
Deputy City Clerk
City Hall
Plattsburgh, NY 12901

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

Dear Ms. Luppa:

I have received your letter of June 12 in which you asked that I review minutes of a recent meeting conducted by the Common Council of the City of Plattsburgh for the purpose of advising with respect to their adequacy under the Open Meetings Law.

The minutes represent a "revised format", and you wrote that, after a meeting, "the secretary enters the appropriate information and action taken on each item on the agenda and this becomes the 'Official Resolution' as well as the 'Official Minutes' for filing...". You added that correspondence referenced in the minutes is later "pasted in the minutes".

In this regard, as you are aware, section 106(1) of the Open Meetings Law pertains to minutes of open 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."

Based upon my review of the minutes, it appears that they are fully consistent with the Open Meetings Law. I point out that the provisions in that statute contain what might be characterized as minimum requirements concerning the contents of minutes. Clearly, the Law does not require that minutes include a verbatim account of discussions occurring at meetings. Rather, at a minimum, minutes must consist of a "record or summary" of motions, proposals, action taken and the vote of each member of a

public body. The minutes that you enclosed included a brief description of each subject discussed, the language of resolutions, summaries of proposed resolutions, the identities of members who introduced and seconded motions and resolutions, the result of votes taken by the members, and a roll call record indicating how each member cast his or her vote. In addition, many of the items are identified by a "meter number" signifying the location of discussions on tape recordings. As such, it is reiterated that, in my opinion, the minutes satisfy the requirements of the Open Meetings Law.

Your interest in compliance with the Open Meetings Law is much appreciated.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6693
OML-AO-1946

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

June 19, 1991

Mr. Francis Thompson
President
Hoosic Valley Teachers Association
Schaghticoke, NY 12154

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

Dear Mr. Thompson:

I have received your letter of June 13 in which you requested an advisory opinion concerning a motion carried by the Hoosic Valley Central School Board of Education at a recent meeting.

In your capacity as president of the Hoosic Valley Teachers Association, you enclosed a copy of the minutes of the meeting in question, which includes reference to a motion "[t]o bring 3020A charges of incompetence against [a named teacher] and pursuant to Section 913 of the Education Law, to order a psychiatric evaluation of said teacher". The motion was carried without dissent. You specified that no finding of probable cause under section 3020-a of the Education Law has yet been made.

You have asked whether, in my view, it is "appropriate for a Board of Education to print the name of the teacher as well as information that charges may be brought against the teacher and that the teacher is to undergo psychiatric examination".

In this regard, while I believe that the Board of Education clearly had the authority to consider the matter in private and withhold the name of the teacher, it does not appear that any statute would prohibit the disclosure of the teacher's identity.

With respect to consideration of the issue in public, I direct your attention to the Open Meetings Law. As a general matter, that statute requires that public bodies conduct their meetings in public, except when an executive session may properly be withheld. In this instance, an executive session could, in my view, have been conducted, for section 105(1)(f) of the Open Meetings Law permits a public body to conduct an executive session to discuss:

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

Nevertheless, the Open Meetings Law is permissive. Stated differently, although a public body may be authorized to hold an executive session, nothing in that statute requires that an executive session be held. I point out that the Law includes a requirement that a procedure be accomplished, during an open meeting, before an executive session may be convened. Specifically, the introductory language of section 105(1) states that:

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

As such, when the subject matter under consideration may properly be discussed behind closed doors, an executive session may be held if the requirements imposed by section 105(1) are accomplished. Further, even when the subject matter qualifies for discussion in executive session, a public body may choose to hold an open meeting, or a motion to enter into an executive session may be defeated. Therefore, notwithstanding the prudence of discussing or voting upon the issue during an open meeting, I do not believe that the Board would have been required to enter into an executive session.

I point out that the next step in the process, according to section 3020-a of the Education Law, requires that certain action be taken in executive session. Subdivision (2) of that statute states in part that:

> "[U]pon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine by a vote of a majority of all the members of such board, whether probable cause exists."

For reasons analogous to those discussed with respect to the Open Meetings, the Freedom of Information Law, in my view, would permit the Board to withhold the name of the teacher but would not require that the name be withheld.

Like the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access. In brief, 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.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Although it has been found in a variety of circumstances that public employees enjoy a lesser degree of privacy than others, for they are required to be more accountable than others, it has been advised that when allegations have been made or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations might justifiably be withheld, for disclosure would in most circumstances result in an unwarranted invasion of personal privacy [see e.g., Herald Co. v. School District of City of Syracuse, 430 NYS 2d 460 (1989)]. Further, to the extent that allegations are found to be without merit or charges are dismissed, I believe that they may be withheld. Therefore, I believe that records or information indicating the teacher's identity could have been withheld.

Nevertheless, the language of the Freedom of Information Law indicates that an agency may withhold records, but that it is generally not required to do so. Specifically, the introductory language of section 87(2) states in relevant part that: "Each agency shall...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof" that fall within the grounds for denial that follow (emphasis added).

Moreover, the Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "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, although an agency may in appropriate circumstances withhold records, I do not believe that it is obliged to do so.

In sum, irrespective of the wisdom of disclosure and my belief that the matter could validly have been discussed in executive session under section 105(1)(f) of the Open Meetings Law and that reference to the teacher's identity could have been withheld under section 87(2)(b) of the Freedom of Information Law, nothing in those statutes, in my opinion, would require confidentiality.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1947

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

June 21, 1991

Ms. Virginia L. Marsh
Town Clerk
Town of Tuxedo
Box 725
Tuxedo Park, NY 10987

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

Dear Mr. Marsh:

I have received your letter of June 14 in which you raised questions involving minutes of meetings.

Specifically, in your capacity as clerk of the Town of Tuxedo, you have asked whether a town clerk "can be required to supply verbatim minutes of Town Board meetings" and whether minutes prepared by a town clerk "need to be approved by the Board".

In this regard, I offer the following comments.

First, section 106 of the Open Meetings Law pertains to minutes and states in relevant part that:

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

Based upon the 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 minutes more expansive than those required by the Open Meetings Law may be prepared, 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 no action is taken, there is no requirement that minutes of an executive session be prepared. It is also noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement or whether the board member should submit the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181).

Second, although as a matter of practice, policy or tradition many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Moreover, in another opinion of the Comptroller, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609).

I hope that I 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-1948

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

June 25, 1991

Ms. F.J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of June 13 in which you raised a question concerning the Open Meetings Law.

You asked whether meetings of the New York City Procurement Policy Board and the Advisory Council established by the Board are subject to the Open Meetings Law.

In this regard, according to the Official Directory of the City of New York and a discussion with a representative of the Board, the Board was created by the City Charter in 1989 and has the authority to promulgate rules with which City agencies must comply concerning the procurement of goods, services and construction. The Advisory Council consists of citizens, particularly community and industry representatives.

With respect to the issue, 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."

The Board, in my opinion, constitutes a "public body" for it has the authority to make policy by means of the promulgation of rules binding upon City agencies. Further, by viewing the definition of "public body" in terms of its components, I believe that the same conclusion can be reached by means of the following analysis.

First, the Board consists of five members.

Second, I believe that the Board is required to conduct business by means of a quorum, whether or not there is any specific requirement concerning a quorum in by-laws, for example, or the act that created it. I direct your attention to section 41 of the General Construction Law, which defines "quorum" as follows:

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

Based upon the provision quoted above, whenever three or more public officers or persons are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that the Board must conduct business by means of a quorum, section 41 of the General Construction Law imposes such a requirement.

Third, the Board conducts public business and performs a governmental function for the New York City, which is a public corporation. Further, the representative of the Board with whom I spoke indicated indicated that the Board conducts its meetings in public.

The Advisory Council does not appear to be a public body subject to the Open Meetings Law. I point out that recent decisions indicate generally that entities, such as citizens advisory bodies, 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 government function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Assuming that the Advisory Council has no authority to take binding action on behalf of the Board or the City, I do not believe that it would constitute a public body.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Constance Cushman, Executive Director/Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO- 1949

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

June 26, 1991

Ms. Lilian M. Popp, Member
Community School Board District 31
211 Daniel Low Terrace
Staten Island, NY 10301

Dear Ms. Popp:

I have received your recent note, which is attached to a letter that you wrote, in your capacity as a member of Community School Board District 31, to Olivia Brennan, Chairman of the Board.

In brief, according to your letter, the Board was asked to enter into an executive session "to discuss personnel". You protested based upon a contention that the Board "had not been informed as to the nature of the topic to be discussed" and pointed out "that without some information it would be impossible to know how to vote in deciding to go into closed sessions". Although "[n]o motion was made, no vote taken and no further explanation offered", an executive session was held.

For purposes of clarification and to enhance the Board's understanding of the requirements of the Open Meetings Law, 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 subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Therefore, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

Second, judicial interpretations of the Open Meetings Law indicate that a motion to enter into an executive session cannot merely describe the subject to be discussed as "personnel" or "personnel matters", for example.

It is noted that the word "personnel" appears nowhere in the Open Meetings Law, and that 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 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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

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, Supreme Court, Chemung County, July 21, 19981]; 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].

In short, the language of section 105(1)(f) is quite specific, and unless an issue focuses upon a particular person or persons in conjunction with one of more of the topics described in that provision, it cannot be asserted as a basis for conducting an executive session. Moreover, as you suggested, a motion that merely describes a topic to be discussed as "personnel", without more, would not enable Board members or others in attendance to know that the subject is appropriate for consideration in an executive session.

Copies of this letter will be forwarded to the Board and its chairman.

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: Olivia Brennan, Chairman
Community School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1950

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

June 26, 1991

Ms. Connie Bowie
Chairperson
Town of Chenango Citizens
Box 607 HC78
Castle Creek, NY 13744

The staff of the Committee on 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. Bowie:

I have received your recent letter. In your capacity as Chairperson of the Town of Chenango Citizens Committee, you requested an advisory opinion concerning "minutes at public meetings and public speaking".

In your letter, you described various situations. For example, you wrote that no minutes are taken at "regular Town Board work sessions". Further, when a topic is discussed at a work session with members of the audience, you wrote that "the Board is unwilling to allow [you] to speak or ask questions or take part in the topic what so ever."

In this regard, I offer the following comments.

First, by way of background, 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 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, 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).

Based upon the direction given by the courts, if a quorum of the Town Board meets to discuss public business, such a gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, regardless of its characterization. As such, I believe that a "work session" must be conducted in accordance with the requirements of the Open Meetings Law. Further, since the Open Meetings Law applies equally to work sessions and regular meetings, 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 artificial.

Second, with respect to minutes of "work sessions", 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, including motions to conduct executive sessions, occur during work sessions, I believe that minutes must be prepared indicating those actions and made available to the public.

In short, I do not believe that characterizing a gathering as a work session alters the Board's responsibilities under the Open Meetings Law.

Lastly, although the Open Meetings Law provides the public with the right to attend open meetings and listen to the deliberative process, the Law is silent with regard to public participation. Therefore, a public body is not required to permit the public to speak or otherwise participate at meetings, whether they are characterized as "regular meetings" or "work sessions". Certainly a public body may choose to permit public participation, and when it does so, it has been advised that it may permit the public to speak in accordance with reasonable rules or policies that treat the 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1951

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

June 26, 1991

Mr. Thomas C. Blandy
[redacted]

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

Dear Mr. Blandy:

I have received your letter of June 20, as well as a news release that you issued and related materials.

According to your letter, it is your experience as a member of the Troy Board of Education that "[e]xecutive sessions...tend to slide in and out of appropriate subject matter...". In the release, you contended that an executive session recently held "should never have been closed to the public". The release indicates that "[t]he subject of the meeting was redistributing students and teachers among the six elementary schools in the district, and revising bus routes", and that the Superintendent called an executive session because "this subject is an uncomfortable one to discuss openly". You added that you do not disagree with the Superintendent's attempts to deal with the substantive issues; rather you expressed disagreement with "the confidentiality".

You have asked "[w]hat sanctions are there for these violations?"

In this regard, I offer the following comments.

First, there are no automatic sanctions that may be imposed if and when violations of the Open Meetings Law occur. However, section 107 of that statute describes the means by which one may seek to enforce the Open Meetings Law. Section 107(1) states in relevant part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a pro-

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

Further, subdivision (2) of section 107 states that:

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

Second, in my opinion, rather than engaging in costly and time consuming litigation, it may be more appropriate and effective to attempt to educate members of public bodies regarding the provisions of the Open Meetings Law.

As you are likely 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, unless there is a basis for entry into an executive session. Public bodies must accomplish a procedure, during an open meeting, before an executive session may be held. Specifically, the introductory language of section 105(1) states that:

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

Moreover, a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may properly be considered during executive sessions.

In my view, a discussion of the redistribution of students and teachers among elementary schools would not qualify for consideration in executive session. While the issue might in some manner have involved personnel related issues, I point out that the word "personnel" appears nowhere in the Open Meetings Law, and that 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.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Mario Scalzi, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1952

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

July 2, 1991

Mr. Joseph W. Vogt
[redacted]

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

Dear Mr. Vogt:

I have received your letter of June 25, which relates to the Open Meetings Law.

As I understand the issue, the Little Falls Board of Health no longer conducts business at City Hall, but rather carries out its duties by means of a series of telephone calls.

In this regard, I offer the following comments.

First, to the extent that the functions of the Board and its members do not require that it carry out its duties collectively, as a body, I do not believe that it would be acting inappropriately.

Second, however, insofar as an issue requires that the Board take action, as a body, I do not believe that action could be taken through telephonic communications.

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,

> 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.

> 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 other bodies having the authority to take final and binding action. If the Board of Health has such authority, I believe that it constitutes a public body subject to the requirements of the Open Meetings Law.

While there is nothing in the Open Meetings Law that would preclude members of a public body from conferring by telephone, 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 be inconsistent with 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,

I hope that I 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 Health

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1953

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

July 2, 1991

Ms. Dawn M. Touzin
[redacted]

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

Dear Ms. Touzin:

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

According to your letter, notice was published in a local newspaper concerning a meeting of the Town of New Hartford Planning and Zoning Boards to be held on June 26. Since your neighborhood association is involved in litigation with the Zoning Board, you sought to attend the meeting "to keep abreast of the latest activities". Upon your arrival, you were told that the meeting would focus upon "environmental studies on future development of commercial areas of the town". Since you decided to stay, you wrote that the Town planner asked you why you were there. When you responded, "[s]he said that the meeting may go into executive session regarding litigation". Although at the time, a quorum was not yet present, when a sufficient number to constitute a quorum arrived, the meeting was begun. Immediately afterward, a motion was made to "go into executive session since possible litigation may be discussed".

You stated that you "could understand their going into executive session if the meeting had been going on and the conversation seemed about to touch on sensitive issues", but that "they had not begun any discussion at all".

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that the subject matter under consideration may appropri-

ately be discussed during an executive session. Further, paragraphs (a) through (h) of section 105(1) of the Law specify and limit the subjects that may properly be discussed during an executive session.

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:

> "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 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" 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, or a possibility that litigation will be discussed. In short, the executive session, in my opinion, would properly have been held only to the extent that the Board's litigation strategy was discussed.

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; also Previdi v. Hirsch, 524 NYS 2d 643, 645 (1988)].

As you requested, and in an effort to enhance Town officials' understanding of the Open Meetings Law, copies of this opinion will be forwarded to those identified in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town of New Hartford Planning Board
Town of New Hartford Zoning Board
Town Board of New Hartford
Mr. John Longeretta, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6717
OML-AO-1954

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

July 3, 1990

Ms. Kathleen O'Brien Frazer
Attorney-At-Law
36 Washington Avenue
Kingston, NY 12401

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

Dear Ms. Frazer:

I have received your letters of June 26 and June 27. In both, and in your capacity as a member of the Board of Education of the City of Kingston School District, you described problems and raised questions concerning the Open Meetings Law.

In the first letter, you referred to notice given to Board members on the afternoon of June 19 "that the Superintendent wanted [the Board] to meet in executive session that evening at the beginning of a previously scheduled open meeting". When you sought clarification of the purpose of the executive session, you were told that the topics involved "ESP negotiations (a designated bargaining unit for certain employees) and nonaligned raises (a group of employees, including upper administrators and some central office staff people, who are not represented by any bargaining unit)".

Although you were not present when the meeting began, you expressed the belief that those who were did not first meet in public or vote to conduct an executive session; rather, you believe "that arriving members just went directly into executive session in the superintendent's office with no preliminaries in open session". You surmised that, prior to your arrival, a presentation was made by the Superintendent "admonishing certain members of the board for questioning his budgetary decisions and for planning to offer resolutions to amend the budget in open session". When you were present, "the board discussed the decision reached in the previous evening's executive session to freeze salaries of nonaligned employees this year due to the budget crunch". You added that one member "offered a proposal to postpone the vote on nonaligned raises until later in the summer and a vote was taken" to the effect that "that amount would re-

main as a part of the budget to be adopted before the end of June". Neither the motion nor the vote were recorded. In addition, you stated that "[v]otes taken during our executive sessions are frequently disguised and designated as 'checking for consensus' or an 'informal vote'."

You requested an opinion concerning the foregoing description of facts.

In your second letter, you asked that I clarify "the differing responsibility of a Board present and board members" concerning the ability or desire to enter into executive sessions. You also expressed uncertainty as to "how to categorize votes in executive session not to take an action in open session". Finally, you raised the following questions:

> "1. Does a Board president have greater responsibility, or a different responsibility, than a regular Board member for insuring that the Open Meetings Law and other applicable statutes are followed by a public body?
>
> 2. What actions should a board member take if he believes that the actions of the board are not in conformance with the Open Meetings Law or other applicable statutes, taking into consideration that a board member occupies an unpaid, part-time position without secretarial staff or access to the school district attorney without specific board approval?
>
> 3. What amount of time may transpire between a vote in executive session, however designated, and a vote in public session (minutes, hours, days, weeks, months or years)?
>
> 4. Can a vote in executive session not to take an action or introduce a motion in open session, which may indirectly have financial impact, constitute a violation of the Open Meetings Law?"

In this regard, I offer the following comments.

First, with respect to the Board's procedures and the responsibility of a board president as opposed to other members, those kinds of issues are in many instances unrelated to the Open Meetings Law. I point out that section 1709(1) of the Education Law authorizes a board "[t]o adopt such by-laws and rules for its government as shall seem proper in the discharge of the duties required under the provisions of this chapter". However, implicit in that grant of authority is the requirement that any such rules or by-laws be reasonable. It has been held that the authority conferred by section 1709(1) "is not unbridled" and that "[i]rrational and unreasonable rules will not be sanctioned" [Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. While it is clear that a board of education is empowered to adopt rules concerning its proceedings and the president of the board presides at meetings, that person has the same voting power as other board members.

Second, in terms of the action a board member should or may take if he or she believes that the board is not complying with law, it is suggested that the member attempt to become knowledgeable concerning areas of interest and that he or she seek to educate the members concerning that area of expertise.

Third, certain aspects of your questions appear to be based upon what I consider to be inaccurate assumptions. For example, for reasons to be described later, the discussion of nonaligned raises likely did not qualify for discussion in executive session; moreover, in general, boards of education cannot vote during executive sessions.

In this regard, in an effort to educate, to enhance understanding of the Open Meetings Law, and to put the issues raised in perspective, I offer the following comments.

It is noted at the outset 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. 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) of the Open Meetings Law states in relevant part that:

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

Based upon the foregoing, it is clear that an executive session is not separate from an open meeting but rather is a part of such meeting and that a meeting must be convened in public before an executive session may be held. The procedure also indicates that the Open Meetings Law is permissive regarding the ability to enter into an executive session; while a mtion carried by a majority vote of a public body may authorize the holding of an executive session, the members may vote against such a motion, even if a basis for closed door discussion exists. Moreover, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the topics that may properly be considered during executive sessions.

With respect to the executive sessions described in your correspondence I believe that "ESP negotiations" could appropriately have been discussed in private, for section 105(1)(e) permit a public body to enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14, as you may be aware, is commonly known as the Taylor Law, and it pertains to the relationship between public employers (i.e., a school district) and public employee organizations (i.e., a teachers union). However, the discussion involving non-aligned staff, as you described it, would not fall within the scope of section 105(1)(e), for those employees are not members of a union.

Although the matter might have related to personnel, the language of the so-called "personnel" exception for entry into executive session is limited and precise.

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:

> "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>, Supreme Court, Chemung County, July 21, 19981]; 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 Doolittle was decided].

As section 105(1)(f) relates to matters concerning the budget review process, issues of policy, such as those involving the allocation of public moneys, must in my opinion generally be discussed in public. Discussion of the abolishment of position, for example, could not likely be considered during an executive session. In brief, only when an issue focuses upon a "particular person" in conjunction with one or more of the topics specified in section 105(1)(f) can an executive session be properly held pursuant to that provision.

If discussions of raises or related matters pertained to nonaligned staff as a group and did not focus upon any "particular person", I do not belief that any ground for entry into executive session would have been applicable. Similarly, if the Superintendent's presentation or dialogue with the Board involved questions pertaining to "budget decisions" or plans to introduce resolutions to amend the budget, those topics should in my view have been discussed in public, for none of the grounds for entry into executive session could justifiably have been asserted.

With respect to minutes and voting in 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). If no action is taken, there is no requirement that minutes of an executive session 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 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 [i.e., see Education Law, section 3020-a(2)]. Therefore, when a board of education acts in accordance with those decisions, rarely will there be minutes of executive sessions, for votes or actions taken will occur during open meetings.

The issue of decisions effectively made by consensus or "informal votes" relates to both the Open Meetings Law and potentially the Freedom of Information Law.

Section 106(1) of the Open Meetings Law pertains to minutes of open 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."

As such, proposals and motions, including motions to enter into executive sessions, must be recorded in minutes, whether or not a motion is approved.

In one of the few instances in the Freedom of Information Law that requires that records be maintained, section 87(3)(a) provides that:

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

Based upon the foregoing, 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 a board of education, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of section 87(3)(a), it appears that the State Legislature sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. 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 and states that:

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

There is only one decision of which I am aware that deals with the notion of a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated further that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

In the context of the situations that you described, when the Board reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may be unaware of the members' views on a given issue. If indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, takes action by reaching an agreement on a particular subject, I believe that the minutes should reflect the actual votes of the members.

In contrast, if an informal or "straw vote" is not binding and does not represent members' action that could be construed as final but rather represents a means of ascertaining whether additional discussion is warranted or necessary, for example, I do not believe that minutes including the votes of the members would be required to be prepared.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0726
OML-AO-1955

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

July 11, 1991

Mr. Frank C. Quinn
[redacted]

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

Dear Mr. Quinn:

I have received your letter of July 4 in which you raised a series of questions concerning voting by boards of education.

Specifically, you raised the following issues:

> "When a Board of Education votes on a very important issue such as a new negotiated teachers contract, please explain to me, what vote is needed. Does it need a majority, 2/3 majority? What about voting on other issues?
>
> "Is the president of the Board obligated to poll each and every member of the Board on every issue or just important issues?
>
> "Can the Board make their own laws on such matters or are there State Laws and/or State Education laws."

In this regard, I offer the following comments.

First, in general, I believe an affirmative vote of a majority of the total membership of a public body, including a board of education, is required to take action. Section 41 of the General Construction Law, entitled "Quorum and majority", states that:

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

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.

There is only one instance of which I am aware in which a board of education is required to take action by means of an affirmative vote of greater than a majority. Section 3016(2) of the Education Law states that:

> "No person who is related by blood or marriage to any member of a board of education shall be employed as a teacher by such board, except upon the consent of two-thirds of the members thereof at a board meeting and to be entered upon the proceedings of the board."

The provisions of both the Freedom of Information Law and the Open Meetings Law are pertinent to the second question. Section 106 of the Open Meetings Law pertains to minutes of meetings and states in relevant part that:

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

In one of the few instances in the Freedom of Information Law that requires that records be maintained, section 87(3)(a) provides that:

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

Based upon the foregoing, 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 a board of education, a record must be prepared that indicates that manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of section 87(3)(a), it appears that the State Legislature sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. 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 and states that:

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

Further, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found 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), aff'd 72 NY 2d 1034 (1988)].

Lastly, having discussed the remaining issue with an attorney for the New York State School Boards Association, I was informed that a board of education may, within certain limitations, require greater than a majority vote to take action. For example, in Matter of Miller (17 Education Department Reports 275), it was found that a requirement to approve an action by four-fifths of a board exceeded the board's authority; however, in Matter of Volpe (25 Education Department Reports 398), it was found that a requirement that two-thirds of the board approve the appointment of a superintendent was "not unreasonably restrictive".

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6729
OML-AO-1956

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

July 12, 1991

Mr. Alton J. Landsman
New York State Senate
Office of the Minority Leader
270 Broadway, Room 1812
New York, NY 10007

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

Dear Mr. Landsman:

I have received your letter of July 3. You have requested an advisory opinion concerning whether business improvement districts, particularly those located in New York City, are subject to the Freedom of Information and Open Meetings Laws.

In this regard, as you are aware, the statutes concerning the creation and functions of business improvement districts are found in Article 19-A of the General Municipal Law, sections 980 and 980-a through 980-p. Having reviewed those provisions, I do not believe that business improvement districts are agencies or public bodies; rather they are geographical areas in which business districts are located within municipalities. Other than district management associations, which will be discussed later, Article 19-A did not create any new governing body to operate those districts. Section 980-c specifies that a local legislative body has various powers with respect to districts, and section 980-d(c) specifies the roles of various New York City entities, i.e., the City Council, community boards, and the Planning Commission, in conjunction with the establishment or extension of a district. Certainly the records of those entities would fall within the scope of the Freedom of Information Law, and their meetings would be subject to the Open Meetings Law.

It is unlikely in my view that district management associations created by section 980-m of the General Municipal Law would be subject to either the Freedom of Information Law or the Open Meetings Law.

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

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

Section 980-m characterizes such associations as not-for-profit corporations. As such, it does not appear that they would perform a governmental function.

The Open Meetings Law applies to 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."

It is noted out that recent decisions indicate generally that entities, such as citizens advisory bodies, 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 government function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Assuming that the associations have no authority to take binding action on behalf of governmental entities, I do not believe that they would constitute 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1957

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

July 15, 1991

Mr. Daniel Hershberg
Acting Chairman
Albany Area Non-Public School
Advocacy Group
19 Colvin Avenue
Albany, NY 12206

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

Dear Mr. Hershberg:

I have received your letter of July 4 in which you raised two issues pertaining to the manner in which the Board of Education of the City of Albany School District has given effect to the Open Meetings Law.

The first involves what you characterized as a "regular practice of the Board". Specifically, you wrote that "[t]he Board meets in advance of its regularly scheduled meeting in what is billed as an 'Executive Session'." According to your letter, meetings "are normally called for 7:00 PM and the Board of Education convenes in a separate room which is made available to them by custodial workers...and [w]hile these meetings take place the public awaits the start of the public sessions".

The second concerns a meeting held on June 27 during which the "impact of Early Retirement Incentive on the budget and the impact of reimbursement on transportation to non-public schools outside the District were discussed". You indicated that a motion was made at that meeting to adopt an early retirement incentive plan "without any substantive discussion regarding the short term budgetary impact". You added, however, that you were informed after the meeting "that this was because a full discussion of the impacts had been conducted during 'Executive Session'." With respect to the Board's decision "to remove transportation to non-public school students outside the school

district", you suggested that "misinformation was promulgated at that meeting", that "[t]he vote on that matter revolved around the interpretation of the reimbursement rate for this line item", and that "[h]aving been duly misinformed at a private meeting, the Board members changed their votes".

You have requested an advisory opinion concerning the foregoing matters. In this regard, I offer the following comments.

First, by way of background, the term "meeting" has been construed broadly by the courts. In a landmark decision, 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)].

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 or conduct 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. In a decision involving the propriety of scheduling executive sessions prior to meetings, 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; note: the Open Meetings Law has been renumbered and section 100 is now section 105].

Moreover, as you are aware, 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.

Second, from my perspective, neither of the two issues that you described could justifiably have been discussed during an executive session.

Although the issue concerning early retirement might have related to personnel, the language of the so-called "personnel" exception for entry into executive session is limited and precise. 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.

As stated in the same decision as that cited earlier:

> "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 per-

> sonnel 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..." (id.).

As section 105(1)(f) relates to matters concerning the budget review process, issues of policy, such as those involving the allocation of public moneys, must in my opinion generally be discussed in public; only when an issue focuses upon a "particular person" in conjunction with one or more of the topics specified in section 105(1)(f) can an executive session be properly held pursuant to that provision.

It appears that both of the topics considered in executive session dealt with budgetary concerns and issues of policy, and that neither focused upon any particular individual in a manner falling within the scope of section 105(1)(f). Therefore, if the facts that you presented are accurate, the Board, in my view, would not have had any basis for conducting an executive session to discuss the issues that you described.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Superintendent Bach

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6734
OML-AO- 1958

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

July 17, 1991

Ms. Sondra Bauernfeind
Chairman
Sullivan County Conservative Party
[redacted]

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

Dear Ms. Bauernfeind:

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

Your initial area of inquiry relates to a meeting of the Sullivan County Board of Supervisors during which "there was a direct attempt to prevent [you] from addressing several issues which were under consideration by the Board of Supervisors for that meeting". According to your letter, when you were given an opportunity to speak, the Chairman "kept interrupting [you] and demanded to know if [you were] going to speak on a topic which was on the agenda for the meeting". You responded by stating that you did not know what was on the agenda "since the agenda for the meeting was not available before the meeting so that anyone who wished to address particular issues had no way of knowing what the issues to be discussed would be". You added, however, that, after you sat down, the first resolution involved "exactly the topic on which you intended to make [your] remarks".

"Since the public is allowed to speak at the regular meetings of the Board of Supervisors", and "since the public is allowed to speak only on topics and resolutions on the agenda", you asked when the agenda should be made available to the public.

In this regard, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, section 100). However, the Open Meetings Law is silent with respect to the issue of public participation. Consequently, if a public body does not want the public to speak or otherwise parti-

cipate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to permit public participation. If a public body does permit the public to speak, I believe that may do so based upon rules that treat members of the public equally.

Further, while public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that such was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

In the context of your question, if one can speak only about topics appearing on the agenda, in order to be reasonable, the Board's procedures, must in my view, permit disclosure of the agenda at a reasonable time prior to a meeting. I point out that there is nothing in the Freedom of Information Law or the Open Meetings Law that deals specifically with agendas. However, once prepared, an agenda constitutes a "record" subject to rights conferred by the Freedom of Information Law. Assuming that an agenda consists of a factual list of general topics to be considered at a meeting, I believe that it would be available under section 87(2)(g)(i) of the Freedom of Information Law, which requires that intra-agency materials consisting of factual information be disclosed.

The second area of inquiry involves a request directed to the Monticello Housing Authority for the names of "all employees, their addresses, the position(s) each holds and the salary for each position." Although the request was made on May 31, it appears that there has been no response.

By way of background, I point out that the Freedom of Information Law is applicable to agency records and that section 86(3) of the Law defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a

> governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Section 3(2) of the Public Housing Law states that municipal housing authorities are public corporations, and section 470 of the Public Housing Law specifies that the Village of Monticello Housing Authority "shall constitute a body corporate and politic". Since the definition of "agency" includes public corporations, I believe that the Authority is clearly an "agency" required to comply with the Freedom of Information Law. Moreover, it has been held judicially that a municipal housing authority is subject to the Freedom of Information Law [Washington Rockland Newspapers, Inc. v. Fischer, 101 AD 2d 840 (1985)].

Further, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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)].

Lastly, with respect to rights of access to payroll information, 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.

Among the few instances in the Freedom of Information Law that requires agencies to maintain particular records relates to payroll information. Specifically, section 87(3) of the Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

As such, a payroll record that identifies all agency officers or employees by name, public office address, title and salary must be prepared and maintained by an agency to comply with the Freedom of Information Law. Further, I believe that payroll information must be disclosed for the following reasons.

One of the grounds for denial, section 87(2)(b), permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available under the Freedom of Information Law, and prior to the enactment of that statute [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the general principle that records that are relevant to the performance of the official duties of public employees are available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October

30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

It is noted that section 89(7) states in part that the Freedom of Information Law does not require the disclosure of the home address of a public employee. While home addresses of Authority employees need not be disclosed, I believe that records including their names, public office addresses, titles and salaries must be disclosed.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Supervisors
Chairman, Monticello Housing Authority
Thomas Mack

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1459

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

July 18, 1991

Hon. Duncan M. Bellinger
Supervisor
Box 66
Howes Cave, NY 12092

<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 Bellinger:

I have received your letter of July 12 in which you asked whether "the proper procedure was used in setting up the meeting on July 11th, 1991 for the interviewing of town clerk candidates".

By way of background, you wrote that on June 6 or 7, you contacted the Town Clerk to inform her that you "had knowledge of 5 candidates to interview and [you] set Tuesday, June 11, 1991 as the date for that meeting". You added that the clerk "was to post a Special Meeting Notice in front of the town hall and [you were] to contact the official town newspaper...of a special board meeting to conduct interviews, discuss highway business and any other business that should come before the board."

In this regard, 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 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 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 an 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.

Based upon your letter, it appears that notice of the time and place of the meeting was posted and given to the news media. Assuming that those steps were taken at a reasonable time prior to the meeting, I believe that the notice requirements imposed by the Open Meetings Law would have been met.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6741
OML-AO-1968

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

July 19, 1991

Mr. Robert E. Bettmann
[redacted]

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

Dear Mr. Bettmann:

I have received your letter of July 16. You wrote that the president of the Hartsdale Volunteer Fire Department has advised you that its meetings and records are not open to the public.

You have asked that I advise him on the matter. In this regard, I offer the following comments.

First, it is noted that the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines "public body" to mean:

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

By reviewing the components in the definition of "public body", I believe that each is present with respect to the board of a volunteer fire company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function

is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law.

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

In view of the decision rendered in Westchester Rockland Newspapers v. Kimball, I believe that the board of a volunteer fire company, as well as committees that it may designate, fall within the definition of "public body" and would be required to comply with the Open Meetings Law.

More recently, another decision confirmed in an expansive manner that volunteer fire companies are subject to the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court stated that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having, by law, control over the prevention or ex-

> tinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This Court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

In my view, the foregoing bolsters the contention that meetings of boards of volunteer fire companies are subject to the Open Meetings Law and confirms that its records are subject to the Freedom of Information Law.

As you requested, copies of this opinion will be forwarded to president of the Department as well as the other 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Ira Josephson, President
Paul Agresta, Town Attorney
Thomas O'Reilly, Chairman of
Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6740
OML-AO-1961

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

July 19, 1991

Ms. June Maxam
The North Country Gazette
Box 408
Chestertown, NY 12817

Dear Ms. Maxam:

As you are aware, Mr. Larry Hackman of the State Archives and Records Administration has forwarded a copy of your letter of May 22 to the Committee on Open Government.

Your inquiry concerns records submitted to town officials of the Town of Chester that are not acknowledged by the Town Board, discussed at meetings or referenced in minutes of meetings. It is your view that "letters and/or petitions etc. should be publicly acknowledged, notation of same made in the official minutes and the letters etc. made part of the public record and subject to the Freedom of Information Law."

In this regard, I offer the following comments.

First, while a public body may choose to acknowledge or read letters or petitions at meetings, I am unaware of any provision of law that requires that it must do so.

Second, the Freedom of Information Law pertains to agency records, and section 86(4) of that statute defines the term "record" to include:

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

As such, any letters, petitions or similar documentation forwarded to a public body or public official in my view clearly constitute "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.

From my perspective, one of the grounds for denial, section 87(2)(b), may be relevant to the kinds of records to which you referred. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Depending upon the contents of a letter, for example, it is possible that the name or other identifying details of a person writing to the Town could be deleted to prevent an unwarranted invasion of personal privacy. In such a case, the substance of such a letter would likely be available following the deletion of identifying details. I point out that there is no requirement that a municipality must delete those details; rather, it may do so to the extent that disclosure would result in an unwarranted invasion of personal privacy. A petition, in my view, would be public in its entirety, for those who sign or submit petitions do so, in my opinion, with an intent to make known the contents of those records and their identities.

Lastly, with regard to minutes, the Open Meetings Law prescribes what may be viewed an 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 reference or responses to correspondence as part of the minutes, the Open Meetings Law does not require that kind of information to be included in minutes. It is implicit in the Law, however, that whether minutes are brief or expansive, they must accurately describe what transpired at a meeting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1962

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

July 19, 1991

Ms. Jeanne Frankl
Executive Director
Public Education Assistance
39 West 32nd Street
New York, NY 10001

The staff of the Committee on 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. Frankl:

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

Your inquiry was precipitated by "the discussion of a policy item in an Executive Session meeting" of the New York City Board of Education on June 17. By way of background, you wrote that the notice posted in the Board's lobby prior to the meeting "announced an Executive Session meeting of the Board at 9 a.m.", thereby indicating that "this meeting was to be a closed one was established before a vote of the Board members". Further, following the meeting, it was confirmed that "the Board's AIDS curriculum and a potential parental 'opt out' plan was discussed at the meeting". Although Counsel to the Board contended that the executive session was appropriate because the Board discussed "possible litigation", you expressed the view that "this was not a threat in this particular instance as no litigation is pending or proposed at this time".

In this regard, I offer the following comments.

First, the term "meeting" has been construed broadly by the courts. In a landmark decision, 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)].

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 or conduct 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. In a decision involving the propriety of scheduling executive sessions prior to meetings, 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; note: the Open Meetings Law has been renumbered and section 100 is now section 105].

Second, as you are aware, 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.

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).

Based upon the foregoing, except to the extent that a public body's "litigation strategy" is discussed, I do not believe that "threatened" or "possible" litigation could validly be considered during an executive session on the basis of section 105(1)(d). As suggested by the court in Weatherwax, virtually any issue discussed by a public body, including issues involving policy, could at some point relate to or become the subject of litigation. That possibility, however, would not in my view constitute an appropriate reason for conducting an executive session. Moreover, if I understand your commentary accurately,

the Board voted to present a particular aspect of the AIDS program at a future meeting. That vote, as I understand the matter, represented an issue of policy that is unrelated to litigation, "possible" or otherwise.

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); also Previdi v. Hirsch, 524 NYS 2d 643, 645 (1988)].

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

Lastly, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law section 105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to section 106(2). 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 board of education cannot take action during an executive session (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)]. As such, 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 and understanding of the Open Meetings Law, copies of this opinion will be forwarded to the Board of Education and Counsel 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Mary Tucker, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1963

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

July 19, 1991

Ms. Joanna Ezinga
[redacted]

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

Dear Ms. Ezinga:

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

According to your letter, for several months you have been attending meetings of the Zoning Board of Appeals of the Village of Chatham "in an effort to remain informed about the status of a proposed 14 store strip mall slated to be built on the outskirts of the village". You added that the "mall is the single largest commercial development the village board has ever had to consider, and as a town resident opposed to the project, a clear understanding of the board's decisions and deliberations is essential".

Your ability to understand what transpires at the meetings, however, has been impaired, for you wrote that:

> "it is often difficult and impossible to hear the proceedings of the sessions. The meetings are held in a large 2nd floor room, with no amplification system. Zoning board members occasionally sit with their backs to the audience and usually speak quietly among themselves despite requests from the public to speak louder...It is very awkward for members of the public to be forced to repeatedly remind board members to speak loudly enough to be heard. At every meeting, people slowly inch their chairs forward across

> the floor. By the end of the meeting the configuration of the room is one tight little knot of people, bunched in the corner, straining to hear."

In addition, you indicated that at each meeting, those in attendance "are reminded by the attorney that, it is a 'public meeting' not a 'public hearing', and questions, discussion or comments are not allowed."

In this regard, I offer the following comments.

First, with respect to the capacity to hear what is said at meetings, I direct your attention to section 100 of the Open Meetings Law, its legislative declaration. That provision states that:

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to the deliberative process". Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view situate itself and conduct its meetings in order that those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basic requirement of the Open Meetings Law.

Second, there is a distinction between meetings and hearings. A meeting generally involves a gathering of a public body for the purpose of discussion, deliberation and perhaps the taking of action. A hearing, on the other hand, generally involves a situation in which the public is given an opportunity to speak in conjunction with a particular issue.

As indicated earlier, although the Open Meetings Law provides the public with the right to attend open meetings and listen to the deliberative process, the Law is silent with regard to public participation. Therefore, while many public bodies do so, a public body is not required to permit the public to speak or otherwise participate at meetings. Certainly a public body may choose to permit public participation, and when it does so, it has been advised that the body may permit the public to speak in accordance with reasonable rules or policies that treat the members of the public equally.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1969

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

July 22, 1991

Peter W. Hill, Esq.
[redacted]

Dear Mr. Hill:

I have received your letter of July 16, as well as the correspondence attached to it.

The issue involves the status of "non-chartered committees" of the Oneonta Common Council, i.e., committees that have not been created by the city charter or specifically designated by the Common Council. According to the City Attorney, the committees in question were established by the Mayor as "an organizational tool", and he indicated that they have no specific powers, duties or authority. You have asked whether I am aware of any published judicial decisions concerning non-chartered committees.

In this regard, I know of no decisions that deal directly with the issue. However, I offer the following comments on the matter.

It is noted at the outset that recent decisions indicate generally that entities consisting of persons other than members of public bodies having no power to take final action, such as citizens advisory committees, 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, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

With respect to committees consisting of members of public bodies, 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" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee of a common council, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [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 three, for example, a quorum would be two.

While a committee may have no authority to take final action, the clause at the end of the definition of "public body" involving a "committee or subcommittee or similar body of such body" would have no meaning if entities consisting of members of public bodies designated by a person or body having the authority to make such a designation were not subject to the requirements of the Open Meetings Law. Such a result would place form over substance and essentially negate that clause of 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: David S. Merzig, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6744
OML-AO-1465

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

July 22, 1991

Mr. Kenute Sterling
[redacted]

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

Dear Mr. Sterling:

I have received your recent letter, which reached this office on July 18.

You have asked whether it is possible to obtain records concerning the vote by the State Legislature to increase tuition at the State University of New York, as well as records of meetings kept by the State Legislature on the subject of the state budget.

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of the Freedom of Information Law states in part that an entity need not create or prepare a record in response to a request, unless there is specific direction to the contrary.

Second, the State Legislature is subject to different provisions of the Freedom of Information Law than agencies of state and local government. Section 88(2) of the Law specifies the kinds of records that must be disclosed by the Senate and the Assembly. Of likely relevance to your inquiry are paragraphs (a) and (e) of section 88(2), which respectively grant access to: "bills and amendments thereto, fiscal notes, introducers' bill memoranda, resolutions and amendments thereto, and index records", and "transcripts or minutes, if prepared, and journal records of public sessions including meetings of committees and subcommittees and public hearings, with the records of attendance of members thereat and records of any votes taken".

Third, I point out that the Open Meetings Law pertains to public bodies. 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."

As such, I believe that the Senate and the Assembly, as well as committees consisting of their members, are public bodies subject to the Open Meetings Law. With respect to meetings concerning the budget, I would conjecture that those held by the Senate Finance and Assembly Ways and Means Committees would be most relevant.

With regard to minutes of meetings, the Open Meetings Law prescribes what may be viewed an 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.

Fourth, a request made under the Freedom of Information Law should be directed to an entity's "records access officer". The records access officer has the duty of coordinating responses to requests. Both the Senate and the Assembly have designated records access officers. In addition, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable officials to locate the records.

Lastly, you asked whether it is possible to gather records from banks and credit bureaus about yourself. Those entities are not governmental in nature, and their records are not subject to the Freedom of Information Law. Since I am not an expert on the subject, I cannot offer specific guidance. However, under the Fair Credit Reporting Act, a federal statute, I believe that, under certain circumstances, individuals may obtain records pertaining to themselves from credit reporting agencies. It is suggested that you might be able to obtain information on the subject through your congressman.

Enclosed are copies of the Freedom of Information Law, the Open Meetings Law and a brochure describing both statutes.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1966

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

July 23, 1991

Mr. Roger Helbig
Town of Milo Zoning Office
158 East Lake Road
Penn Yan, NY 14527

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

Dear Mr. Helbig:

I have received your recent letter in which you raised a question concerning quorum requirements.

According to your letter, the Yates County Planning Board consists of 20 members, and its by-laws indicate that "a quorum is 7 and that a majority of that 7 is sufficient to pass resolutions of the board". You have asked whether that is appropriate.

In this regard, I offer the following comments.

First, although the Open Meetings Law refers to entities that conduct public business by means of a quorum, a different statute, section 41 of the General Construction Law, entitled "Quorum and majority", provides specific direction concerning the issue that you raised. 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 foregoing, a quorum of a public body consisting of 20 members would be 11, a majority of its total membership. In my view, until at least 11 members of the Board convene, the Board would be incapable of carrying out its powers and duties. Further, under section 41 of the General Construction Law, in order to "pass resolutions", I believe that a motion must be carried by at least an affirmative majority of the total membership. Stated differently, 11 affirmative votes would be needed to carry a motion.

Lastly, in my opinion, a by-law cannot conflict with direction given by a statute. In other words, absent statutory authority to do so, I do not believe that a by-law could reduce a quorum requirement in a manner inconsistent with section 41 of the General Construction Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1967

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

July 24, 1991

Mr. Joseph LaPlant
Supervisor
Town of Florida
P.O. Box 37
Fort Hunter, NY 12069

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. LaPlant:

I have received your recent letter in which you requested an advisory opinion concerning the legality of a town zoning appeals board conducting door deliberations to determine the merits of requests for special exceptions to zoning ordinances.

In this regard, I offer the following comments.

By way of background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. The Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law. Further, due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session. As you may be aware, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one of more of those topics arises, a public body, including a zoning board of appeals, must deliberate in public.

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

I hope that I 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 Attorney
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1968

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

July 24, 1991

Mr. Richard J. Klein
[redacted]

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

Dear Mr. Klein:

I have received your letter of July 21 and the materials attached to it. As in the case of earlier correspondence, the issue involves meetings of committees of the Allegany and Cattauraugus County Legislatures.

Having reviewed the opinion sent to you on May 6, copies of which were forwarded to the chairpersons of those legislative bodies, there is little that I can add in terms of the requirements of the Open Meetings Law. Nevertheless, in conjunction with the material that you recently sent, I offer the following comments.

First, the Chairman of the Cattaraugus County Legislature appears to have suggested that a certain meeting would have to be cancelled in order to "advertise" the meeting if my opinion were to be followed. Similarly, the Chairman of the Allegany County Legislature indicated that meetings may often be scheduled on short notice.

In this regard, the Open Meetings Law does not preclude a public body from convening quickly, for it enables a public body to provide notice of meetings in a manner that would comply with law, whether the meetings are regularly scheduled or otherwise.

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 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 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 an 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, subdivision (3) specifies that a public body is not required to pay to "advertise" or place a legal notice when it provides notice of a meeting under the Open Meetings Law.

Second, the Open Meetings Law contains provisions concerning its enforcement. Section 107 states in relevant part that:

> "1. Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.

> 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...
>
> 2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party."

I hope that I 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. Delores Cross, Chairman
Hon. Don B. Winship, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1969

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

August 19, 1991

Deborah W. Taylor, Councilwoman
P.O. Box 51
Patterson, New York 12563

<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 Councilwoman Taylor:

I have received your letter of July 31 in which you requested an advisory opinion concerning minutes.

In your capacity as a member of the Patterson Town Board, you wrote that there are often "delays" in the preparation of minutes. By means of example, you wrote that, at the Board meeting of June 12, you were given minutes for the purpose of approval for a series of meetings held between November 20, 1990 and May 2 of this year. You also indicated that no minutes had been prepared with respect to a number of meetings.

In this regard, I offer the following comments.

I direct your attention to section 106 of the Open Meetings Law, which includes direction concerning the content of minutes in the time within which they must be prepared. 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."

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. Further, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Clearly minutes need not consist of a verbatim account of all that was said at a meeting. However, at a minimum, minutes of open meetings must consist of a record or summary of all motions, proposals, resolutions and matters voted upon, including the vote of each member.

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 an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6766
OML-AO-1970

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

August 22, 1991

Ms. Jocelyn A. McIntee
Chairman
Heckscher Park Area Residents'
Association
[redacted]

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

Dear Ms. McIntee:

As you are aware, I have received your letter of July 24 and the materials attached to it. Your inquiry concerns the status of the Heckscher Museum and its Board of Trustees under the Freedom of Information and Open Meetings Laws.

According to your letter, the Heckscher Museum is a non-profit, charitable, educational corporation. Further, you wrote that:

> "The Heckscher Museum building and collection are publicly owned and financed by the Town of Huntington, Suffolk County, Long Island. The facility sits in Heckscher Park also publicly owned and supported. The park predates the Museum by three years and was donated to the town in 1917. It was a gift to the people of the Town of Huntington by philanthropist August Heckscher.
>
> "The relationship between the Heckscher Museum, the private, charitable organization and Heckscher Museum, the facility is unusual. The Town of Huntington, in an agreement from 1964, has contracted the operation and management of the museum to the Board of Trustees of the incorporated Heckscher

> Museum. They supervise exhibitions, etc. and at this time are contributing approximately 1/3 of the operating costs of the museum facility, included in this 1/3 are grant monies from federal, state, and county agencies.
>
> "On the other hand, the Town of Huntington owns the museum, the collection, the Park, pays the director of the museum, by far the greater proportion of the salaries of the staff and pays all of the capital expenditures of the museum."

You have been informed that, due to its corporate status, the Museum is not subject to the Freedom of Information Law and it has been inferred that meetings of the Board of Trustees are outside the coverage of the Open Meetings Law.

In an effort to learn more of the relationship between the Town and the Museum, I have obtained a copy of the agreement between those entities, which was executed on July 28, 1964. As you indicated, the agreement states that the Town owns the Museum and the property upon which it is situated. It further specifies that:

> "Any additions to the buildings occupied by said Museum shall be constructed and owned by the Town and constructed in accordance with plans prepared by the Museum and approved by the Town";

that

> "The Museum may raise by private donations funds sufficient, together with any funds appropriated thereto by the Town, to complete any such addition to said Museum buildings, in accordance with plans and specifications approved by the Museum and the Town";

that

> "The Museum trustees will have control of the maintenance and operation of the buildings and collections subject to approval by the Town. Appointments of personnel to the Museum staff shall be made by the Museum, subject, however, to approval of the Town Board of the Town";

that

> "The Town Board of the Town will annually appropriate such sum or sums of money as it shall, in the exercise of its discretion, deem requisite and necessary, for the payment of the salary of the director of the Museum, for the maintenance of the building or buildings and the guarding of the collection and for such other purposes as it shall deem advisable. The Town will insure the Museum building or buildings against loss by fire and other accepted risks"; and

that

> "The collections and all other property acquired by the Museum which were acquired separately from the Heckscher Trust and which shall continue to be and remain absolutely the property of the Museum, and the Town shall not have any right, title, or interest therein, nor shall the Museum, by reason of occupation and use of said building or buildings under this agreement, acquire or be deemed to have any right, title, or interest in said building or buildings, except insofar as expressly granted by this agreement."

Based upon the foregoing, as well as other aspects of the agreement, the situation appears to represent what might be characterized as a hybrid. While the Museum and its Board of Trustees maintain control with respect to the operation of buildings, collections, and appointments of staff, those functions may be carried out only with the approval of the Town. Although certain aspects of the contents of the Museum are owned by the Museum, the Town clearly owns the real property constituting the Museum. Further, if the Museum fails to carry out the agreement, or if the agreement is terminated by either party, the Town, upon sixty days notice "may reenter and shall have again, repossess, and enjoy the premises aforementioned and in like manner as though these presents have never been made".

In general, I would agree that not-for-profit corporations are not subject to the Freedom of Information Law. Those entities are ordinarily not governmental in nature and they generally function in a manner independent of government, despite the possible receipt of government funds. Moreover, I am unaware of any judicial decisions rendered under the Freedom of Information Law that deal with facts or circumstances analogous to those presented here. Nevertheless, due to the nature of the relationship

between the the Town and the Museum and the degree of control over the Museum's activities enjoyed by the Town, I am inclined to advise that the records maintained by the Museum are subject to the Freedom of Information Law.

That statute is applicable to agency records, and 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."

The Town is clearly an agency, for it is a public corporation. From my perspective, it may be contended that the Museum, despite certain elements of separateness from the Town, is part of Town government. Again, the facility is essentially owned by the Town and its activities are subject to the control of the Town. I point out that section 64 of the Town Law, which relates to the general powers of town boards, states in subdivision (4) that a town board "[s]hall have the management, custody and control of all town lands, buildings and property of the town and keep them in good repair and may cause the same to be insured against loss or damage by fire or other hazard". Although the Museum "manages" various aspects of its functions, it apparently does so in great measure subject to the approval and oversight of the Town in a manner generally congruent with section 64(4) of the Town Law. In some respects, it appears that the Museum and its Board of Trustees serve as the agent of the Town in terms of the management of the facility.

Viewing the matter from a different perspective, as indicated earlier the Freedom of Information Law pertains to agency records. Section 86(4) of the Law defines "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."

The Court of Appeals 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" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records", thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant.

While I am unaware of any judicial decisions that deal with facts similar to those presented in this situation, the definition of "record" includes not only documents that are maintained by an agency; it refers to documents "kept, held, filed, produced or reproduced by, with or for an agency". Under the circumstances, it appears that the records in question, although in the physical possession of the Museum, may be kept and produced for the owner of the Museum, the Town of Huntington. Since the Museum is the property of the Town, the records in possession of the Museum would appear to be kept and produced for the Town. If that is so, I believe that they would be subject to the Freedom of Information Law.

Moreover, in a decision cited earlier, the Court of Appeals found that certain not-for-profit corporations, volunteer fire companies, are subject to the Freedom of Information Law despite their corporate status. In its holding, which expansively construed the scope and intent of the Freedom of Information Law, the Court stated:

> "We begin by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, section 84).
>
> "...For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of 'a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (Westchester Rockland Newspapers, supra, 579).

With regard to the Open Meetings Law, that statute applies to meetings of public bodies, and 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."

Again, the boards of not-for-profit or private corporations do not in my opinion generally constitute public bodies, for they do not conduct public business or perform a governmental function. However, in this instance, due to the relationship between the Museum and the Town and the functions performed by the Museum's Board of Trustees, the Board may be subject to the Open Meetings Law, perhaps with respect to certain of its functions.

There is a decision that involves facts that might have been somewhat comparable to those presented. In Holden v. Board of Trustees of Cornell University [80 AD 2d 378 (1981)], the issue was whether meetings of the Cornell University Board of Trustees were subject to the Open Meetings Law. Cornell University is clearly a hybrid, for it is both a private university and a land grant college. Four of the colleges within the University are so-called "statutory colleges". Under section 350(3) of the Education Law, statutory colleges are "operated by private institutions on behalf of the state pursuant to statute or contractual agreements". In the case of Cornell, there are four statutory colleges, and Cornell acts as the representative of the State University. In its description of the matter, the Court in Holden stated that:

> "Cornell maintains custody and control of the property, buildings, furniture, and other apparatus of the statutory colleges, but title to such remains with the State...
>
> "The SUNY Board of Trustees retains supervision of Cornell's operation of these colleges (Education Law, [section] 355, subd 1, par f). The SUNY Trustees must approve the Board's selection of deans of the statutory colleges and are consulted with respect to tuition rates. Cornell must report to SUNY Trustees

> every year about the colleges' expenditures. The statutory colleges receive public moneys which must be kept in a separate fund and used only for the public colleges."

Based upon those considerations, the Court held that the Board was subject to the Open Meetings Law "when its deliberations and actions concern the statutory colleges" (id. 381). In reaching the determination, the Court found that:

> "The close relationship between Cornell and the State and Cornell's dual role, as both a private and public institution, indicate that the Board is a public body as defined by section 97 of the Public Officers Law. The conclusion also must be drawn that Cornell, as such public entity, conducts public business and performs a governmental function for the State or for an agency or department of the State. Cornell in operating the statutory colleges, is involved in the day-to-day management of the colleges, setting tuition levels, determining spending priorities and numerous other activities which form a part of a college's existence. Indeed, the Board in administering the colleges, spends State moneys appropriated for these four colleges. Management of public moneys is public business.
>
> "The Board is the acknowledged representative of SUNY which is a corporate agency within the State Education Department charged with carrying out certain governmental functions (Education Law, [section] 352). In its capacity as administrator, therefore, the Board performs a governmental function for the State Education Department and necessarily for the State.
>
> "The Open Meetings Law is to be given a broad and liberal construction so as to achieve the purposes for which it was enacted as evidenced by the legislative declaration contained in section 95 of the law" (id., 380-381; Note: the Open Meetings Law was renumbered

after the Holden decision, and sections 95 and 97 are now sections 100 and 102 respectively).

In the context of your inquiry, I would contend that the Museum Board of Trustees constitutes a "public body" insofar as its meetings involve matters falling with the eventual control or approval of the Town. Other matters, such as those involving collections or museum property, would appear to fall within the sole control of the Museum and, therefore, outside the scope of the Open Meetings Law.

By viewing the definition of "public body" in terms of its components, it may be concluded in my view that the Board, to the extent suggested above, is a public body subject to the Open Meetings Law. Presumably the Board consists of at least two members. It is required to conduct its business by means of a quorum pursuant to applicable provisions of the Not-for-Profit Corporation Law or arguably section 41 of the General Construction Law. Further, insofar as it manages Town property, it appears to conduct public business and perform a governmental function for a public corporation, the Town of Huntington.

In sum, due to its unusual status and relationship with the Town, the status of the Museum under the Freedom of Information Law and Open Meetings Law is unclear. Nevertheless, based upon the preceding commentary and subject to the qualifications described above, it appears that the Museum is subject 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

cc: John E. Coraor, Ph.D.
Jo-Ann Raia, Town Clerk
Mark Grossman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6775
OML-AO-1971

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

September 3, 1991

Ms. Rebecca James
Cortland Bureau
81-85 Main Street
P.O. Box 742
Cortland, NY 13045-0742

The staff of the Committee on 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. James:

As you are aware, I have received your letter of August 4 in which you requested an advisory opinion. Please accept my apologies for the delay in response.

Your inquiry pertains to the Cortland County Legislature's Solid Waste Disposal Committee, which held an executive session "to hear a report from the engineering company working on the county landfill". The report, according to your letter, "dealt with the contractor's work on the landfill and an ongoing dispute between the engineer and the contractor". You added that:

> "Assistant County Attorney William Ames said he believed the committee could discuss the matter in private for two reasons. First, since the areas of dispute are likely to come up in future litigation and arbitration, Ames said he was concerned that a legislator might speak rashly and, for instance, admit some liability, which could be used against the county in court. Second, Ames contends that reports from the engineer, the county's consultant, can be given in executive session. He reasons that

> because some consultant reports, when the report constitutes advice to the county, do not have to be disclosed to the public, then oral reports at a public meeting can also be done in private."

In this regard, I offer the following comments.

First, 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."

Since the definition refers specifically to a committee of a public body, the Solid Waste Disposal Committee, assuming that it consists of members of the County Legislature, would in my opinion constitute a public body required to comply with the Open Meetings Law.

Second, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that the subject matter under consideration may be discussed during an executive session. Further, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may appropriately be considered behind closed doors. Therefore, a public body may not enter into an executive session to discuss the subject of its choice; on the contrary, the Open Meetings Law limits the ability to engage in executive session to certain subjects.

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).

Based upon the foregoing, except to the extent that a public body's "litigation strategy" is discussed, I do not believe that threatened or possible litigation could validly be considered during an executive session on the basis of section 105(1)(d). As suggested by the court in Weatherwax, virtually any issue discussed by a public body could at some point relate to or become the subject of litigation. That possibility, however, would not in my view constitute an appropriate reason for conducting an executive session. In short, only to the extent that the Committee discussed its litigation strategy would section 105(1)(d) have been properly asserted.

Lastly, the Freedom of Information Law is similar in structure to the Open Meetings Law, for it requires that all records be made available, except those records or portions thereof that fall within the scope of the grounds for denial appearing in section 87(2) of that statute. In this regard, it is emphasized that the grounds for entry into an executive session appearing in section 105(1) of the Open Meetings Law are not necessarily consistent with the grounds for denial of access to records appearing in section 87(2) of the Freedom of Information Law. In some instances, although the discussion of a particular topic might justifiably be conducted during an executive session, records related to that topic would not necessarily fall within any ground for denial in the Freedom of Information Law, and vice versa. For instance, if a public body discusses the possible appointment of a particular individual to a position, an executive session would likely be proper, for section 105(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

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

Since such a discussion would involve matters "leading to the appointment...of a particular person", and an executive session would in my view be appropriate. Nevertheless, if a public body chooses to appoint an individual to a position, records reflective of the appointment would be made available as minutes required to be prepared under section 106 of the Open Meetings Law. Moreover, section 87(3)(b) of the Freedom of Information Law requires each agency to maintain and make available as a payroll record indicating the name, public office address, title and salary of all officers or employees of the agency. As such, even though a discussion resulting in the appointment of an individual to a position might be closed under the Open Meetings Law, records relating to the appointment of the individual might be accessible under the Freedom of Information Law. Similarly, while I believe that a memorandum recommending a change in policy or local law transmitted by a legislator to the members of a legislative body could be withheld under section 87(2)(g) of the Freedom of Information Law, it is unlikely that any of the grounds for entry into an executive session would be applicable when the body considers the issue at a meeting. In that situation, a record might properly be withheld, but a discussion of its contents must occur during an open meeting.

With respect to the facts that you presented, based upon the judicial interpretation of the Freedom of Information Law, records prepared for an agency by a consultant may 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.

While the Court of Appeals has found that consultants' reports constitute intra-agency materials, the Court 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" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents. Moreover, as indicated earlier, the grounds for entry into executive session are not always consistent with the grounds for withholding records. In short, the Open Meetings Law pertains to meetings; the Freedom of Information Law pertains to records. Despite the possibility that a record that is the subject of a discussion may be withheld under the Freedom of Information Law, if none of the grounds for entry into executive session specified in section 105(1) of the Open Meetings Law apply, I believe that a meeting of a public body must be conducted in public.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to Cortland County 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: Solid Waste Disposal Committee
William Ames, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1972

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

September 3, 1991

Ms. Carolyn Whalen
[redacted]

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

Dear Ms. Whalen:

As you are aware, I have received your letter of August 4 in which you requested assistance. Please accept my apologies for the delay in response.

Your inquiry pertains to a special meeting of the West Islip Board of Education held to consider "budgetary impacts as a result of recent state aid reductions". According to your letter:

> "At that meeting Board President Ronald Bova, after stating that there would be no public participation, proceeded to remove the microphones from in front of the board members so that the audience could not hear what was being discussed. When two board members objected he replied, 'Duly noted.' When audience members objected he ruled them out of order. He then proceeded to take the tables that the board members were sitting at and form a circle so that some of the members were sitting with their backs to the audience. (Another obvious attempt to exclude the public!) At that point some of the members of the audience moved their chairs up to the board 'circle' and surround the board so that they could hear the board discussion. After one board member requested

> minutes, it stated that there would be no microphone or community input at this meeting, and after several taxpayers reminded Mr. Bova that this was an open meeting, the microphones were brought back."

In this regard, I believe that the ability to hear and observe the members of a public body during an open meeting is a basic requirement of the Open Meetings Law. I direct your attention to section 100 of the Open Meetings Law, its legislative declaration. That provision states that:

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of and observe the performance of public officials" and "listen to the deliberative process". Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view situate itself and conduct its meetings in order that those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with the basic intent of the Open Meetings Law.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1923

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

September 13, 1991

Mr. Richard Farrell
The Eagle
P.O. Box 36
Cambridge, NY 12816

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

Dear Mr. Farrell:

As you are aware, I have received your note of August 16 in which you requested an advisory opinion concerning the status of a private meeting conducted by a board of education to engage in a "self assessment".

In a letter to your newspaper, five people, presumably members of the Cambridge Central School Board of Education, presented their view of the issue. In their description of the self assessment, it was stated that:

> "The idea of a school board assessing its own performance is encouraged by national and state school board associations. Boards do this to identify their strengths and weaknesses in particular areas, to improve communication between members and with the superintendent, to identify areas of conflict, and to identify board goals. These assessments are used by a board to plan for improving its performance."

The issue in my view involves whether or the extent to which a self assessment session constitutes a "meeting" subject to the Open Meetings Law. From my perspective, some of the subjects described in the letter would, if considered independently, fall beyond the scope of the Open Meetings Law; others in my view would be subject to the Law. The problem involves the ability to separate those subjects.

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).

Insofar as a self assessment session truly involves matters such as interpersonal relationships and similar or related matters, arguably the session would not constitute a meeting, for the members would not likely be conducting public business. However, if and when a discussion moves to "board goals", it is difficult to view that kind of subject as anything but public business. While it may be easier to discuss board goals and related matters in a relaxed private atmosphere, it is my view that consideration of those matters would fall within the definition of the term "meeting" as it has been construed judicially.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6795
OML-AO-1974

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

September 30, 1991

Mr. Robert R. Cole
[redacted]

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

Dear Mr. Cole:

I have received your letter of September 18. As requested, enclosed are materials concerning the Freedom of Information Law, the Open Meetings Law and the Personal Privacy Protection Law.

You asked whether the "rules, regulations, codes or laws established by the local board of trustees and mayor supersede those established by state agencies". In this regard, I offer the following comments.

First, I point out that the Personal Privacy Protection Law does not apply to local governments. That statutes pertains to state agencies only.

Second, it has been held that an enactment of a local government, such as a local law, ordinance or charter provision cannot restrict rights of access conferred by the Freedom of Information Law, which is an act of the State Legislature [see e.g., Morris v. Martin, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. It has also been held that an agency cannot establish fees for copies of records above those permitted by the Freedom of Information Law, absent statutory authority (i.e., an enactment of the State Legislature) to do so [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Similarly, section 110 of the Open Meetings Law, entitled "Construction with other laws", states that:

> "1. Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article

shall be deemed superseded hereby to the extent that such provision is more restrictive than this article.

2. Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby.

3. Notwithstanding any provision of this article to the contrary, a public body may adopt provisions less restrictive with respect to public access than this article."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1925

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

October 2, 1991

Ms. Gayjone Carroll
[redacted]

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

Dear Ms. Carroll:

I have received your letter of August 26 and the correspondence attached to it.

In brief, having requested minutes of a meeting of the Board of Trustees of the Village of Airmont, you were informed that the minutes "will not be available to the public until they have been approved by the Mayor and the Board of Trustees."

You have requested advice and assistance in the matter. 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 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 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.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to Village officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Sarah O'Hara, Clerk
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1976

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

October 2, 1991

Gail S. Wolanin, Town Clerk
Town of New Hartford
48 Genesee Street
New Hartford, New York 13413-2397

The staff of the Committee on 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. Wolanin:

I have received your letter of August 28 and the memorandum attached to it.

You referred to an advisory opinion prepared on July 2 concerning the propriety of an executive session held during a meeting of the Town of New Hartford Planning Board to discuss "possible litigation". Based on a review of that opinion, attorneys for the Town wrote that "[t]he matters to be discussed at the meeting...involved issues that are the subject of current dispute with attorneys who represent clients within the study corridor. For this reason, the Planning Board chose to continue the discussion in Executive Session". You have requested my comments on the matter.

First, having reviewed the July 2 opinion, part of the problem involved the procedure by which the Board or Boards entered into the executive session. That issue was considered at length in the opinion.

Second, as indicated in the opinion, the courts have found, in brief, that section 105(1)(d) of the Open Meetings Law is intended to enable a public body to discuss its litigation strategy in private so as not to divulge its strategy to its adversary, who may be present at the meeting, and that the threat or possibility of litigation may be inadequate to justify holding an executive session.

The description by the Town's counsel of the matter, "issues that are the subject of current disputes with attorneys who represent clients within the study corridor", indicates little about the substance of the discussion. Does the term

"dispute" mean litigation or merely a disagreement or contentiousness? Without additional facts or the capacity to have been present, it is impossible to offer a statement concerning the propriety of the executive session. As indicated in the advisory opinion, "the executive session, in my opinion, would properly have been held only to the extent that the Board's litigation strategy was discussed". That remains my view for the reasons described herein.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1977

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

October 4, 1991

Ms. Carolyn Whalen
[redacted]

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

Dear Ms. Whalen:

I have received your letter of August 24, which reached this office on September 5. You have requested an advisory opinion concerning two incidents involving the West Islip Board of Education.

With respect to the first, you wrote that at a meeting of the Board's Finance Committee, present were several District officials, six board members and approximately twenty members of the public. Upon the arrival of the sixth member of the Board, the acting superintendent asked the Chairman of the Finance Committee to move for an executive session "so he could speak to the Board for five or ten minutes". Nearly an hour later, the public was called back into the meeting room, and the Finance Committee meeting "reconvened". It is your view that "since there were six Board members present that this was an unannounced and therefore illegal meeting of the Board". You added that "according to at least one Board member all Board members present took part in the discussion in executive session.

In this regard, I offer the following comments.

First, 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."

Based on the foregoing, the Board of Education clearly is a public body. Further, in view of the last clause of the definition, a committee consisting of at least two Board members would in my opinion constitute a public body.

Second, the issue appears to be whether the gathering in question was a meeting of the Finance Committee during which other members of the Board were permitted to attend the executive session, or whether the gathering became a meeting of the Board. I point out that 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". The public body that began the meeting was the Finance Committee. If that body conducted an executive session, it could have authorized others, i.e., members of the Board who do not serve on the Finance Committee, to attend. If indeed the gathering was an executive session of the Finance Committee, it appears that it would have been appropriately held. On the other hand, if the six members of the Board gathered as the Board, rather than as the Finance Committee with others authorized to attend, I would agree with your contention that the gathering would have constituted a meeting of the Board of Education that should have been preceded by public notice given in accordance with section 104 of the Open Meetings Law.

With respect to the second incident, you wrote that:

> "..the Board scheduled its monthly meeting for August 8, 1991 at 8 P.M. at West Islip High School. The meeting with the 8 P.M. starting time was posted in the West Islip Library. In addition, two community members called the District Office on the afternoon of August 8, 1991 to verify the 8 P.M. starting time. At 7:15 P.M. the Board met in the high school auditorium and immediately went into Executive Session. When told by community members that they were meeting illegally, Mr. Ronald Bova, President of the Board, waved his hand in disgust at the protestors. Mr. Ernesto Mattace, a resident of the district, walked to the principal's office, where the Board was meeting, knocked on the door, and when Mr. Bova opened the door, informed him that he was meeting illegally. Mr. Bova responded by muttering something inco-

> herent and slamming the door in Mr. Mattace's face. When the Board returned to the auditorium at 8 P.M. they did not reconvene but opened the meeting as they would any other meeting. During the public portion of the meeting I informed Mr. Bova that he had run an illegal meeting. He replied that the meeting was legal."

In conjunction with the foregoing, it is emphasized that the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from 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, in a technical sense, 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 an open meeting during which the execu- tive 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].

Finally, if the Board intended to meet at 7:15, I believe that public notice to that effect should have been given prior to the meeting.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the Board of Education. You may copy and reproduce it as you see fit.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6809
OML-AO-1978

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

October 4, 1991

Ms. Kathy Kellogg
Board of Directors
Concerned Citizens of
Cattaraugus County
P.O. Box 23
Franklinville, NY 14737

The staff of the Committee on 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. Kellogg:

I have received your letter of September 3 and the materials attached to it. You have described a series of issues involving the Freedom of Information Law and the Open Meetings Law as those statutes have been implemented by the Town of Farmersville, particularly in relation to your efforts in gaining the enactment of a "landfill ban law".

In consideration of the matters that you presented, I offer the following comments.

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

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknow-

> ledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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)].

You referred to "contract agreement" as a "secret document". If a contract exists between the Town and a firm, I believe that it must be disclosed, for none of the grounds for denial would be applicable. If the contract is still in the process of being negotiated, I point out that section 87(2)(c) of the Freedom of Information Law enables an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards". Therefore, the issue in that instance would involve whether premature disclosure would impair the Town's ability to engage in an optimal contractual agreement on behalf of the taxpayers.

You wrote that you were charged a dollar per page for copies of records. In this regard, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches. A higher fee may be charged only when a statute other than the Freedom of Information Law authorizes such a fee. A "statute" is

an act of the State Legislature, and a fee of greater than twenty-five cents per photocopy cannot be established by policy or by a local law ordinance, for example [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

With respect to Open Meetings Law, like the Freedom of Information Law, that statute is based on a presumption of openness. Meetings Law public bodies must be conducted open to the public, except to the extent the subject matter under consideration may justifiably be discussed during an executive session. An 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. Further, a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may properly be discussed in executive sessions.

Since you referred to Board members going into a "huddle" at a meeting, I direct your attention to section 100 of the Open Meetings Law, its legislative declaration. That provision states that:

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of and able to observe" and "listen to the deliberative process". Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view situate itself and

conduct its meetings in order that those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to o comply with a basic requirement of the Open Meetings Law.

I point out, too, that there is a distinction between meetings and hearings. A meeting generally involves a gathering of a public body for the purpose of discussion, deliberation and perhaps the taking of action. A hearing, on the other hand, generally involves a situation in which the public is given an opportunity to speak in conjunction with a particular issue.

As indicated earlier, although the Open Meetings Law provides the public with the right to attend open meetings and listen to the deliberative process, the Law is silent with regard to public participation. Therefore, while many public bodies do so, a public body is not required to permit the public to speak or otherwise participate at meetings. Certainly a public body may choose to permit public participation, and when it does so, it has been advised that the body may permit the public to speak in accordance with reasonable rules or policies that treat the members of the public equally.

With respect to the records of meetings, 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
>
> 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). If no action is taken, there is no requirement that minutes of an executive session 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.

I point out that 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 one week or two weeks, as the case may be, and that if the minutes have been 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.

Further, 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 a school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

Finally, in order to maintain a complete record of meetings, although no statute deals with the matter, the courts have consistently held since 1979 that any person may use a portable 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, 418 NYS 2d 508 (1979)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law and the Open Meetings Law, a copy of this opinion will be forwarded to the Farmersville Town Board. Enclosed are copies of those statutes, and an explanatory brochure that may be useful to you.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6811
OML-AO-1979

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

October 8, 1991

Mr. Roger Helbig
Zoning Officer
Town of Milo
158 East Lake Road
Penn Yan, NY 14527

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

Dear Mr. Helbig:

I have received your letter of September 3 in which you raised two issues relating to the Yates County Planning Board.

According to your letter, having met with the Planning Board's Executive Committee, you were informed that its by-laws state that the Board's membership "shall not exceed 20 members". It was contended, in your words, that "a nebulous size of not less than 13 nor more than 20 and therefore would have a varying quorum and majority vote". You asked whether the Board may indeed "have a flexible membership".

In this regard, since the issue deals tangentially with the Open Meetings law, I contacted James Coon of the Department of State, who is an expert on the subject of municipal law, particularly in the area of planning and zoning. He suggested that under section 239-b of the General Municipal Law, a county board of supervisors is authorized to establish a county planning board and that such board, generally by means of resolution, specifies the number of persons who serve on a planning board. While the statute is not specific, Mr. Coon indicated that he did not believe that the membership, within a given period, could be flexible. He also stated that the county board of supervisors could not in his opinion delegate the authority to determine the number of members on a planning board to that board or to its executive committee.

The other issue involves section 239-m of the General Municipal Law, which requires that certain appeals of zoning actions be referred to the County Planning Board for recommendations. You wrote that it is the Planning Board's practice "to return their recommendations without showing the Board's vote, by member, on the issue".

Here I point out that 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 a community board, 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 rational 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 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."

Lastly, in an Appellate Division decision, it was found that "The use of a secret ballot for voting purposes was improper". In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law (section 87[3][a]; (section) 106[1], [2]" [Smithson v. Ilion Housing Authority, 130 Ad 2d 965, 967 (1987].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Yates County Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-1980

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

October 8, 1991

Ms. Arline Harms
[redacted]

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

Dear Ms. Harms:

As you are aware, I have received your letter of September 4 and the materials attached to it.

You raised a series of concerns relating to the implementation of the Open Meetings Law by the Franklin Square School District Board of Education. The issues pertain to the propriety of various executive sessions and "recesses", particularly as they involved consideration of the budget, the adequacy of motions to enter into executive sessions, notice of meetings and the availability of minutes.

In this regard, I offer the following comments.

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

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

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

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 majority of the Board gathers to discuss School District business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, 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 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 before the meeting. If, however, less than a quorum gathers to discuss an issue or issues, the Open Meetings Law would not be applicable.

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..."

It has been consistently advised that, in a technical sense, 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. In a case in which a public body scheduled executive sessions in advance of its meetings, 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; note: the Open Meetings Law has been renumbered, e.g., section 100 is now section 105].

Based upon the foregoing, I do not believe that a notice to the effect that a public body will meet in executive session at a designated time and place technically complies with the Open Meetings Law. However, if it is clear that the only subject to be discussed at a meeting may be considered in an executive session, the notice might so specify in order to avoid misleading the public concerning the actual nature of the meeting. In such a situation, perhaps a notice could state something like: "The Board of Education will meet at 8 p.m. on January 1, 1991, in the Board Room. The only subject to be considered will be collective bargaining negotiations concerning the Teachers Union, and motion to enter into an executive session will be made immediately after the Board convenes."

Third, motions to enter into executive sessions to discuss "specific personnel matters" or "negotiations" would in my opinion be insufficient to comply with the Open Meetings Law.

More specifically and in the context of the issues you raised, 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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

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, supra, see also Becker v. Town of Roxbury, Sup Ct., Chemung Cty., April 1, 1983].

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 focus of your concerns involves the process by which the budget was considered. While issues pertaining to the budget may relate to "personnel", they deal by and large with issues of policy and the allocation of public monies. Those kinds of discussions must in most instances in my view be conducted in public. Only when a discussion focuses on a particular person in conjunction with a topic appearing in section 105(1)(f) would an executive session be properly held pursuant to that provision.

Further, a "recess" or "caucus" conducted by the Board to discuss or clarify issues is in my opinion part of a meeting. There is some indication, however, that one of the recesses involved a clarification of an issue given by the District's attorney. In this regard, it is noted that the Open Meetings Law provides two vehicles under which a public body may meet in private. One 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.

Of possible relevance to the recess 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, i.e., when a municipal attorney provides legal advice to his client, the Board, the communications made pursuant to that relationship are 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.

With respect to the preparation and availability of minutes, I direct your attention 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 regard 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, 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 an effort to enhance the understanding of and 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1981

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

October 9, 1991

Mr. Thomas H. Healey
[redacted]

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

Dear Mr. Healey:

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

You wrote that the Board of Fire Commissioners of the Hawthorne Fire District scheduled a meeting to consider a subject of interest to you. However, upon your arrival at the meeting, you were informed by the Chairman that the gathering was an "executive meeting" and that only commissioners would be allowed to attend. You also wrote that a previous meeting was closed for the reason that it was a "work shop" session.

In this regard, I offer the following comments.

First, it is noted that 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."

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 in my view is clearly a public body subject to 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 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).

In view of the judicial interpretation of the Open Meetings Law, when a majority of the Board gathers for the purpose of discussing public business, any such gathering would in my view constitute a "meeting" subject to the Open Meetings Law, even if there is no intent to take action and regardless of the characterization of the gathering, i.e., as a "work shop".

Lastly, the Open Meetings Law requires that a public body conduct its business in public, unless there is a basis for entry into an executive session. It is emphasized that a public body cannot hold 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 executive sessions. Enclosed for your review is a copy of the Open Meetings Law.

In an effort to enhance their understanding of and compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Board of Fire Commissioners.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1982

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

October 10, 1991

Ms. F.J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your correspondence prepared on July 8 and sent to this office on September 11.

In brief, as I understand the matter, you sought to attend a meeting of the New York City Banking Commission on July 8. However, you were informed that you must ask to attend and that you must identify yourself. Further, although it is unclear whether you were permitted to attend, you wrote that the meeting was held by means of a conference call.

You have requested my views on the matter. 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 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."

According to the Official Directory of the City of New York, the New York City Banking Commission consists of three members, designates the banks in which all moneys of the City shall be deposited, and recommends to the City Council the discount rate for prepayments of real estate taxes and the penalty for late payment. In my view, since the Commission has the authority to take action, i.e., to designate the banks where City money is deposited, it constitutes a "public body" required to comply with the Open Meetings Law.

Second, section 103(a) of the Open Meetings Law states in part that "[e]very meeting of a public body shall be open to the general public...". Therefore, any person may attend an open meeting. In my opinion, a member of the public does not have to express a reason for seeking to attend. Further, I do not believe that the ability to attend can be conditioned upon the disclosure of one's identity.

Third, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring by telephone. However, a series of telephone calls among the members which results in a decision 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 Commission members may consult with one another by phone, I do not believe that the Commission 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: Banking Commission
Carol O'Cleireacain, Commission of Finance

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1983

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

October 10, 1991

Mr. Daniel Hershberg
Chairman
Albany Area Non-Public
School Advocacy Group
19 Colvin Avenue
Albany, NY 12206

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

Dear Mr. Hershberg:

I have received your letters of September 11 and September 18, as well as related materials, including correspondence of September 13 and September 23 prepared by Stephen W. Herrick, Counsel to the Albany City School District Board of Education. Mr. Herrick's remarks pertain to the commentary in your letters.

The focus of the correspondence involves an executive session held by the Board of Education on September 11. According to your first letter, you were:

> "present in the auditorium of the Thomas O'Brien Academy of Science and Technology at 6:25 PM on this evening, September 11, 1991. Although the NOTICE OF PUBLIC MEETING (labelled A and attached) was made available in advance of the scheduled meeting, the Board did not convene a public meeting at 6:30 PM. Instead the Board of Education met in another room behind closed doors and then convened for a regularly scheduled public meeting at 7:00 PM NOTICE OF PUBLIC MEETING is labelled B and is attached).

> "When [you] pointed out during the open forum section of the public meeting that the 'executive session' meeting was held in violation of the Open Meetings Law, the attorney for the Board indicated that [you] should have known that an Executive Session was convened in another room."

You added that you believe that you:

> "had a legitimate question regarding what 'particular personnel' matter and 'potential litigation' were to be discussed. If the discussion was in item covered by section 105(1)(f) [you] would not have objected to the Board discussing this matter in Executive Session. By not convening in public to formally move to Executive Session, the Board does not allow this type of question to be raised either by a Board member or the public."

Notwithstanding your contentions, Mr. Herrick wrote that:

> "The Notice of Public Meeting indicated that the meeting would be held on a specific date, at a specific time and at a specific location within the building. At 6:30 p.m., the Board convened a public session in a smaller room adjacent to the auditorium of the school building. This is the same room where any and all executive sessions held at this building take place. Mr. Hershberg, who has followed the action of the Board of Education for quite some time is well aware of the room where the 6:30 p.m. meeting was held...
>
> "Even if Mr. Hershberg did not know where the 6:30 p.m. meeting was to be held, it would have been extremely easy for him to determine its location. Later that same evening Mr. Hershberg indicated he had seen two separate Board members when he came into the building prior to 6:30 p.m. Mr. Hershberg could have asked either of those Board members, a custodian (either in the auditorium or in the foyer area between the auditorium

> and the front of the building) or other District staff working in the auditorium area were Mr. Hershberg says he was at 6:25 p.m. Any member of the public could have easily determined the location of the 6:30 p.m. meeting...
>
> "The public portion of this meeting held prior to the motion to go into executive session was not held 'behind closed doors' as indicated by Mr. Hershberg. The doors of the room were open and the media and general public welcome until after approval of the agenda item relative to an executive session."

In your letter of September 18, you disputed Mr. Herrick's claim that you were "well aware" of the site of the meeting. Further, you contended the executive session in question, as well as others, could have been held at a time more convenient to the public. In response to that letter, Mr. Herrick indicated that he accepted the notion that you had raised the issues in good faith but again contended that you could have easily determined the location of the meeting by asking any number of District staff members of its location. He also expressed the belief that it is not up to you or the public to determine when a public body enters into executive sessions or that you necessarily have the right to raise questions concerning the propriety of executive sessions.

In this regard, I offer the following comments.

First, not having been present at the meeting, I cannot comment on the truth of the matters asserted. However, it appears that notice was given in a manner consistent with section 104 of the Open Meetings Law. Further, assuming that there were District staff members in the building who were aware of the location of the meeting, I agree with Mr. Herrick's contention that a member of the public such as yourself could have ascertained where the meeting was being held.

Second, although it may be possible to anticipate when executive sessions may be held and that public bodies may hold executive sessions at times "convenient" to the public, there is nothing in the Open Meetings Law that directs when executive sessions must be held during meetings. Moreover, depending upon the nature of the subjects considered by public bodies, it may be impossible to predict whether or when an executive session may properly be held.

Lastly, while the Open Meetings Law provides the public with the right to attend open meetings, that statute is silent with respect to the right to speak or otherwise participate at meetings. Although many public bodies permit members of the public to speak at meetings, I do not believe that they are obligated to do so. When public bodies authorize the public to speak, it has been suggested that they do so in accordance 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:jm

cc: Stephen W. Herrick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1984

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

October 15, 1991

Mr. Anthony Attina
[redacted]

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

Dear Mr. Attina:

I have received your letter of September 12, which reached this office on September 18.

According to your letter, your firm of certified public accountants "would like to provide a free seminar to the members of the Board of Education of the Fire Island UFSD" for the purpose of focusing on reading and understanding the financial statements of a school district. You added that the "setting and structure would [be] on an informal basis held in [y]our office", and that the "primary purpose of this seminar is to help board members understand the more detailed aspects of financial statements and the role of management in their preparation."

You have requested a "ruling" as to the applicability of the Open Meetings Law to the seminar.

In this regard, I offer the following comments.

First, the Committee on Open Government is not empowered to issue a "ruling" that is considered legally binding. Rather, section 109 of the Open Meetings Law authorizes this office to advise with respect to that statute.

Second, the issue in my view involves whether the seminar would constitute a "meeting" subject to the Open Meetings Law. By way of background, 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).

If the seminar is to be held solely for the purpose of educating Board members, and if the members do not conduct School District business collectively as a body, the seminar likely would not constitute a meeting of a public body subject to the Open Meetings Law.

I point out that similar questions have arisen at workshops and seminars during which I have spoken and which were attended by many, including perhaps a majority of the membership of several public bodies. Those persons asked whether their presence at those gatherings fell within the scope of the Open Meetings Law. In short, I have responded that, since the members of those entities did not attend for the purpose of conducting public business as a body, the Open Meetings Law, in my view, did not apply.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1985

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

October 15, 1991

Daniel and Barbara Anne Sabia
[redacted]

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

Dear Mr. and Ms. Sabia

I have received your letter of September 20, as well as the related correspondence.

Having requested minutes of meetings of the North Bellmore Fire Department Board of Fire Commissioners, you were informed that the request would be taken "under advisement". As of October 3, you had not received any further response, and you requested assistance in the matter.

In this regard, I offer the following comments.

First, it is noted that 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."

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 in my view is clearly a public body subject to the Open Meetings Law.

Second, 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
>
> 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). If no

action is taken, there is no requirement that minutes of an executive session 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.

I point out that 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 one week or two weeks, as the case may be, and that if the minutes have been 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 an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be sent to the District Supervisor.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Tomko, District Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6832
OML-AO-1986

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

October 16, 1991

Ms. Gloria Quinones
[redacted]

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

Dear Ms. Quinones:

I have received your letter of September 17, which reached this office on September 23.

In your capacity as a member of the Copiague Union Free School District Board of Education, you raised a series of questions concerning minutes of executive sessions and "personal note taking". Specifically, you wrote that:

> "Althrough [sic] Executive Session, and up until the conclusion, our Director of Personnel takes verbatim personal notes. Meanwhile, our District Clerk (who has been appointed by the Board to document the official proceedings of the meetings by recording the minutes), has been specifically directed by the Superintendent, not to take minutes during Executive Session, unless mandated by legal requirements."

You asked whether, in my view, the Board should prepare "official" minutes of its executive sessions, whether the verbatim notes prepared by the director of personnel become the official Board minutes, whether the notes must be made available under the Freedom of Information Law, and how you and other members can "stop this irksome practice".

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 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.

Since I am not familiar with each of the provisions of the Education Law and other statutes that relate to the functions of a school board, I cannot specify each situation in which a school board may vote during an executive session. However, the following situations are, in my opinion, most common. One involves a so-called 3020-a proceeding in which a board must vote in executive session to determine whether charges should be filed with respect to a tenured employee. The other generally pertains to situations involving particular students, for certain federal Acts prohibit the disclosure of information identifiable to students without the consent of the parents [see e.g., the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g]. Therefore, if, for instance, disciplinary action is taken concerning a particular student, I believe that a vote may be taken behind closed doors. Similarly, in situations in which the vote may identify a handicapped student, I believe that, due to requirements of federal law, a vote should occur in private. While there may be other situations in which a vote may be taken in an executive session of which I am not aware, those described above are in my opinion the situations that arise most frequently in which a board of education may vote during a closed session.

Based upon the foregoing, the Board in my opinion would be required to prepare minutes of executive sessions only in rare situations. Further, I do not believe that the notes taken by the director of personnel could be characterized as the Board's official minutes.

Second, the Freedom of Information Law pertains to all agency records, and section 86(4) of that statute 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."

As such, I believe that notes taken by a school district official, presumably in the performance of his or her official duties, would constitute "records" subject to rights conferred by the Freedom of Information Law. This is not intended to suggest that the notes would necessarily be public, for the Freedom of Information Law includes several grounds for withholding records that may be relevant here.

In brief, the Freedom of Information Law 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.

Again, there may be several grounds for denial that could be asserted to withhold the notes or portions of the notes. For instance, if an issue arises with regard to a specific student, and a discussion is based upon or relates to education records of a student (i.e., in conjunction with placement, a health problem, an award, discipline, etc.), the disclosure of notes identifying that student would in my opinion violate federal law, unless the parents of the student consent to disclosure [see Family Educational Rights and Privacy Act, 20 U.S.C. section 1232(g)]. In that kind of situation, the notes would be specifically exempted from disclosure by statute and deniable under section 87(2)(a) of the Freedom of Information Law. In other situations, although disclosure of notes of executive sessions may not be prohibited by statute, it might result in detriment to the taxpayers or the capacity of the board to carry out its duties effectively, as in a case where disclosure of a board's strategy in collective bargaining negotiations would place a board at a disadvantage in ensuing negotiations. In that case, notes could likely be withheld under section 87(2)(c) of the Freedom of Information Law. A disclosure of the placement of security devices might enable evasion of law enforcement [see Freedom of Information Law, section 87(2)(e)] or endanger life or safety [see section 87(2)(f)]. A disclosure of commentary concerning a particular employee may be stigmatizing and potentially give rise to a claim that one's civil rights have been violated. In that situation, records might justifiably be withheld as an unwarranted invasion of personal privacy under section 87(2)(b) or as intra-agency materials under section 87(2)(g). In short, I believe that there may be a variety of valid reasons for denying access to notes of executive sessions. Nevertheless, but perhaps more importantly, even though notes might properly be withheld if requested under the Freedom of Information Law, they may be subject to disclosure in a litigation context by means of discovery proceedings or subpoena.

Lastly, section 1709 of the Education Law authorizes a board of education to adopt reasonable rules to govern its proceedings. In conjunction with your final question, the Board could likely adopt a rule limiting or specifying the capacity to take notes during executive sessions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1987

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

October 17, 1991

Mr. Jack McAndrew
[redacted]

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

Dear Mr. McAndrew:

I have received your letter in which you asked whether, in my view, the Public Employment Relations Board (PERB) is subject to the Open Meetings Law. You wrote that it is your understanding that PERB "conducts its monthly meeting in Executive Session and only permits the public to attend when oral arguments are scheduled." Consequently, you also asked whether the PERB should "be in public session before going into Executive Session".

In this regard, I offer the following comments.

First, as you may be aware, the Open Meetings Law applies to 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."

Based upon a review of section 205 of the Civil Service Law, which pertains to the establishment, membership, powers and functions of PERB, I believe that PERB is a "public body" required to comply with the Open Meetings Law.

Second, as a general matter, meetings of public bodies must be conducted open to the public, except to the extent that the subject matter considered may be properly discussed during an executive session. 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, the Law requires that a public body accomplish a procedure, during an open meeting, prior to entry into an executive session. Specifically, section 105(1) of the Open Meetings Law states in relevant part that:

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

I point out, too, that a public body cannot enter into 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 subjects that may be appropriately considered during an executive session.

Lastly, there are two vehicles under which public bodies may exclude the public from its gatherings. As indicated previously, one is the executive session, which is a portion of an open meeting and which must be preceded by the accomplishment of the procedure described in section 105(1) of the Law. the other involves exemptions. If a matter is exempted from the Open Meetings Law, the provisions of that statute do not apply. Of possible relevance to the issue that you raised is section 108(1) of the Open Meetings Law, which exempts "quasi-judicial proceedings" from the coverage of the Law. While PERB's hearings are conducted in public, its deliberations following hearings could likely be characterized as "quasi-judicial" and, therefore, would be exempt from the requirements of the Open Meetings Law. If, for example, the Board meets for the purpose of engaging in quasi-judicial deliberations, it would not be required to convene in public or follow the procedures that would otherwise be required.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: John Crotty, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1988

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

October 17, 1991

Mr. Arthur Gleason
[redacted]

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

Dear Mr. Gleason:

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

In brief, according to your letter, a certain item was approved on September 18 by the Cohoes Board of Education. However, you wrote that the action was taken prior to the meeting when the President of the Board directed the Superintendent "to poll each Board member by phone so as to get Board approval" to enter into an agreement.

Assuming that the facts that you presented are accurate, the issue is whether the Board could have taken action by means of telephone polling. In this regard, I offer the following comments.

First, to put the matter in perspective, I point out initially that the Open Meetings Law is applicable to 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."

A board of education is clearly a public body 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 or make collective determinations by means of telephonic communications.

In an effort to enhance compliance with and understanding of 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

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6837
OML-AO- 1989

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

October 18, 1991

Mr. Kevin T. Dowd
Drake, Sommers, Loeb, Tarshis
& Catania, P.C.
One Corwin Court
P.O. Box 1479
Newburgh, NY 12550

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

Dear Mr. Dowd:

I have received your letter of September 23 in which you requested an advisory opinion concerning "the voting procedures for a Town Board of Assessment Review".

Specifically, the issue is "whether the Board of Assessment Review is subject to the provisions of the Freedom of Information (Section 87(3)(a)) and the Open Meetings Law (Section 106) with regard to publicly recording the vote of the Board and each of its members thereof on all matters decided by it."

In this regard, I offer the following comments.

First, I believe that a board of assessment review clearly constitutes a "public body" as defined by section 102(2) of the Open Meetings Law and an "agency" as defined by section 86(3) of the Freedom of Information Law.

Second, while meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to section 108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings 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)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

Third, as you suggested, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, section 106(1) of the Open Meetings Law states that:

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

Further, since its enactment, the Freedom of Information Law has contained a related requirement in section 87(3). The provision states in part that:

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

In my opinion, because an assessment board of review is a "public body" and an "agency", it is required to prepare minutes in accordance with section 106 of the Open Meetings Law, including a record of votes in conjunction with section 87(3)(a) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1990

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

October 18, 1991

Mr. Frank J. Ginther
Rensselaer Improvement Committee
P.O. Box 529
Rensselaer, NY 12144

The staff of the Committee on Open 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 September 23 in which you requested an advisory opinion concerning the Open Meetings Law.

Having attended a meeting of the City of Rensselaer Common Council, following discussion of items on the agenda, you wrote that a motion was made to enter into an executive session without any explanation concerning the reason. When the Acting Resident of the Council was questioned as to the reason, he responded by stating" "We do not have to give a reason".

In this regard, the Open Meetings Law requires that a procedure be accomplished before a public body may conduct an executive session. Specifically, section 105(1) states in relevant part that:

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

Therefore, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

Further, 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 <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. As such, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion.

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, Supreme Court,

> Chemung County, July 21, 19981]; 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].

Lastly, you asked "what action should [you] take to insure against a repetition of the event". In my view, the most appropriate means of ensuring compliance with the Open Meetings Law involves attempts to educate members of public bodies concerning the requirements of the Law. In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the Common Council.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council, City of Rensselaer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1991

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

October 21, 1991

Mr. James Flanagan
[redacted]

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

Dear Mr. Flanagan:

I have received your letter of September 19, which reached this office on September 26.

Your comments concern a conference sponsored by the Irvington School Board cut the Hudson River Conference Center in Ossining. You wrote that "[t]he meeting was be invitation only and no provisions were made for the public to attend". In addition, you enclosed a copy of the District's newsletter, which does not indicate the location or time of the conference. The newsletter article pertaining to the event states in part that:

> "In order to begin to identify the future educational goals and needs, the district will hold a 'Vision-Setting' conference on August 20th and 21st.
>
> "The conference will initiate an in-depth review of the philosophy and content of our educational program -- a process that will extend well into the coming school year and should result in a clearly defined sense of what this district will be striving to accomplish in all three of our schools for many years to come.
>
> "In order to accomplish this task, a wide range of views within the community must be aired. Therefore the board is in the process of

> appointing some twenty-five people to participate in the conference. The group will include: the five Board members, the four school administrators, six teachers, two additional teachers who are also chairpersons of academic programs, a student or recent graduate of the High School, and six to eight district residents representing the community at large. Earlier this summer each district resident received a letter inquiring as to whether they would be interested in participating in this conference."

Despite the foregoing, it is your view that the public could not and was not invited to attend. You also noted that "[t]he School Board is now saying the meeting was open to the public", but that "[t]his meeting was so secret it took several days to find out where it was being held". You expressed the hope that this office "can take some kind of action to prevent this type of behavior in the future".

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Open Meetings Law. This office cannot compel a public body to comply with the Open Meetings Law.

Second, the issue in my view involves whether the gathering constituted a "meeting" subject to the Open Meetings Law. By way of background, 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 con-

> strued 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).

If the Board conducted public business collectively, as a body, or if it presided at the gathering, I believe that the gathering would have constituted a meeting subject to the Open Meetings Law. Further, if the gathering was a meeting, I believe that it should have been preceded by notice of its time and place given pursuant to section 104 of the Open Meetings Law.

Lastly, as indicated earlier, the newsletter states that all District residents received letters inquiring as to their interest in participating in the conference. It is unclear whether that letter involved participation of residents as representatives of the community or whether it involved the possibility of attending. If the letter involved the latter, it does not appear that the conference could have been characterized as "secret".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4852
OML-AO- 1992

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

October 24, 1991

Ms. Barbara J. Prinz
City Paralegal
City of Gloversville
City Hall
Gloversville, NY 12078

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

Dear Ms. Prinz:

I have received your letter of October 16 in which you requested an advisory opinion.

According to your letter, a member of the Gloversville City Council has requested "notes taken at an Executive Session which was called concerning a personnel matter". Due to the subject matter, you wrote that you are "reluctant to give those notes out, especially if they are going to be revealed to the public". You also expressed the belief that the Councilwoman is seeking the notes as an individual, rather than on behalf of or at the direction of the Council as a whole.

In this regard, I offer the following comments.

First, section 106 of the Open Meetings Law pertains to minutes of meetings. Subdivision (2) of that provision concerns minutes of executive sessions and states that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim or expansive account of what was said during or an executive session. If action is taken during an executive session, minutes reflective of the action, the date and the vote of the members must be prepared and made available to the extent required by the Freedom of Information Law. If no action is taken, there is no requirement that minutes of an executive session be prepared. Further, notes in my view could not be characterized as minutes. The notes in question would likely be more detailed or expansive than minutes would have to have been if action was taken.

Second, the Freedom of Information Law pertains to all agency records, and section 86(4) of that statute 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."

As such, I believe that notes taken by a public official, presumably in the performance of his or her official duties, would constitute "records" subject to rights conferred by the Freedom of Information Law. This is not intended to suggest that the notes would necessarily be public, for the Freedom of Information Law includes several grounds for withholding records that may be relevant here.

In brief, the Freedom of Information Law 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.

There may be several grounds for denial that could be asserted to withhold the notes or portions of the notes. A disclosure of commentary concerning a particular employee may be stigmatizing and potentially give rise to a claim that one's civil rights have been violated, and the notes might justifiably be withheld as an unwarranted invasion of personal privacy under section 87(2)(b) or as intra-agency materials under section 87(2)(g). In short, I believe that there may be valid reasons for denying access to notes of executive sessions under the Freedom of Information Law.

Third, neither the Freedom of Information Law nor any other statute of which I am aware deals specifically with the situation that you described in which a public officer, presumably acting alone, seeks records that might ordinarily be withheld from the public. In general, I believe that the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Viewing the matter from a technical perspective, one of the functions of a public body involves acting collectively, as an entity. The City Council, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of the total membership. In my view, in most instances, a Council member acting unilaterally, without the consent or approval of a majority of the total membership of the Council, has the same rights as those accorded to a member of the public, unless there is some additional right conferred upon a council member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6853
OML-AO-1993

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

October 28, 1991

Mr. Earl Van Wormer, III
[redacted]

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

Dear Mr. Van Wormer:

I have received your letter of October 15, which reached this office on October 15, as well as materials concerning activities of the Town of Esperance.

Several of the issues that your raised involved the "real truth" relating to the Town Board and the Supervisor, and you referred to an advisory opinion that I prepared at the request of the Supervisor on July 18. In this regard, and as indicated at the beginning of opinions drafted by this office, opinions are based upon information provided in conjunction with requests for opinions. My comments are prepared based upon an assumption of good faith and the accuracy of commentary on the part of those who seek opinions.

The first issue involves a situation in which letters were addressed to the Town Board, but in which you allege that the Supervisor chose that they not be distributed to some Board members. It is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. While the issue does not directly relate to those statutes, it is my view that correspondence addressed to the Town Board should be equally available to each member, unless the Board has adopted a rule or policy to the contrary.

A second issue involves insurance proposals that were initially presented to the Board at a meeting held on March 28. The minutes of that meeting state that the Board "will meet at a later date to decide which proposal will be fit (sic) the town needs". You wrote that no other regular meeting was held until April 25, "except the one at the Supervisor's home on April 15, 1991 which was neither publicized by advertising or posting and there are no minutes on record". The minutes of the meeting of

April 25 state that a bid from one of the insurance companies was accepted, and it is your view that action was taken "somewhere in between" the meetings of March 28 and April 25. You have asked whether the meeting of April 15 was "a legal meeting".

In this regard, the Open Meetings Law applies to meetings of public bodies, and 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 vote or 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 crys-

> tallization 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, if a quorum of the Board met to discuss public business on April 15 or at another time, such a gathering in my view would have been subject to the Open Meetings Law.

Assuming that there was a meeting, I point out that every meeting of a public body must be preceded by notice of the time and place of the meeting. Section 104(1) of the Law pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media 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. The duty to provide notice under the Open Meetings Law is imposed upon public bodies, and there is no requirement of which I am aware that pertains to a clerk's responsibility to provide notice of meetings. I believe, however, that a town board, by resolution, could designate the clerk as the person responsible for providing notice.

As an aside, although the Open Meetings Law does not specify where a public body must conduct its meetings. The Law does, however, provide direction concerning the site of meetings, for section 103(b) 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."

Whether the Supervisor's home or other location permits barrier-free access is unknown to me.

With respect to the other meetings to which you referred, again, any such meetings should have been preceded by notice. Further, with regard 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 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, minutes need not consist of a verbatim account of what was said at a meeting. Further, although minutes more expansive than those required by the Open Meetings Law may be prepared, 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 no action is taken, there is no requirement that minutes of an executive session be prepared. It is also noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement or whether the board member should submit the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181).

Responses to several of your questions are dependent upon the truth of the matters asserted. Since there appear to be conflicting versions of the facts, I could not advise with certainty as to the "legality" of meetings. For that reason, the preceding comments dealt largely with the requirements of the Open Meetings Law that apply generally to meetings of public bodies.

Lastly, you wrote that the Supervisor destroyed twelve letters addressed to the Town Board. In this regard, although tangential to the issue, the Freedom of Information Law pertains to all agency records. Section 86(4) of that statute defines the term "record" to mean:

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

As such, I believe that the letters constituted Town records.

Further, section 57.25(a) of the Arts and Cultural Affairs Law 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 safekeeping and ultimate disposal."

Subdivision (2) of section 57.25 states that public records cannot be destroyed within 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 am not familiar with the retention period applicable to the letters. However, I believe that a retention schedule applicable to town records may be obtained from the State Education Department, State Archives and Records Administration, Cultural Education center, Albany, NY 12230.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1994

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

October 29, 1991

Ms. Kathleen Driscoll
Staff Writer
Democrat and Chronicle
55 Exchange Boulevard
Rochester, NY 14614-2001

The staff of the Committee on 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. Driscoll:

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

According to your letter and the news article attached to it, the Board of the Western Regional Off-Track Betting Corporation voted during an executive session to defer a wage freeze for administrative employees. Your question is whether the executive session was properly held.

In this regard, I offer the following comments.

First, section 519(1) of the Racing and Wagering Law indicates that several counties have been designated to comprise the "Western region" for purpose of off-track betting. Section 501(3) defines "corporation" to mean "Each regional off-track betting corporation as created by section five hundred two of this article", and section 502 (1) of the Racing and Wagering Law states in relevant part that:

> "A regional off-track betting corporation is hereby established for each region...Each regional corporation shall be a body corporate and politic constituting a public benefit corporation."

Section 66(1) of the General Construction Law defines "public corporation" to include a "public benefit corporation". Therefore, Western Regional OTB is a "public corporation" and its board of directors in my view clearly constitutes a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, section 102(2)].

Second, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that issues may appropriately be considered during executive session. Further, a public body may not conduct an executive session to discuss the subject of its choice, for paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may be discussed in executive sessions.

Although two of the grounds for entry into executive session might have been relevant, based on my understanding of the facts, neither could properly have been asserted.

Section 105(1)(e) permits a public body to enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14, which is commonly known as the "Taylor Law", pertains to the relationship between public employers and public employee unions. Assuming that the administrative employees are not members of a public employee union, the Taylor Law would not have been relevant. Moreover, it does not appear that the Board was engaged in collective negotiations. If my assumptions are accurate, section 105(1)(e) would not have served as a basis for entry into executive session.

Although the matter might have related to personnel, the language of the so-called "personnel" exception for entry into executive session is limited and precise.

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:

> "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, Supreme Court, Chemung County, July 21, 19981]; 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].

As section 105(1)(f) relates to matters concerning issues of policy, such as those involving the allocation of public moneys, those kinds of issues must in my opinion generally be discussed in public. Discussion of a proposed action affecting a group of employees would not have involved any specific employee, and consequently, I do not believe that the Board could have relied upon section 105(1)(f) as a basis for entry into an executive session. In sum, only when an issue focuses upon a "particular person" in conjunction with one or more of the topics specified in section 105(1)(f) can an executive session be properly held pursuant to that provision.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Directors, Western Regional OTB

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1995

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

October 30, 1991

Mr. William P. Stris
[redacted]

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

Dear Mr. Stris:

I have received your letter of October 14, which reached this office on October 21.

You wrote that the Board of Education of the Valley Stream Union Free School District Thirteen intends to interview candidates for a vacant position on the Board. You have requested an advisory opinion concerning whether the interviews must be conducted in public.

In this regard, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except to the extent that an executive session may properly be held. 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. Further, paragraphs (a) through (h) of section 105(1) of the Law specify and limit the topics that may be discussed during executive sessions.

Relevant to your inquiry 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..."

Since an interview of a candidate would represent a matter "leading to the appointment... of a particular person", I believe that the Board could legally interview candidates in 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 6860
OML-AO- 1996

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

October 30, 1991

Mrs. Shirleymarie Sullivan Sheldon
[redacted]

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

Dear Mrs. Sheldon:

I have received your recent letter, which reached this office on October 21.

You have questioned whether the Open Meetings Law is applicable to "planning and environmental boards" in the same manner as that statute would apply to a town board. In addition, you sought clarification concerning access to minutes and tape recordings of meetings.

In this regard, I offer the following comments.

First, 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 my opinion, in view of the authority conferred upon planning boards pursuant to Article 16 of the Town Law, it is clear that those boards are public bodies required to comply with the Open Meetings Law. I am unfamiliar with entities characterized as "environmental boards". However, section 239-y of the General Municipal Law authorizes a local legislative body, such as a town

board, to designate a "conservation board". Conservation boards perform a variety of functions pertaining to "open area" planning, conservation and development. If the environmental board to which you referred is a conservation board as described in section 239-y of the General Municipal Law, I believe that it would constitute a public body subject to the Open Meetings Law.

Second, 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
>
> 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). If no

action is taken, there is no requirement that minutes of an executive session 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.

I point out that 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 one week or two weeks, as the case may be, and that if the minutes have been been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Lastly, although there is no requirement that meetings of public bodies be recorded, many public bodies do so, and the courts have held that any person may use a portable 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 (1983)]. Further, the Freedom of Information Law is applicable to all agency records, and 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."

Therefore, if tape recordings of open meetings are prepared by an agency, I believe that they would constitute "records" subject 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 would be 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, NYLJ, December 27, 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

cc: M. Calhoun, Supervisor
M. Warren, Chairman, Planning Board
G. Pietraszek, Chairman, Environmental Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 1997

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

October 31, 1991

Ms. Audrey Glover
[redacted]

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

Dear Ms. Glover:

I have received your letter of October 11, which reached this office on October 21.

You have asked whether public bodies have "discretion on whether or not to have public participation" at their meetings.

In this regard, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, section 100). However, the Open Meetings Law is silent with respect to the issue of public participation. Consequently, if a public body does not want the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to permit public participation. If a public body does permit the public to speak, I believe that it may do so based upon rules that treat members of the public equally.

Further, although public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that such a rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned"

[see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6865
OML-AO-1998

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

October 31, 1991

Ms. Victoria E. Jones
[redacted]

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

Dear Ms. Jones:

I have received your letter of October 18 in which you raised a series of questions concerning tape recordings and minutes of meetings of public bodies.

You wrote that meetings of certain public bodies had been recorded, but that they are no longer recorded. In this regard, although there is no requirement that meetings of public bodies be recorded, many public bodies do so, and the courts have held that any person may use a portable 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 (1983)]. As such, a member of the public or a public body may in my view tape record open meetings in whole or in part.

With respect to the contents of 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

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). If no action is taken, there is no requirement that minutes of an executive session 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.

I point out that 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 one week or two weeks, as the case may be, and that if the minutes have been 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.

You also asked whether there are any requirements concerning "archiving the tapes". In this regard, although the Freedom of Information Law does not deal directly with the issue, that statute is applicable to all agency records, and 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."

Therefore, if tape recordings of open meetings are prepared by an agency, I believe that they would constitute "records" subject to rights of access.

Separate from the Freedom of Information Law are provisions found in the "Local Government Records Law" (Article 57-A of the Arts and Cultural Affairs Law). 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 safekeeping and ultimate disposal."

Subdivision (3) 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. I believe that the schedule as it pertains to tape recordings of open meetings requires that those records must be retained for four months. Following the expiration of that period, I believe that they may be destroyed or erased and reused.

I hope that I 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 Dobbs Ferry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1999

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

November 8, 1991

Ms. F.J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of October 16, which reached this office on October 23.

You asked that I "revise" an opinion rendered at your request on October 10, which involved a meeting of the New York City Banking Commission that was allegedly held by means of a conference call. While I wrote that it was unclear whether you were permitted to attend the meeting, you pointed our that your correspondence specifies that you were "never allowed to attend the meeting". I apologize for the oversight.

Having reviewed the opinion of October 10, I do not believe that any other aspect of that document merits revision. In short, it is reiterated that the New York City Banking Commission is in my opinion a public body required to comply with the Open Meetings Law and that a public body cannot in my view conduct meetings by means of telephone conferences or make collective determinations by means of telephonic communications.

In view of your inability to attend, the question is whether the gathering constituted a meeting of a public body. If no quorum was physically present, from my perspective, the event would not have been a meeting. If a quorum was present, I believe that the event would have constituted a meeting.

As a general matter, meetings must be convened open to the public and conducted in public, except to the extent that an executive session may properly be held. 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, the Law requires that a procedure be accomplished, during an open meeting, before an executive session may be held. Specifically, section 105(1) states in relevant part that:

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

A public body cannot conduct an executive session to discuss the subject of its choice. On the contrary, the subject that may be considered in executive session are specified in paragraphs (a) through (h) of section 105(1).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: New York City Banking Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6870
OML-AO-2000

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 20, 1991

Ms. Helen N. Petruccione
Village Clerk
43 Third Street
Yorkville, NY 13495

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

Dear Ms. Petruccione:

I have received your letter of October 22 in which you asked that I confirm our conversation of the preceding day.

In brief, your inquiry pertains to your obligations as Clerk of the Village of Yorkville concerning the disclosure of records, as opposed to information, and the contents of minutes.

It is noted at the outset that the title of the Freedom of Information Law may be somewhat misleading, for that statute is not an access to information law per se; rather it is a statute that pertains to existing records. As such, the Freedom of Information Law is not a vehicle under which public officials must answer questions or supply information in response to questions. They may do so, but if they do, they are acting beyond the scope of the Freedom of Information Law. Further, section 89(3) of the Freedom of Information Law states in relevant part that: "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity...". Therefore, an agency need not create a record in response to a request.

With respect to minutes, 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 reference or responses to correspondence as part of the minutes, the Open Meetings Law does not require that kind of information to be included in minutes. It is implicit in the Law, however, that whether minutes are brief or expansive, they must accurately describe what transpired at a meeting. I point out, too, that 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.

I hope that I 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-2001

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

Mr. Rick Bogdan
[redacted]

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

Dear Mr. Bogdan:

I have received your correspondence of October 25. Please accept my apologies for the delay in response, which is due to shortage of staff.

Your inquiry focuses upon the Board of Trustees of the newly created Village of Airmont. You wrote that the Board "is constantly having closed session meetings" and "unannounced" meetings. You added that "[a] budget was created in closed session for $400,000 with no input from the public".

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. Further, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

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

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. Nevertheless, two of the grounds for entry into executive session may be pertinent.

Section 105(1)(e) permits a public body to enter into an executive session regarding "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law is commonly known as the "Taylor Law" and it deals with the relationship between public employees (i.e., school districts) and public employee unions. As such, section 105(1)(e) pertains to collective bargaining negotiations. If the Board is currently negotiating with a union, some of its discussions concerning the budget may relate to and be intertwined with collective bargaining negotiations. To that extent, it is likely that section 105(1)(e) could be asserted as a basis for conducting an executive session.

The other ground for entry into executive session of likely significance is section 105(1)(f), the so-called "personnel" exception. By way of background, there is both legislative history and judicial precedent concerning that provision, which has been clarified since the initial enactment of the Open Meetings Law.

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that section 105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs which can be accomplished by according to seniority, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In neither case in such circumstances would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to section 105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "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" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering of the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of [section] 100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f. of [section] 100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 26, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe discussions relating to budgetary concerns could appropriately be discussed during an executive session.

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media 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 an advance, again, notice of the time and place 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, as in the case of an emergency, 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 judicial interpretation of the Open Meetings Law indicates that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the

more extensive notice required by POL section 104(1). Only respondent's choice in scheduling prevented this result.

"Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...

"In White v. Battaglia, 79 A.D.2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as the one at bar:

> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, merely posting a single notice or telephoning a representative of the news media would fail to comply with the Open Meetings Law, for the Law requires that notice be given to the news media and posted "conspicuously" in one or more "designated public locations" prior to meetings. Further, absent an emergency or urgency, the Court in Previdi suggested that it may be unreasonable to conduct meetings on short notice.

Lastly, although the Open Meetings Law provides the public with the right to attend meetings of public bodies, the Law is silent with respect to public participation. While a public body may permit the public to speak or otherwise participate, it is not required to do so. If a public body authorizes the public to speak, I believe it should do so in accordance 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:jm

cc: Board of Trustees, Village of Airmont

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2002

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

Mr. Gaetano V. Cruciani
[redacted]

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

Dear Mr. Cruciani

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

According to your letter, you attempted without success to attend a meeting of the PTA that was held at a school in the Commack Union Free School District #10. Despite your protests, you wrote that you were "threatened with police action if [you] did not leave", and you did leave.

You have requested an advisory opinion concerning the legality of the PTA's "exclusion of the public from meetings that it holds on school property". In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and the phrase "public body" is defined in section 102(2) to mean:

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

Based upon the language quoted above, as a general matter, I believe that public bodies are those entities that perform governmental functions. Although a PTA performs its functions in relation to government, I do not believe that the board of a PTA would constitute a public body subject to the Open Meetings Law. As such, its meetings in my view fall outside the requirements of the Open Meetings Law.

Second, however, section 414(1)(c) of the Education Law states that a board of education may permit school property to be used for specific purposes, one of which is:

> "For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public."

Although the Committee is not authorized to advise with respect to the Education Law, under section 414 of the Education Law, if a meeting is held on school property for a "civic" purpose or for a purpose pertaining to the welfare of the community, such a gathering "shall be non-exclusive and shall be open to the general public". As such, it appears that a meeting of the PTA held on school property would fall within the scope of the language quoted above.

In an effort to enhance compliance with and understanding of applicable law, a copy of this letter 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2003

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

Ms. Gayjone Carroll
[redacted]

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

Dear Ms. Carroll:

I have received your letter of October 25, which pertains to notice requirements imposed by the Open Meetings Law.

According to your letter, the Board of Trustees of the Village of Airmont recently conducted meetings without having given public notice. In another instance, you wrote that the Board "notified the local radio station at 4 pm that they were having a public meeting at 7 pm that evening".

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media 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 an advance, again, notice of the time and place 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, as in the case of an emergency, 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 judicial interpretation of the Open Meetings Law indicates that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL section 104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D.2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as the one at bar:

> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, merely posting a single notice or telephoning a radio station would fail to comply with the Open Meetings Law, for the Law requires that notice be given to the news media and posted "conspicuously" in one or more "designated public locations" prior to meetings. Further, absent an emergency or urgency, the Court in Previdi suggested that it may be unreasonable to conduct meetings on short notice.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded 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 Airmont

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6884
OML-AO-2004

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 2, 1991

Ms. Maryanne Lehrer, Trustee
Oceanside Board of Education
Oceanside Union Free School District
Administration Office
145 Merle Avenue
Oceanside, New York 11572

Mr. Jerome H. Ehrlich
Jaspan, Ginsberg, Ehrlich, Schlesinger,
Silverman & Hoffman
300 Garden City Plaza
Garden City, NY 11530-3324

The staff of the Committee on 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 and Mr. Ehrlich:

As you are aware, I have received correspondence from both of you pertaining to the propriety of disclosure by a member of a public body of information acquired during an executive session. A related issue involves disclosure by a member of a public body of records characterized as "confidential".

More specifically, the initial issue involves an executive session held by the Board of Education of the Oceanside Union Free School District to consider whether the term of the Superintendent's contract should be extended. According to Mr. Ehrlich, although members of the Board expressed opinions concerning the advisability of extending the contract, no vote or action was taken. He also referred to a telephone conversation between Ms. Lehrer, a member of the Board, and myself, during which it was allegedly stated:

> "...that the decision reached during that session to place the matter of extending the Superintendent's contract on the agenda of 10/24/41 [sic] for action by the Board is not confidential or otherwise restricted from immediate public disclosure by any person."

The other issue involves the disclosure of certain intra-agency documents that were marked "confidential".

In this regard, I offer the following comments.

First, I believe that the discussion relating to the possibility of extending the Superintendent's contract could properly have been considered 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..."

In my view, the issue would have focused upon a "particular person" in conjunction with that person's employment history, or possibly upon a matter leading to that person's dismissal or removal.

Second, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of section 105(1), there is no requirement that an executive session be held even though a public body has the right to do so. Further, the introductory language of section 105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the

Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Third, I am unaware of any statute that would prohibit a Board member from disclosing the kinds of information at issue. While information might have been obtained during an executive session properly held or from records marked "confidential", the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you are aware, the Family Educational Rights and Privacy Act (20 USC section 1232g) generally prohibits an agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, section 108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with section 87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your correspondence.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

Lastly, while there may be no prohibition against disclosure of information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created in order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosures made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2005

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 3, 1991

Ms. Linda M. Denny
[redacted]

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

Dear Ms. Denny:

I have received your letter of November 5 in which you raised a series of issues concerning the implementation of the "Sunshine Law" in the Valley Stream School District.

Enclosed are copies of the Open Meetings Law, which is often characterized as the Sunshine Law, and an explanatory brochure on the subject.

The initial issue that you raised involves "subcommittee meetings". In this regard, it is noted that recent decisions indicate generally that entities consisting of persons other than members of public bodies 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, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

With respect to committees or subcommittees consisting of members of public bodies, 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 govern-

ing 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" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee 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 three, for example, a quorum would be two.

I point out, too, that 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)].

The second issue involves "what business may be addressed in Executive Sessions". As a general matter, meetings of public bodies must be conducted in public. However, executive sessions, portions of open meetings during which the public may be excluded, may be held in accordance with section 105(1) of the Open Meetings Law. Paragraphs (a) through (h) of that provision specify the subjects that may properly be considered in executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, the Law limits the ability to engage in private discussion to those topics appearing in section 105(1) of the Law.

Lastly, with respect to minutes of meetings, 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 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."

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 regard 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.

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 an effort to enhance compliance with and understanding of 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2006

182 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 3, 1991

Ms. Maureen E. O'Hara
[redacted]

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

Dear Ms. O'Hara:

I have received your letter of November 5 in which you raised several issues concerning the implementation of the Open Meetings Law in the Middle Country School District.

The initial issue involves situations in which the Board of Education has held executive sessions prior to its open meetings. In this regard, it is noted at the outset that the term "meeting" has been broadly construed by the courts. In brief, it has been 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, even if there is no intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Further, the phrase "executive session" is defined in 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, in a technical sense, 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].

Based upon the foregoing, I do not believe that a public body may conduct or schedule an executive session in advance of an open meeting.

The second issue involves notice of meetings, and 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 must 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 prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place 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, as in the case of an emergency, 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, too, that the judicial interpretation of the Open Meetings Law indicates that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been

scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL section 104(1). Only respondent's choice in scheduling prevented this result.

"Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...

"In White v. Battaglia, 79 A.D.2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as the one at bar:

> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Consequently, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice.

The remaining issue involves the right to attend school policy and other meetings of committees. Here I point out that recent decisions indicate generally that entities consisting of persons other than members of public bodies 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, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

With respect to committees consisting of members of public bodies, 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 de-

> partment 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" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee 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 three, for example, a quorum would be two.

In an effort to enhance compliance with and understanding of 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6897
OML-AO-2007

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1991

Mr. Sebastiano P. Occhino
Town Attorney
Town of Rotterdam
Vinewood Avenue
Rotterdam, NY 12306

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

Dear Mr. Occhino:

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

In your capacity as Town Attorney for the Town of Rotterdam, you asked whether a member of the Town Board violated "any Standards of Ethics and/or Law" by "divulging information obtained from an employee's personnel file". You enclosed a copy of a transcript of an open meeting during which information derived from records obtained by a Board member was disclosed. At various time during the exchange relating to the issue, it was suggested that personnel records are confidential and that discussions concerning personnel must be conducted in private.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. The Committee has no jurisdiction concerning issues involving standards of ethics. Those issues, as they pertain to local governments, are considered by the NYS Temporary State Commission on Local Government Ethics, which is located at 235 Mamaroneck Avenue, White Plains, NY 10605 and can be reached at (914) 683-5375. Nevertheless, for purposes of clarifying the Freedom of Information Law and the Open Meetings Law, I offer the following comments.

First, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of section 105(1), there is no requirement that an executive session be held even though a public body has the right to do so. Further, the

introductory language of section 105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with certain grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Second, I am unaware of any statute that would prohibit a Board member from disclosing the kind of information at issue. Even when information is obtained during an executive session properly held or from records marked "confidential", the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

Moreover, in a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

Third, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under 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. It is emphasized 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. Based upon the language quoted in the preceding sentence, I believe that a single record may be accessible or deniable in whole or in part. Moreover, that language, in my view, imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In general, two of the grounds for denial relate to personnel records.

Of frequent relevance is section 87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". While that standard is flexible and often may result in subjective interpretations, there are numerous decisions that pertain to the privacy of public employees. In brief, the courts have held that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such 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 2d 562 (1986); Scaccia v. NYS Division of Police, 138 AD 2d 50 (1988); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Gannett Co. v. County of Monore, 45 NY 2d 954 (1978); Montes v. Board of Education, East Moriches, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980].

I point out, too, that section 89(2)(b) of the Freedom of Information Law provides examples of unwarranted invasions of personal privacy, the first of which includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..." [section 89(2)(b)(i)].

The remaining ground for denial of significance is section 87(2)(g), 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, 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. Presumably an application would consist of factual information that would be available, except to the extent that different basis for denial [i.e., section 87(2)(b) concerning privacy) may be cited.

With respect to access to a resume or application of a public employee, for example, while sections 87(2)(b) and section 89(2)(b)(i) of the Freedom of Information Law may be cited to withhold portions of an application or resume of a person who has been hired, for instance, I do not believe that they could necessarily be cited to withhold those kinds of documents in their entirety.

If, for instance, an individual must have certain types of experience or educational accomplishments as a condition precedent to serving in an particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of

documents would result in a permissible rather than an unwarranted invasion of personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see section 87(3)(b)]. However, information included in a document that is irrelevant to criteria required for holding the position, such as grade point average, class rank, home address, social security number and the like, could in my opinion be deleted prior to disclosure of the remainder of the record to protect against an unwarranted invasion of personal privacy.

Lastly, in a discussion of the intent of the Freedom of Information Law that may be relevant to the matter, the Court of Appeals has held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know,' affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers (Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571 [citing Public Officers law section 84]).
>
> "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted (see, Public Officers Law section 87[2]; Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 79-80, supra)... Exemptions are to

be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (see Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75, 80, supra; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571..." (Capital Newspapers, supra, 564-566).

I hope that I 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-6907
OML-AO-2008

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 14, 1991

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

As you are aware, I have received your letter of November 19 in which you raised a series of issues concerning the Freedom of Information and Open Meetings Laws.

The first area of inquiry involves the status of "purely advisory bodies" under the Open Meetings Law. In this regard, it is noted that recent decisions indicate generally that entities consisting of persons other than members of public bodies 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, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Inter-governmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

To be distinguished are committees or subcommittees consisting solely of members of a governing body. Section 102(2) of the Open Meetings Law defines the phrase "public body" to mean:

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

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

Since the last clause of the definition refers to committees, subcommittees and similar bodies of public bodies, I believe that a committee consisting of members of a public body would itself constitute a public body subject to the Open Meetings Law.

It is noted that the Committee has recommended that advisory bodies designated by public bodies should be subject to the Open Meetings Law. The proposal is included in the Committee's annual report, a copy of which will be sent to you shortly.

Second, you referred to requests for records in situations in which "time is a factor", and "in which written requests are unrealistic, or impose an unreasonable time and financial burden, or are used to obfuscate and delay". Although the regulations promulgated by the Committee on Open Government dealing with the procedural aspects of the Freedom of Information Law enable agencies to accept oral requests [21 NYCRR 1401.5(a)], section 89(3) of the Law and same provision of the regulations authorize agencies to require that requests be made in writing. Section 89(3) requires that agencies respond to requests in some manner within five business days of the receipt of requests. While I do not believe that the reference to five business days is intended to permit agencies to delay responding to requests, there is nothing in the Law that requires agencies to respond to requests instantly or in a shorter period of time.

The next issue involves situations in which a records access officer is absent. In my view, the absence of a records access officer should not serve to delay the process of responding to requests. Under section 1401.2 of the regulations, an agency may designate "one or more persons as records access officer", and that provision states that the "designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so". In addition, the regulations state that the records access officer "shall have the duty of coordinating agency response to public requests for access to records". Therefore, I do not believe that a records access officer must deal with or review each and every request; on the contrary, in conjunction with that person's duty to "coordinate" responses to requests, the records access officer has the authority to ensure that other staff act on his or her behalf, whether that person is present or absent.

You asked whether the Committee includes representatives of the "print or TV media". Since the enactment of the Freedom of Information Law in 1974, it has required that at least two members be present or former members of the news media. Currently, four members are or have been associated with the news media, three of whom have been involved with newspapers and the other with television.

Lastly, you asked whether the Committee has "any formal relationship" with the New York City Commission on Public Information and Communication. I have had a number of conversations with one of the members of the Commission and met with its director. However, it is my understanding that, due to fiscal constraints, the Commission has been unable to perform its duties and that it currently has no staff.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2009

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 17, 1991

Mr. Ely Myzel
[redacted]

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

Dear Mr. Myzel:

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

According to your letter and the news article attached to it, in view of various problems, Michael H. Mostow of the State Education Department's Office for Special Projects suggested that the Lackawanna Board of Education "go out of town on retreat together to 'bury the hatchet and figure out how you are going to manage this school district'." Thereafter, the Board held a two day retreat at taxpayers' expense. You have asked whether the retreat "constituted an improper secret meeting, because the public had no opportunity to attend."

In this regard, the issue in my view involves whether the gathering constituted a "meeting" subject to the Open Meetings Law. By way of background, 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).

If the Board conducted public business collectively, as a body, to discuss the management of the District, I believe that the gathering would have constituted a meeting subject to the Open Meetings Law. Further, if the gathering was a meeting, I believe that it should have been preceded by notice of its time and place given pursuant to section 104 of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2010

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 20, 1991

Mr. Kenneth Gobel
[redacted]

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

Dear Mr. Gobel:

I have received your letter of November 29 in which you raised a question concerning the Open Meetings Law.

According to your letter, the Sullivan County Board of Supervisors holds its meetings at 10 a.m. Because you work during the day, you wrote that you are "in fact denied admission to a publicly-called meeting...". You asked whether the Board's practice is legal.

In this regard, similar questions have arisen, and I believe that the Board's practice is appropriate. The Open Meetings Law does not specify when or the times of day during which meetings must be conducted. Irrespective of when meetings are held, some people may be unable to attend due to various commitments, including employment responsibilities. Further, many people work at night and may be unable to attend evening meetings.

From my perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. If a public body chose to begin a meeting at 3 a.m., I believe that would be unreasonable, for it is unlikely that any significant sector of the public could reasonably attend. However, if a meeting is held during regular business hours, which is ordinarily the case with respect to Congress, the State Legislature and many other public bodies, I believe that a public body would be acting reasonably and in compliance with law.

Lastly, I point out that any person in attendance at an open meeting may tape record the meeting. Moreover, some public bodies tape record their meetings, and the tapes of open meetings would be available under the Freedom of Information Law. Consequently, even when a person is unable to attend, there may be other means of knowing what transpired at a meeting.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm