STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6943
OML-AO-2011

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. Scott W. Grady
[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. Grady:

I have received your letter of December 17, as well as the materials attached to it. You asked that I review and comment with respect to an appeal made under the Freedom of Information Law to the Wilmington Town Supervisor. Although you received various records in response to requests, you expressed dissatisfaction with respect to certain aspects of the response.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and section 89(3) of that statute provides in part that an agency generally need not create records in response to a request. Similarly, while agency officials may provide explanations or answer questions, the Freedom of Information Law does not require that they do so. In short, if an agency does not maintain records containing information sought, it is not required to prepare new records in response to a request for information.

Second, an issue of likely relevance with respect to several aspects of your request involves the requirement that an applicant "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing system.

I am unaware of the means by which the Town maintains its records or the volume of the records sought. However, it is possible that some aspects of the request do not reasonably describe the records sought, particularly those in which you sought "all" records dealing with an issue.

Third, you questioned the propriety of the denial of access to "the attorney's recommendations on the proposed Subdivision regulations and BLDG. standards". In my opinion, the recommendations may be withheld. As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Two of the grounds for denial may be relevant to the issue of rights of access.

Section 87(2)(g) permits an agency to withhold records that:

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

> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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. If the attorney is the Town Attorney, his or her recommendations could be withheld under section 87(2)(g).

The other ground for denial of possible relevance, section 87(2)(a), pertains to records that "are specifically exempted from disclosure by statute". One such statute is section 4503 of the Civil Practice Law and Rules, which makes confidential the communications between an attorney and a client, such as Town officials in this instance, 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 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 records consist of legal advice provided by counsel to the client, the records would be confidential pursuant to section 4503 of the Civil Practice Law and Rules and, therefore, section 87(2)(a) of the Freedom of Information Law.

Another aspect of the request involved contracts and related documents between the Town and an engineering firm. Based upon the content of your letter and an assumption that those records exist, I believe that any such records would be accessible, for none of the grounds for denial would be applicable.

Lastly, you raised questions concerning the contents of minutes. In this regard, 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. 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.

Copies of this opinion will be forwarded to Town officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Joanne Zaumetzer, Supervisor
Judy A. Bowen, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2012

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mrs. Raymond 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 Mrs. Weed:

I have received your letter of December 5. As in the case of previous correspondence, you referred to the implementation of the Open Meetings Law by the Saratoga Town Board.

You referred to an advisory opinion prepared at your request on March 15 which described various requirements of the Open Meetings Law. You indicated that, since the Town Board's receipt of a copy of that opinion, some practices have been changed. Nevertheless, although you have been informed by telephone of the time of certain meetings, you wrote that no public notice had been posted, or that notices were posted in a location that is often inaccessible to the public. Further, in another situation it was not announced that a special meeting had been scheduled to replace a regularly scheduled meeting. Lastly, you referred to a newspaper article which stated that "following a closed session for an unannounced purpose, the board agreeed to a $2100 grant per year, over the next two years, to the village of Victory fire department".

In this regard, although several of the issues raised were considered in the opinion of March 15, I offer the following comments.

First, with respect 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."

Consequently, notice of the time and place of meeting must be given to the news media prior to every meeting, and additionally, notice must be "conspicuously posted" in at least one "designated public" location prior to every meeting. In my view, which is based on an ordinary dictionary definition, "conspicuous" should be construed to mean "obvious" or "noticeable", and notice should be posted in a location where it can readily be seen.

Second, there is nothing in the Open Meetings Law that pertains to notice of cancellation of meetings. However, in that situation, I believe that it would be reasonable and a matter of courtesy to the public to provide notice of cancellation of a meeting or a change in schedule.

Third, 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 Law states in relevant part that:

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

As such, a motion to enter into executive session must indicate the reason. Moreover, 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. Based upon the content of the news article that you enclosed, it does not appear that the subject under consideration would have qualified for discussion in executive session.

Lastly, enclosed are copies of the Open Meetings Law and "Your Right to Know", which describes both the Freedom of Information Law and the Open Meetings Law in detail.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Board, Town of Saratoga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2013

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 2, 1992

Mr. William Ciraco
[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. Ciraco:

As you are aware, I have received your letter concerning the implementation of the Open Meetings Law by the Board of Cooperative Educational Services for the First Supervisory District (BOCES) in Suffolk County.

According to your letter, there is little public discussion at the regular meetings of the Board, and you wrote that "[i]t is more than obvious that private meetings are being held at other times to discuss and decide items on the agenda". Further, in our telephone discussion of the matter, you alleged that the Board holds private meetings to discuss agenda items.

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 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. As such, I believe that an agenda session or a "pre-meeting meeting" must be conducted in accordance with the requirements of the Open Meetings Law.

Second, if the gatherings in question constitute "meetings", they must be preceded by notice given pursuant to section 104 of the Open Meetings Law. Further, any such meetings must be conducted open to the public, except to the extent that executive sessions may properly be called. Paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

I hope that I 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: Ray Defeo, Superintendent
Lee Abbot

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2014

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 6, 1992

Mr. Ray Pfleegor
[redacted]

Dear Mr. Pfleegor:

I have received your recent letter in which you asked that the Committee on Open Government "work to put teeth" in the Open Meetings Law. In addition, you complained with respect to a meeting from which you and others were excluded while a public body "approved the union demands of Court House workers...".

In this regard, I offer the following comments.

First, for several years, the Committee has made proposals to the Governor and the State Legislature to strengthen the Open Meetings Law. Although the Governor has recommended legislation based upon the Committee's proposals, the Legislature has not enacted the legislation. In brief, the proposals would expand a court's authority to nullify action taken by a public body when its action is preceded by a closed door discussion held in violation of the Open Meetings Law. Further, the legislation would provide a court with the authority to fine members of public bodies individually in cases in which a flagrant violation or a pattern of violations has been found. It is our intent that the enactment of the legislation would encourage compliance by deterring violations of the Open Meetings Law.

Second, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings must be conducted open to the public, unless there is a basis for entry into a closed or executive session. Paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify the subjects that may properly be considered during an executive session. As such, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, the Law limits the subjects that may be discussed in private.

Although you did not describe the issue fully, I point out that section 105(1)(e) permits a public body to engage in and discuss collective bargaining negotiations involving the public employee union in an executive session. Therefore, if the public body to which you referred was discussing collective bargaining negotiations, I believe that it could properly have held an executive session.

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

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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6962
OML-AO-2015

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 8, 1992

Ms. Michele Di Chiara
[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. Di Chiara:

I have received your letters of January 3 in which you sought advisory opinions.

By way of background, in April, the Mayor of the Village of Garden City designated a committee consisting of Village residents to review and report with respect to the law firm currently employed by the Village, as well as other firms that might be interested in representing the Village. At a recent meeting of the Board of Trustees, the Mayor announced that a lengthy report had been received, and the Board entered into an executive session to discuss its contents. Soon thereafter, you requested the report, which was denied on the ground that "the Trustees were still reviewing the document". You appealed the denial on January 3. Having discussed the matter with others, I have been led to believe that much of the report pertains to the performance of Gary Fishberg, the current Village Attorney, and you wrote that "there may be statements within this report that demean [his] character". Nevertheless, you indicated that you have spoken with Mr. Fishberg and that "he waives any objections to the release of this report in its current form". You have asked whether the Village has the right to withhold the report, and whether the Freedom of Information Law applies "to minutes taken during an executive session of the Village Board of Trustees".

In this regard, I offer the following comments.

First, 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."

The language quoted above is expansive, and the courts have interpreted the definition as broadly as its terms suggest [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Capital Newspapers v. Whalen, 69 NY 2d 246 (1987); Russo v. Nassau Community College, 554 NYS 2d 774 (1990)]. Based upon the definition, it is clear in my opinion that the report in question would constitute a record subject to rights of access conferred by the Freedom of Information Law, for it was produced for and is maintained by the Village.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. In my view, whether the Board has completed its review of the report or otherwise has no bearing on rights of access; only to the extent that a basis for denial appearing in section 87(2) could appropriately be asserted would the Village has the authority to withhold the report. While I believe that one of the grounds for denial is relevant to an analysis of rights of access, that provision would not likely serve as a basis for denial.

Specifically, section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article". In the context of your inquiry and discussions with others, issues of privacy have been raised with respect to those aspects of the report pertaining to Mr. Fishberg and to the law firms that expressed interest in representing the Village.

With respect to Mr. Fishberg, although allegations or statements that might "demean" his character might ordinarily be withheld as an unwarranted invasion of personal privacy, if indeed he has waived any objection to disclosure of those portions of the report, I do not believe that they could be withheld in consideration of his privacy. I point out that section

89(2)(c)(ii) states in part that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...when the person to whom a record pertains consents in writing to disclosure".

With respect to the report as it relates to law firms, I believe that the provisions in the Freedom of Information Law pertaining to privacy are intended to deal with natural persons, rather than entities, such as corporations or other commercial establishments. Although Article 6-A of the Public Officers Law, the Personal Privacy Protection Law, applies only to state agencies, that statute, when read in conjunction with the Freedom of Information Law, in my opinion, makes it clear that the protection of privacy as envisioned by those statutes is intended to pertain to personal information about natural persons [see Public Officers Law, sections 92(3), 92(7), 96(1) and 89(2-a)].

Moreover, in a decision rendered by the Court of Appeals that focused upon the privacy provisions, the court referred to the authority to withhold "certain personal information about private citizens" [see Matter of Federation of New York State Rifle and Pistol Clubs, Inc. v. The New York City Police Department, 73 NY 2d 92 (1989)]. In a decision involving a request for a list of names and addresses, the opinion of this office was cited and confirmed, and the court held that "the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence" [American Society for the Prevention of Cruelty to Animals v. New York State Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). Most recently, in a case concerning records concerning the performance of individual cardiac surgeons, the court granted access and cited an opinion prepared by this office in which it was advised that the information should be disclosed since it concerned professional activity licensed by the state (Newsday Inc. v. New York State Department of Health, Supreme Court, Albany County, October 15, 1991).

Assuming that the report identifies entities, such as law firms, or perhaps persons acting in a business capacity, I do not believe that the provisions in the Freedom of Information Law concerning personal privacy would be relevant to a determination of rights of access. Insofar as the report identifies private practitioners and includes personal details about those individuals, rather than information concerning their professional activities, those details, depending upon their nature, might properly be deleted as an unwarranted invasion of personal privacy.

It is also noted that the Freedom of Information Law is permissive; even when an agency is authorized to withhold records or portions of records, it is not required to do so. As stated by the Court of Appeals: "...while an agency is permitted to restrict access to records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Third, whether the report was discussed in executive session or whether information contained in the report might have been derived from discussions that occurred during an executive session would be largely irrelevant. It is emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session [see Open Meetings Law, section 105(1)(a) through (h)] are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public, and vice versa. Further, in a Nassau County decision in which the issue was whether discussions occurring during an executive session 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).

In sum, with the exception of the possibility that certain aspects of the report concerning private practitioners might be withheld to protect against an unwarranted invasion of their privacy, I believe that the report must be disclosed.

Lastly, with respect to minutes of executive sessions, section 106(2) of the Open Meetings Law states that:

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

I point out, however, that if a public body enters into an executive session and merely discusses an issue but takes no action, there is no requirement that minutes of the executive session be prepared.

I hope that I 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: Village Board of Trustees
Gary Fishberg, Village Attorney
Eileen Murphy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2016

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 9, 1992

Mr. Fred Estlinbaum
Supervisor
Town of Marcellus
24 East Main Street
Marcellus, NY 13108

The staff of the Committee 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. Estlinbaum:

I have received your letter of January 2 and 3.

You referred to a meeting held by the Marcellus Town Board on October 14, which, according to the minutes, adjourned at 8:12 p.m. Upon adjournment, you and others left the meeting. Nevertheless, you wrote and the minutes confirm that the meeting was "reconvened" at 8:15 p.m. At that time a resolution was introduced and approved to "change the night of the regular November meeting to Thursday, November 7, 1991 and to precede the meeting with the annual Budget Hearing".

In my opinion, an adjournment signifies the end of a meeting. Therefore, when members of the public left the meeting following the motion to adjourn made at 8:12, I believe that they could justifiably have assumed that the Board's proceedings for that evening had ended. Further, I believe that any ensuing gathering of the Town Board for the purpose of conducting public business would have constituted a new meeting that should have been preceded by notice given pursuant to section 104 of the Open Meetings Law, convened open to the public, and in view of the subject matter in this instance, conducted open to the public.

In short, it appears that the meeting that began at 8:15 represented a new meeting that was effectively held in secret and without notice to the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 6971
OML-AO. 2017

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 14, 1992

Mrs. Paul Hodgson
[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. Hodgson:

I have received your letter of January 4, which pertains to a request for records of the Middle Island Fire District.

According to your letter, the Board of Commissioners has begun construction of a fire training center on land bordering your property, and you "have reason to believe that the bidding for the construction contract was not made public". You referred to a portion of "Your Right to Know" involving "notice requirements" and added that neither you nor your neighbors received any notice of the decision to construct a training facility. The records that you requested, citing 5 USC 552, include bids relating to the project, "records of public notice published concerning any voting relating to construction of the road and the 100' x 100' concrete slab", "the records of public notice published by the Middle Island Fire District requesting submittal of bids", and the name of the company under contract "to pour the concrete slab".

In this regard, I offer the following comments.

First, the statute that you cited, 5 USC 552, is the federal Freedom of Information Act. That Act pertains to records maintained by federal agencies. The statute that deals with rights of access to records of state and local agencies in this state is the New York Freedom of Information Law.

Second, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. Neither of those statutes pertains to notices that might be required concerning bidding or land use and development.

With respect to requirements concerning the bid process, it is suggested that you contact the Department of Audit and Control, which has a regional office in Hauppauge and can be reached at (516) 360-6534.

The reference to notice in "Your Right to Know" pertains to meetings of public bodies, such as a board of fire commissioners. Specifically, section 104 of the Open Meetings Law states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

I point out that the requirements of the Open Meetings Law involve only notice of the time and place of meetings. There is no requirement under that statute that notice indicate the subject matter to be considered at meetings or that notice be given directly to individuals, such as property owners adjacent to a project, prior to meetings. Again, however, there may be other provisions of law that impose different kinds of notice requirements.

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

In my opinion, insofar as the records sought exist, they must be disclosed. The only ground for denial of possible relevance is section 87(2)(c), which permits an agency to withhold records which "if disclosed would impair present or imminent contract awards or collective bargaining negotiations". Assuming that the deadline for submission of bids has passed and that

contracts have been awarded, disclosure would not "impair" the District's capacity to engage in appropriate contractual agreements [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (1980)].

I hope that I 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 Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2018

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 15, 1992

Helmut E. Nimke, Councilman
[redacted]

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

Dear Councilman Nimke:

Your letter of January 6 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.

You have complained with respect to the "dictatorial and autocratic conduct of Town Board meetings" by the Tuxedo Town Supervisor, Annette Dorozynski. By means of example, you enclosed an agenda of a recent meeting in which it was written that: "Each Board Member can express his decision to the public concerning their vote on this issue", which involved the designation of the Town as lead agency under the State Environmental Quality Review Act. Despite the statement in the agenda, you wrote that you were "flatly denied that expression". You also referred to a situation in which you were "cut off by the Supervisor with the arbitrary admonition that [you] could speak further for but one minute". In addition, attached to your letter is a memorandum sent by the Supervisor to Board members, stating that: "You may discuss your position at anytime, but may be limited to two minutes at any scheduled meeting on any topic that is on the Agenda".

In this regard, although the issue relates to meetings, it does not specifically involve the Open Meetings Law. That statute generally provides direction concerning the extent to which public bodies must conduct their business in public. The Open Meetings Law does not deal with the length of deliberations, with the authority of a town supervisor or with the amount of time that members of public bodies may address issues.

More relevant in my opinion is section 63 of the Town Law, entitled "Presiding officer and rules of procedures". Section 63 states that:

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

Based upon the foregoing, although a town supervisor presides at meetings, a town board as a whole, rather than the supervisor acting individually, has the ability to "determine the rules of its procedure". It is suggested that you communicate your concerns with the Town Board or propose that the Board adopt written rules of procedure relative to the conduct of its meetings. It is also noted that a public body may generally adopt reasonable rules to govern its own proceedings. Therefore, if, for example, a rule is adopted restricting members' commentary to two minutes, the question would be whether the rule is reasonable.

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: Supervisor Dorozynski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2019

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

Ms. Laurel F. 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 Ms. Cole:

I have received your letter of January 9 and the materials attached to it.

Your commentary involves two gatherings of members of the City of Fulton Common Council. One pertains to a private meeting held at the Mayor's home during which five of the six council members met with the Mayor and "finalized the plan to cut the city's work force". It was contended that the subject involved "personnel matters" and that "abolition of city positions is a legitimate exemption to the open meetings law". The second concerned a meeting, also to discuss "personnel matters", that was held "without notice".

You have asked that I describe "correct procedures" and questioned "what actions can be taken to stop this flagrant disrespect of the laws" if closed meetings are repeatedly held.

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 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.

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, 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 a meeting but rather is a portion of a meeting. Further, 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.

Moreover, judicial interpretations of the Open Meetings Law indicate that motions to enter into executive sessions cannot merely describe the subject to be discussed as "personnel", for example.

I point out that the term "personnel" appears nowhere in the Law. 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].

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.

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

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

As you requested and in an effort to enhance compliance with and understanding of the Open Meetings law, copies of this response will be sent 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

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. George Valette
John Lincoln, Jr.
Jim Rice
John Kruk
James Meyers
David Halstead
Richard Hopman
Joseph Tietro, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6979
OML-AO-2020

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

Mr. Richard F. Palmer
Reporter
Cortland Standard
110 Main Street
P.O. Box 5548
Cortland, NY 13045

The staff of the Committee on 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. Palmer:

I have received your letter of January 9 in which you requested commentary concerning two issues.

The first involves the fees that can be charged by municipalities for photocopies of records, specifically accident reports.

In this regard, by way of background, section 87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency

> to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation, for instance, establishing a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction, was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, or a fee that exceeds the actual cost of reproducing records that cannot be photocopied. Moreover, a judicial decision confirmed that a fee of more than twenty-five cents per photocopy may be assessed only pursuant to authority conferred by a statute, an act of the State Legislature [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. I point out that the Sheehan decision dealt specifically with fees for accident reports. Consequently, unless an act of the State Legislature authorizes an agency to charge fees inconsistent with the Freedom of Information Law, no more than twenty-five cents per photocopy can be charged.

It is noted, too, that the amendment was not directed at fees charged for accident reports, but rather fees charged for copies of records in general. From my perspective, although the twenty-five cents limitation may pertain to police accident reports, once again, the intent behind the amendment was to establish a uniform maximum charge with respect to fees generally and not with respect to accident reports specifically.

Some of the confusion regarding the issue might be attributed to section 202 of the Vehicle and Traffic Law, which was recently amended. Section 202(3) authorizes a copying fee of $8.00 for accident reports obtained from the Department of Motor Vehicles and one dollar per page for copies of other records. Section 202 also authorizes the Department to collect certain fees for searching for records. However, since the provisions of the Vehicle and Traffic Law pertain to particular records in possession of the Department of Motor Vehicles only, in my opinion, other agencies, such as municipal police or sheriff's departments, cannot unilaterally adopt policy or regulations authorizing fees in excess of twenty-five cents per photocopy without specific statutory authority to do so.

The second issue involves the status of political caucuses under the Open Meetings Law.

Since 1985, section 108(2) of the Open Meetings Law has provided that the Law does not apply to:

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

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

It is noted that, prior to the 1985 amendment, several courts held that the exemption concerning political caucuses applied only to discussions of political party business and that a gathering of a majority of a legislative body to discuss public business constituted a meeting subject to the general requirements of the Open Meetings Law, even if those in attendance represented a single political party [see e.g., Sciolino v. Ryan, 431 NYS 2d 664, aff'd 81 AD 2d 475 (1981)]. Further, despite the capacity to hold political caucuses in private authorized by the 1985 amendment, many legislative bodies have acted to revoke their authority to discuss public business in private political caucuses.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Homer
Chief, Cortland Police Department
Cortland County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2021

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

Mr. Felix F. Welka
[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. Welka:

I have received your letter of January 14 in which you raised a series of questions concerning the Open Meetings Law.

You wrote that "whenever [y]our School Board or Common Council goes into executive session, they will just state for 'personnel matters' or 'pending litigation'." You have asked whether those phrases are adequate to comply with the Open Meetings Law. You also asked whether a public body may "schedule an executive session for 7:00 PM and the regular meeting for 7:30 PM".

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].

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" or "pending litigation", without additional description.

It is noted that the word "personnel" appears nowhere in the Open Meetings Law. Moreover, while some issues involving personnel may properly be discussed during executive sessions, others could not. By way of background, 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, supra; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

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 pro-

> posed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

I hope that I 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: Common Council, City of Dunkirk
Board of Education, Dunkirk School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2022

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 23, 1992

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 January 8 in which you requested an advisory opinion concerning the ability of a public body to prohibit the use of tape recorders at open meetings.

In this regard, neither the Open Meetings Law nor any other statute directly addresses the issue. However, several judicial decisions have been rendered on the matter.

By way of background, until 1979, there has been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to use their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in

fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings' ...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, Second Department, affirmed a decision of the Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While the board of education has supplied this court with a battery of reasons supporting its positions, its resolution prohibiting the use of tape recorders at its public meetings was far too restrictive, particularly when viewed in light of the legislative scheme embodied in the Open Meetings Law (Public Officers law art. 7) which was enacted and designed to enable members of the public to 'listen to the deliberations and decisions that go into the making of public policy'" (id. at 925).

In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies.

I hope that I 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-2023

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

January 28, 1992

Elaine Lytel, Councilor
DeWitt Town Council
[redacted]

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

Dear Councilor Lytel:

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

You asked whether "committee meetings of an elected town board [are] under the Open Meetings Law." Further, you raised questions concerning the public notice requirements that pertain to those meetings.

In this regard, first, as you may be aware, section 63 of the Town Law states in part that "the supervisor may, from time to time, appoint one or more committees, consisting of members of the board, to aid and assist the board in the performance of its duties".

Second, 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 not defined in section 102(2) to include:

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

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

In view of the amendments to the definition of "public body," I believe that an entity consisting of two or more members of a town board, such as a committee, designated by law or by a person or body authorized to do so, would constitute a "public body" and would fall within the requirements of the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d (1981)].

Third, since a committee as described above is a "public body" subject to the Open Meetings Law, I believe that it is required to provide notice in accordance with section 104 of the Open Meetings Law. That provision states that:

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

designated public locations at least seventy-two hours before each meeting.

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

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place should be given to the news media 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.

As you requested, enclosed are 10 copies of "Your Right to Know".

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1002
OML-AO-2024

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 5, 1992

Ms. Mary Therese Capone
Massapequa POST
1045-A Park Boulevard
Massapequa Park, NY 11762

The staff of the Committee on 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. Capone:

I have received your recent letter, which reached this office on January 27.

You have sought an advisory opinion concerning a recent meeting of the Massapequa Board of Education. According to your letter, after rescinding funding for a winter track program, students petitioned the Board to restore funds, and the Board reconsidered the matter in executive session. During the executive session, the Board "directed the superintendent to reinstate the program". You added that when the public questioned the propriety of the executive session, the Board contended that "since the program would only be reinstated if two coaching positions were cut, they conducted themselves properly since the issue involved 'personnel'."

In this regard, I offer the following comments.

First, by way of background, 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 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 in 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 motions to enter into executive sessions cannot merely describe the subject to be discussed as "personnel", for example.

I point out that the term "personnel" appears nowhere in the Law. 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].

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 due to budgetary concerns, 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 that discussions relating to budgetary matters, such as the funding or reduction of positions, could appropriately be discussed during an executive session.

Third, your article indicates that the Board did not vote, but rather merely "authorized the superintendent to take whatever action was necessary". In my opinion, since action was taken that altered a certain aspect of the District's sports program, it is likely that the Board should have acted by means of a vote. I point out 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)].

In addition, 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.

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 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-1008
OML-AO-2025

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 6, 1992

Ms. Rhea Serefine
[redacted]

Dear Ms. Serefine:

Your letter of January 9 addressed to the Department of State has been forwarded to the Committee on Open Government for response and was received by this office today. Although we have been discussing various related issues by phone, I would like to offer the following remarks in conjunction with your questions.

Your initial area of inquiry involves "Board Meeting Policy at a Village Level", executive sessions, what is "available in a Village office for citizens to read", and who is responsible for making records available, such as bills and vouchers.

With respect to meetings, public bodies, such as village boards of trustees, planning boards and zoning boards of appeals, are required to comply with the Open Meetings Law. That statute is based on a presumption of openness and requires that meetings be conducted in public, unless there is a basis for entry into executive session. A public body may not conduct an executive session to discuss the subject of its choice; on the contrary, the subjects that may properly be considered in executive session are specified and limited in paragraphs (a) through (h) of section 105(1) of the Open Meetings Law.

With regard to access to records, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the Freedom of Information Law. Pursuant to the regulations, a village board of trustees must designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests for records. Most often, the clerk is the records access officer.

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.

Accessible records must be made available for inspection at no charge. If photocopies are requested, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches pursuant to section 87(1)(b)(iii) of the Freedom of Information Law.

Books of account, vouchers, bills, contracts and similar records relating to expenditures of public monies must in my view be made available, for none of the grounds for denial would be applicable. Although I am not an expert regarding the Village Law, I have enclosed copies of sections 4-408 and 5-524 of the Village Law, both of which may be useful to you. Those sections deal respectively with the duties of a village treasurer and the audit and payment of claims.

Lastly, you asked whether a citizen may use a tape recorder at an open meeting. Although neither the Open Meetings Law nor any other statute deals directly with the issue, several judicial decisions on the subject have been rendered.

By way of background, until 1979, there was but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to use their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference

> with public proceedings or the legislative process. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings' ...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, Second Department, affirmed a decision of the Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While the board of education has supplied this court with a battery of reasons supporting its positions, its resolution prohibiting the use of tape recorders at its public meetings was far too restrictive, particularly when viewed in light of the legislative scheme embodied in the Open Meetings Law (Public Officers law art. 7) which was enacted and designed to enable members of the public to 'listen to the deliberations and decisions that go into the making of public policy'" (id. at 925).

In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, including meetings of a board of fire commissioners.

In addition to sections of the Village Law referenced earlier, enclosed are copies of the Freedom of Information Law, the Open Meetings Law and "Your Right to Know", which describes both of those statutes in detail.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2026

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 6, 1992

Ms. Sandra Kissam
SPARC
Box 90
Blooming Grove, NY 10914

The staff of the Committee on 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. Kissam:

I have received your letter of January 23 in which you raised a series of questions concerning the Open Meetings Law as it relates to certain activities of the Stewart Airport Commission (SAC).

The initial area of inquiry pertains to a newspaper report that the Commission was briefed in executive session concerning a letter sent to the Department of Transportation by an assemblyman and a draft response to that letter.

In this regard, paragraphs (a) through (h) of the Open Meetings Law specifies and limits the subjects that may appropriately be discussed during an executive session. Based upon the brief description of the subject matter that you provided, it does not appear that any of the grounds for entry into executive session could properly have been asserted.

Second, you wrote that the "reason usually given to the public when the SAC goes into executive session is to discuss 'negotiations and prospects', and often 'litigation'." You asked whether those are "proper reason[s] to give the public."

By way of background, section 105(1) of the Open Meetings Law prescribes a procedure that must be accomplished by a public body during an open meeting before it may enter into an executive session. That provision states in relevant part that:

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

> or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

With respect to "negotiations", the only ground for entry into executive session that mentions that term is section 105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, section 105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union. It does not appear that the SAC would be discussing collective bargaining negotiations under the Taylor Law. If that is so, section 105(1)(e) would not be applicable as a basis for entry into executive session.

However, a different provision might be applicable, depending upon the nature of a discussion to discuss "negotiations and prospects". Specifically, section 105(1)(f) 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..."

Therefore, insofar as the SAC seeks to discuss the employment or credit history of a particular corporation, for example, I believe that section 105(1)(f) could be asserted. In such a situation, it has been suggested that a motion to enter into executive session be consistent with the language of that provision. For instance, a proper motion might be: "I move to enter into executive session to discuss the employment history of a particular corporation", which need not be named. A motion to discussion "negotiations and prospects", without more, would in my view be inadequate.

The provisions in the Open Meetings Law concerning "litigation" are found in section 105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing that language, it has been held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the language quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Further, since "possible" or "potential" litigation could be the result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a "potential" for litigation.

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 wrote that no minutes of executive sessions are maintained, and you asked whether that is appropriate.

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 hope that I 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: Stewart Airport Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1009
OML-AO-2027

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 6, 1992

Mr. Jeffrey H. Greenfield
NGL Realty Co.
112 Merrick Road
Box 847
Lynbrook, NY 11563

The staff of the Committee on 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. Greenfield:

I have received your letter of January 21 in which you sought advice concerning a denial of a request for records by the Village of Lynbrook and certain practices of its Board of Trustees.

You asked initially whether "the Village Attorney can hide behind client attorney privilege to deny access to Public Village 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.

Relevant to your question is the initial ground for denial, section 87(2)(a), which pertains to records that "are specifically exempted from disclosure by statute". One such statute is section 4503 of the Civil Practice Law and Rules, which makes confidential the communications between an attorney and a client, such as village officials in this instance, 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 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 records consist of legal advice provided by counsel to the client, records would be confidential pursuant to section 4503 of the Civil Practice Law and Rules and, therefore, section 87(2)(a) of the Freedom of Information Law. I point out, however, that a recent decision stressed that the attorney-client privilege should be narrowly applied. Specifically, in Williams & Connolly v. Axelrod, it was held that:

> "To invoke the privilege, the party asserting it must demonstrate that an attorney-client relationship was established and that the information sought to be withheld 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, 139 AD 2d 806 (1988)].

Also of potential relevance are sections 3101(c) and (d) of the Civil Practice Law and Rules, which make confidential, respectively, attorney work product and material prepared for litigation.

In sum, in accordance with the preceding commentary, records in which Village officials seek legal advice from their attorney and reflective of legal advice provided by the attorney would in my view be subject to the attorney-client privilege.

Second, you asked if the Board of Trustees may discuss and vote upon an issue that is not included in "the preprinted, posted agenda...". The Open Meetings Law is silent with respect to agendas or their functions. Nothing in that statute requires that agendas be prepared or that public bodies must adhere to them. Only if the Board of Trustees has adopted a rule requiring the Board to address only those matters appearing on an agenda would there be a restriction in terms of the subjects that could be considered.

Lastly, you indicated that the Board enters into executive session "without specifically noting the reason". In this regard, section 105(1) of the Open Meetings 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..."

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. In addition, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of the Open Meetings Law specify and limit the subjects that may properly be discussed during executive sessions.

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.

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 execu-

> tive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" (Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981).

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].

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

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2028

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 11, 1992

Ms. Patricia Minton
[redacted]

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

Dear Ms. Minton:

I have received your letter of January 30 and appreciate your interest in complying with the Open Meetings Law.

In your capacity as President of the Troy Board of Education, you wrote that you have proposed "a Saturday morning workshop for the Board of Education", which would be held in accordance with the Open Meetings Law. You have asked whether such a meeting may legally be held on a Saturday.

In this regard, the Open Meetings Law is silent with respect to the issue. Moreover, although section 24 of the General Construction Law enumerates certain days as "public holidays", I am unaware of any statute or judicial decisions that deal specifically with the issue of a public body's authority to conduct a meeting on a holiday or a weekend day.

I have found a summary of an opinion rendered by the State Comptroller in which it was advised that a town is not legally obligated to close its offices on the holidays designated in section 24 of the General Construction Law, and that a town board has discretionary authority to close town offices in observation of those holidays (see 1985 Opinion of the State Comptroller, 85-33). In my view, due to the absence of specific statutory guidance, it appears that a public body may in its discretion conduct meetings on public holidays or weekends, so long as it complies with applicable provisions of law, such as the Open Meetings Law.

As an aside, I point out that may public bodies conduct organizational meetings on January 1, which is a public holiday.

In short, so long as the meeting is held in compliance with the Open Meetings Law, I do not believe that there would be any legal impediment to holding the meeting on a Saturday.

I hope that I 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-2029

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 12, 1992

Ms. Georgianna B. Ellett
District Clerk
Cohoes City School District
21 Page Avenue
P.O. Box 350
Cohoes, NY 12047

The staff of the Committee on 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. Ellett:

I have received your letter of January 31 and the materials attached to it.

You wrote that an issue was recently raised concerning "notices of Executive Session Meetings" held by the Cohoes City School District Board of Education. To enable me to advise with respect to notice, you forwarded a copy of the following memorandum, which was transmitted to reporters from three daily newspapers:

> "This is to advise that there will be a Special Meeting of the Board of Education held on Thursday evening, January 30, 1992 at 6:30 PM in the Cohoes High School Library.
>
> "The purpose of this meeting is to enter into Executive Session for the purpose of discussing contractual and personnel items.
>
> "Kindly place this notice in the appropriate section of your respective newspapers. Thank you."

In addition, you directed several staff persons to post the following notice "in all five school buildings and central office in conspicuous locations":

> "A Special Meeting of the Board of Education will be held on Thursday evening, January 30, 1992 at 6:30 PM in the Cohoes High School Library.
>
> "The purpose of the meeting is to enter executive session for the purpose of discussing contractual items and personnel."

Based on the foregoing, I offer the following comments.

First, with respect 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."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place should be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours hours prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

I point out that while the Law requires that notice be given to the news media, there is no requirement that the news media publish notice. As such, there may be instances in which a public body complies with the notice requirements, but in which the news media does not publicize a meeting.

Based upon the materials attached to your letter, I believe that the Board fully complied with notice requirements imposed by the Open Meetings Law.

Second, while my intent is not to be unduly technical, it is suggested that the notice given be slightly different from what was prepared in the context of the kinds of meetings referenced.

As you may be aware, 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, a public body must accomplish a procedure 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 on the foregoing, it has been advised that, in a technical sense, a public body cannot schedule an executive session in advance of a meeting. Nevertheless, in some cases, it may be known that the subject to be discussed at a meeting may be considered during an executive session. In those kinds of situations, although the Law requires only that notice state the time and place of a meeting, it has been suggested that notice, for example, might indicate that a meeting will convene at a certain time and place, and that, immediately after convening, a motion will be made to enter into executive session to discuss a certain subject or subjects.

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-2030

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 18, 1992

Mr. Richard Nash
[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. Nash:

I have received your letter of January 31 in which you requested a "ruling" relating to the Open Meetings Law.

According to your letter, the Auburn Industrial Development Agency "holds meetings with notice, goes into executive session without any explanation, and has sworn its members to secrecy". In addition, you wrote that its by-laws provide that meetings can be held without notice.

In this regard, I offer the following comments.

First, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Open Meetings Law. This office cannot render a "ruling" that is binding upon an entity. Nevertheless, it is hoped that advisory opinions issued by this office are educational and persuasive, and that they serve to enhance compliance with law.

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

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

Section 2304 of the Public Authorities Law describes the Auburn Industrial Development Authority and states that it is a public benefit corporation. Since a public benefit corporation is a "public corporation" (see General Construction Law, section 66), it is clear in my view that the Authority constitutes a public body required to comply with the Open Meetings Law.

Third, a public body is required to provide notice of its meetings in accordance with section 104 of the Open Meetings Law. That provision Law states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place should be given to the news media 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, a public body cannot in my opinion waive notice requirements imposed by the Open Meetings Law by means of its by-laws. Section 110 of the Open Meetings Law is entitled "Construction with other laws" and states in subdivision (1) that:

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

Based on the foregoing, I do not believe that the Authority's by-laws could validly remove or circumvent the notice requirements that must be met under the Open Meetings Law.

Fourth, the Open Meetings Law requires that a procedure be accomplished during an open meeting before an executive session must 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..."

Moreover, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, the subjects that may properly be considered in executive session are specified and limited to those subjects described in paragraphs (a) through (h) of section 105(1) of the Law.

Lastly, although a member of a public body need not disclose what may have been discussed during an executive session, in a decision in which the issue was whether discussions occurring during an executive session 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 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).

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Auburn Industrial Development Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7032
OML-AO-2031

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 24, 1991

Mr. Donald B. McKay
Staff Writer
The Saratogian
20 Lake Avenue
Saratoga Springs, NY 12866

The staff of the Committee on 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. McKay:

I have received your letter of February 12 in which you requested clarification and opinions concerning issues arising under the Open Meetings Law and the Freedom of Information Law.

With respect to the first, at the end of a meeting of the Saratoga County Law and Finance Committee, you wrote that the Chairman of the Committee "motioned for an executive session". Although no "formal vote" was taken, the members verbally supported the motion. The reasons given for holding the executive session were to discuss "a personnel matter and litigation". When you sought a more descriptive basis for the executive session by questioning the Chairman and the County Attorney, "both replied that they did not know the reason for the session".

In this regard, I offer the following comments.

First, section 105(1) of the Open Meetings 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..."

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. In addition, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of the Open Meetings Law specify and limit the subjects that may properly be discussed during executive sessions.

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" or "litigation", for example. It is also noted that the term "personnel" appears nowhere in the Open Meetings Law.

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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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].

The second issue involves a response to your request for copies of financial disclosure statements filed with the County. In brief, you indicated that a portion of the County's Code of Ethics states that "the payment of a fee of $1 per page if a copy of the disclosure statement is desired". It is your view that the fee is excessive. Based upon the ensuing analysis, I agree with your contention.

By way of background, section 87(1)(b) (iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation, for instance, establishing a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction, was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, or a fee that exceeds the actual cost of reproducing records that cannot be photocopied. Moreover, a judicial decision confirmed that a fee of more than twenty-five cents per photocopy may be assessed only pursuant to authority conferred by a statute, an act of the State Legislature [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Consequently, unless an act of the State Legislature authorizes an agency to charge fees inconsistent with the Freedom of Information Law, no more than twenty-five cents per photocopy can be charged.

As you requested and in an effort to enhance understanding of and compliance with the Freedom of Information Law and the Open Meetings Law, copies of this opinion will be forwarded to the County Attorney and the Chairman of the Board of Supervisors.

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: Courtenay Hall, County Attorney
Philip Klein, Chairman, Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2032

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 24, 1992

Ms. Melissa Klein
Gannett Suburban Newspapers
One Gannett Drive
White Plains, NY 10604

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

Dear Ms. Klein:

I have received your letter of February 13 and the news articles attached to it.

You have requested an advisory opinion concerning the propriety of an executive session held by the New Rochelle City Council "to discuss a contract extension for Xanadu Property Associates".

By way of background, the City and Xanadu are parties to a contract to develop David's Island, which is owned by the City. According to one of the articles, prior to the meeting during which the closed session was held, Mayor Idoni stated that he assumed that "a portion of the meeting would take place behind closed doors because the price New Rochelle would receive for turning the island over to Xanadu might be discussed". Further, you wrote that the City's Corporation Counsel advised that an executive session could properly be held, for "it's quite clear because we're talking about real property...the publicity if this is discussed in public would be detrimental". She also added that it was "mandatory" to discuss the "financial stability" of Xanadu in executive session due to a "right of privacy".

In order to obtain additional detail concerning the nature of the subject matter intended to be discussed and the motion for entry into executive session, you reviewed a tape recording of the open portion of the meeting, some of which is unclear, and informed me that the Mayor said that the executive session would

involve an attempt to set parameters concerning future negotiations on the price of the property and the "financial stability" of Xanadu. Although the Council entered into executive session, you indicated that the Mayor never made a formal motion concerning the issues to be discussed during the executive session.

In this regard, I offer the following comments.

First, the Open Meetings Law requires that a procedure be accomplished during an open meeting before a public body may conduct an executive session. Specifically, section 105(1) of the Open Meetings Law states in relevant part that:

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

Based upon your description of the facts, the procedure required to be followed was not carried out in a manner reflective of compliance with the Open Meetings Law.

Second, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may properly be considered during an executive session. Consequently, a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, only to the extent that one or more of the grounds for entry into executive session apply may a public body exclude the public from a meeting. Further, if, for example, a public body seeks to discuss more than one subject or issue during an executive session, a motion to go into executive session must describe the "subject or subjects to be considered".

Third, while I believe that two of the grounds for entry into executive session might have been relevant to the matter, in my opinion, only one of those grounds could properly have been asserted.

Section 105(1)(h) permits a public body to conduct an executive session to discuss:

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

Based on the foregoing, not every discussion relating to a real property transaction may be discussed behind closed doors. Only when "publicity would substantially affect the value" of the property could section 105(1)(h) be asserted. In this instance, the site of the property at issue has been known to the general public for years. Consequently, I do not believe that publicity would have had any effect upon the value of the property. If that is so, section 105(1)(h) would not have served as a valid basis for entry into executive session, and a discussion of the price of the property should in my view have been conducted in public.

The other basis for entry into executive session of potential significance is section 105(1)(f), which authorizes a public body to exclude the public from a meeting to discuss:

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

To the extent that a discussion of Xanadu's financial stability involved the "financial or credit history" of a particular corporation, I believe that the executive session could justifiably have been held.

In sum, while a discussion of the price of the property could not in my opinion have been considered during an executive session, it appears that Xanadu's financial stability would have constituted a proper subject for consideration in executive session.

Lastly, since the Corporation Counsel suggested that it would be "mandatory" to discuss the financial stability of Xanadu in executive session, I point out that the Open Meetings Law is permissive. As indicated in section 105(1), a public body "may" conduct an executive session to discuss certain subjects after having accomplished the procedure described in that provision. However, there is no requirement or obligation to conduct an executive session, even when there is authority to do so. I point out, too, that in a case involving whether discussions occurring during an executive session could be characterized as "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 anyway 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).

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the City Council.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of New Rochelle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2033

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 25, 1992

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 questioned the propriety of a policy of the City Dunkirk Common Council.

As I understand your comments, after Common Council meetings are called to order, members of the public are permitted to address the Council for periods of three minutes each. You wrote, however, that the Council "will not honor (denies) time of three minutes when an individual wishes to give their time to their spokesperson".

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 reasonable 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 meeting, 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.

From my perspective, so long the Council provides an equal opportunity to speak, it would be acting reasonably.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council, City of Dunkirk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2034

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 25, 1992

Ms. Roseanne Mirabella
[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. Mirabella:

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

In your capacity as a member of the Board of Education of the East Greenbush Central School District, you wrote that the Board "has been divided 5-4" since July of last year. You added that you have learned that meetings are being "held in private residences by four members of the majority" and that a telephone call was recently mistakenly placed to a resident by one of the four who "[b]elieving he was speaking to the fifth member of the majority...proceeded to tell her how to vote on issues at the next Board meeting". Based on the foregoing, it is your belief that members of the Board "are meeting in private to discuss District business and reach a decision". You pointed out that there is often little discussion by the five majority members and that the President of the Board during a recent meeting assumed that there would be a "five-four split" concerning a particular issue, even though his comment was made "prior to polling all" of the members. In short, you have contended that decisions are being made in advance of meetings.

In this regard, I offer the following comments.

First, by way of background, 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)

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 statute. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'" (id. at 416)

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

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a

> vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id. at 415).

Based upon the foregoing, if a majority of a public body gathers to discuss public business, such a gathering would in my view constitute a "meeting" subject to the Open Meetings Law.

Second, if a public body, such as the Board in this instance, consists of nine members, a quorum would be five. Therefore, ordinarily, if four of the members meet, the Open Meetings Law would not apply, for no quorum would be present. However, if four members meet and contact a fifth member by phone, or if a conference call is held by a majority of the Board to discuss public business, I believe that those situations would represent meetings held in circumvention of the Open Meetings Law.

Viewing the issue from a somewhat different vantage point, I direct your attention to section 41 of the General Construction Law, which, since 1909, has imposed certain requirements concerning a quorum upon public bodies. The cited provision states that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board 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."

I believe that the provision quoted above permits a public body to perform and exercise its duties only at a meeting conducted by a quorum of the body, a majority of its total membership, and only by means of an affirmative vote of a majority of its total membership. When a majority of the membership of the Board physically gathers or "meets" by means of telephonic communication, the remaining members are constructively excluded from the discussion. 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. Absent such a requirement, the members of a public body constituting a majority might effectively preclude other members from participating in the body's deliberative process, thereby negating the capacity of those members to offer their points of view.

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 violate the Law.

Further, the legislative declaration of the Open Meetings Law, section 100, 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 and that less than a quorum may meet outside the requirements of the Open Meetings Law, a gathering of less than a quorum coupled with a telephone communication with others sufficient to constitute a majority would in my view represent a meeting that should be conducted in accordance with the Open Meetings Law.

Lastly, it has been inferred judicially that gatherings of fewer than a quorum of the members of a public body held to evade the Open Meetings Law may result in a violation of law. As stated by the Appellate Division, Third Department: "We recognize that a series of less-than-quorum meetings on a particular subject which involve at least a quorum of the public body could be used by a public body to thwart the purposes of the Open Meetings Law" [Tri-Village Publishers, Inc. v. St. Johnsville Board of Education, 110 AD 2d 932, 934 (1985)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2035

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 28, 1992

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, which reached this office on February 18.

You have sought my opinion concerning the following items:

> "1. Prior to calling the meeting of the Zoning Board of Appeals to order, the Board met with the City Attorney behind closed doors, came out and announced that the subject matter was referred to the City Attorney.
>
> 2. Can the Zoning Board of Appeals call a meeting to order, listen to the testimony, then go into executive session, (behind closed doors), reconvene, and announce their decision?"

In this regard, it is noted at the outset 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 your first area of 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.

With regard to your second question, 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 or in conjunction with an exemption other than section 108(1). As indicated earlier, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a public body, including a zoning board of appeals, must deliberate in public.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Zoning Board of Appeals, City of Dunkirk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2036

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 28, 1992

Mr. Ivan J. Clark
[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. Clark:

I have received your letter of February 13 and the news article attached to it, which reached this office on February 18.

According to your letter, the Town Board of the Town of Venice instructed its highway superintendent to carry out certain work on your property. You wrote that you have attempted without success to obtain a copy of the minutes of the Board's meeting of January 9, and you sought assistance in the matter.

In this regard, I offer the following comments.

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 "nonfinal," 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 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: Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2037

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 28, 1992

Mr. William Towne
ACTWU
[redacted]

Ms. Sandra Fonda
[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. Towne and Ms. Fonda:

I have received your letter of February 13 and the news article attached to it.

In your capacity as members of the Board of Trustees of Fulton-Montgomery Community College, you have sought an advisory opinion concerning the Open Meetings Law. According to your letter:

> "A properly scheduled and held meeting of the Personnel Committee of the Board of Trustees, on January 23, 1992 was preceded by an unannounced meeting. This unscheduled meeting included a majority of the members of a committee, established by the Board chairman, with some elected Supervisors and county attorneys from both Fulton and Montgomery Counties. The purpose of this unannounced meeting was to discuss the College Board of Trustees involvement in upcoming contract negotiations at the College. This meeting was originally scheduled for February 3, 1992 at 2:00 pm. No notice of a change in meeting date was given. The actual time this unscheduled meeting actually began is unknown to us.

> "It appears official business was actually discussed at the meeting. A decision was made to given the FMCC Board of Trustees a role (equal to Fulton and Montgomery Counties) in the upcoming negotiations with college unions (see attached news articles)."

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, such as board of trustees of community colleges, 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)].

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.

Lastly, 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, unless there is a basis for entry into an executive session. The subjects that may appropriately be considered in executive session are specified and limited to those appearing in paragraphs (a) through (h) of section 105(1) of the Open Meetings Law. Based upon the facts presented in your letter and the news articles, there appears to have been no basis for entry into executive session relative to the gathering in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2038

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

February 28, 1992

Mr. Steve Laws
[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. Laws:

I have received your letter of February 15 and the materials attached to it.

You have raised questions concerning compliance with notice requirements imposed by the Open Meetings Law relative to recent meetings of the Salina Town Board and Plannning Board.

In this regard, I offer the following comments.

First, although the Open Meetings Law makes no reference to "emergency meetings", section 104 of the Law prescribes notice requirements applicable to all 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 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, I believe that any action that might have been taken generally remains valid unless and until a court renders a determination to the contrary. With respect to the enforcement of the Open Meetings Law, section 107(1) states in part that:

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

The same provision also states that:

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

A finding of a failure to comply with the notice requirements imposed by the Open Meetings Law, intentional or otherwise, would, in my opinion, be dependent upon the attendant facts.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2039

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 9, 1992

Ms. Lily C. Taddeo
Town Clerk
Town of Lewiston
1375 Ridge Road
Lewiston, NY 14092

The staff of the Committee on 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. Taddeo:

I have received your letter of February 18 in which you sought advice relating to the Open Meetings Law.

You wrote that, in your capacity as town clerk for the past five years and as deputy clerk prior to that period, you have prepared "detailed minutes, though not verbatim". Since the majority of the Town Board changed, you have been directed to include "only motions, sections, and the resultant votes" in the minutes. One member said that he "doesn't want someone else interpreting statements", and that "it is difficult (for the transcriber) to be objective". You wrote, however, that you "don't find objectivity a problem", that you are conscientious, that tape recordings can be used to verify the contents of minutes, and that the public hears what is said at open meetings. You have asked whether you "can continue to present the minutes (accurately, of course) as [you] see them, or if [you] must follow this Board directive".

In this regard, I offer the following comments.

First, section 30 of the Town Law entitled "[p]owers and duties of town clerk", states in subdivision (1) in relevant part that the clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting, and of all propositions adopted pursuant to this chapter". As such, I believe that the preparation of minutes is a power and a responsibility of a town clerk, not a town board.

Second, with regard 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, while 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...", I believe that a town clerk who prepares minutes may refer to those who may have spoken during a discussion and the nature of their comments.

I hope that I 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-2040

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 9, 1992

Ms. Sonia M. Dusza
[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. Dusza:

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

You have requested an advisory opinion concerning a number of issues relating to "workshop sessions" held by the City of Tonawanda Common Council to discuss the preparation of its budget.

The initial issue involves an executive session held to discuss "personnel" because names would be mentioned. In this regard, by way of background, 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 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 in 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 subject to be discussed as "personnel", for example.

I point out that the term "personnel" appears nowhere in the Law. 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].

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 due to budgetary concerns, 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 that discussions relating to budgetary matters, such as the funding or reduction of positions, could appropriately be discussed during an executive session.

Second, you have contended that the Common Council appropriated public monies during an executive session. Although it appears that discussions of the "appropriations" to which you referred should have been considered in public in great measure, if not in their entirety, as I understand the situation, the Common Council's deliberations involved the preparation of a budget, rather than a final adoption or approval of a budget. If that is so, the process of developing the budget and of adding or removing certain items or proposed expenditures could not in my view be characterized as "appropriations". When the content of a tentative budget is made final and ready for approval, the act of final approval would in my view represent an appropriation; I do not believe that the steps or process leading to adoption of a budget could be considered as appropriations.

Lastly, you referred to an inability on the part of the public to participate at the workshop sessions. 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), the 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 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: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2041

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 9, 1992

Mr. Frederick J. Koelsch
Town Attorney
Town of Yorktown
363 Underhill Avenue
P.O. Box 703
Yorktown Heights, NY 10598

The staff of the Committee on 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. Koelsch:

I have received your letter of February 14 in which you seek to confirm a telephone conversation in which it was advised that the Yorktown Town Board may pass resolutions during its so-called "work sessions".

In this regard, I offer the following comments.

First, it is emphasized 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 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 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 "work session" must be conducted in accordance with the requirements of the Open Meetings Law. 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. Further, 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.

Since a work session 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)].

Lastly, 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 authority or responsibilities under 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2042

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 10, 1992

Robert L. Loretan, Ph.D.
District Superintendent
The State Education Department
First Supervisory District of
Erie County
2 Pleasant Avenue West
Lancaster, NY 14086

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

Dear Dr. Loretan:

I have received your letter of February 18 and the materials attached to it.

By way of background, the President of the Board of Education of the Grand Island Central School District, Dr. Richard McCowan, informed you that the Board met on February 13 to appoint a negotiator and a new superintendent of schools. Having been contacted about the meeting by a reporter for the Buffalo News, I advised that the Board apparently failed to comply with the notice requirements imposed by the Open Meetings Law. The article indicates that "board members signed a waiver to forego requiring a notice of a public meeting". Nevertheless, in a memorandum addressed to you, Dr. McCowan wrote that the board followed the ensuing procedure:

> "1. School board members were informed by telephone 24 hours before a Special Meeting was scheduled on February 13 at 12:00 noon.
>
> 2. Printed notice of the meeting was posted on the front door of the District Office 24 hours before the meeting.
>
> 3. This notice said that a Special Meeting was scheduled during which time the School Board would discuss the proposed contract for the new superintendent.

> 4. Each board member signed a waiver in lieu of written notice indicating that they had been informed of the meeting before the meeting was scheduled. Dr. Frank Costanzo, who was vacationing in Florida, returned his waiver by fax before the meeting.
>
> 5. The six remaining board members met at 12:00 noon in the Special Meeting, adjourned to Executive Session, and returned to the Special Meeting. At that time the motion was made and seconded to appoint Dr. Paul Fields as Superintendent of Schools. It was passed unanimously by the six members present. Then we adjourned the Special Meeting."

In this regard, I offer the following comments.

First, it appears that there may have been confusion concerning a waiver of notice. In the context of the memorandum, I believe that Board members waived written notice requirements that would ordinarily have been utilized to inform them of an upcoming meeting. Any such requirements would be separate and distinct from the notice requirements imposed by the Open Meetings Law.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media 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, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations. While the memorandum prepared by Dr. McCowan indicates that notice was posted, it is unclear whether notice was given to the news media as required by section 104 of the Open Meetings Law.

The article states that if the Board failed to comply with the notice provisions in the Open Meetings Law, "the Field appointment would be invalid". I disagree with that statement due to its breadth. With respect to invalidation of action and the enforcement of the Open Meetings Law, section 107(1) states in part that:

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

The same provision also states that:

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

A finding of a failure to comply with the notice requirements imposed by the Open Meetings Law, intentional or otherwise, would, in my opinion, be dependent upon the attendant facts. Further, I believe that action taken by a public body generally remains valid unless and until a court determines to the contrary.

Third, the memorandum states that action was taken to appoint a superintendent. It is unclear, however, whether the action was taken in public or during an executive session. Here I point out that, 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.

Lastly, in his memorandum, Dr. McCowan wrote that he telephoned me, that I was "too busy" to speak with him, that three hours passed without a return call to me, and that he was "surprised that [I am] more accessible and responsive to reporters that to school board members". For purposes of clarification, I remember Dr. McCowan's call, as well as my sense of frustration. This office consists of myself and a secretary, who was out of the office at the time of Dr. McCowan's call. When he called, I was on the other phone. I answered and explained that I was on another call and that I would return his call as soon as possible. Although we conversed briefly at that time, he hung up before I could write down the last four digits of his phone number. Thereafter, I tried to reach him through the School District, which was closed that day, presumably due to the weather. I also located a home phone number, which I tried repeatedly throughout the day. Finally, I was able to reach a family member, and Dr. McCowan and I spoke at the end of the day. Further, in terms of accessibility and responsiveness, I generally respond to telephone calls and written correspondence in chronological order. Please be assured that I did not ignore Dr. McCowan's call.

I hope that the preceding commentary serves to clarify the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Richard McCowan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2043

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 10, 1992

Mr. Christopher A. Rickard
[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. Rickard:

I have received your letter of February 13, which reached this office on February 20.

You have sought advice concerning the status of a "master plan steering committee" under the Open Meetings Law. The committee in question appears to consist of two members of the East Greenbush Town Board and two members of the Planning Board.

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, such as a town board or a planning board, by way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally

enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

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

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

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

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" 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 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 four, for example, a quorum would be three.

In this instance, since the steering committee consists solely of members of two governing bodies, I believe that it would constitute a public body.

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)].

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.

Lastly, as you may be aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into an executive session. The subjects that may appropriately be considered in executive session are specified and limited to those appearing in paragraphs (a) through (h) of section 105(1) 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
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-7048
FOIL-AO-2044

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 17, 1992

Mr. Donald Reid
Chairman of Assessors
Town of Argyle
RD #2 Box 2020A
Argyle, NY 12809

The staff of the Committee on 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. Reid:

I have received your letter of February 26 in which you raised a series of issues.

The first situation that you described involved an orientation meeting for newly elected assessors. You sought to attend, even though you have served as an elected assessor for some thirty years. As of the date of your letter, it was unclear whether you would be given permission to attend.

In this regard, the Open Meetings Law applies to meetings of public bodies, and a "meeting" ordinarily represents a gathering of public body for the purpose of conducting public business as a body. Although many public officials would attend the session in question, I do not believe that it would be a meeting of a public body. While the Open Meetings Law, in my opinion, would not have been applicable, it is difficult to understand any reason for precluding you from attending for the purpose of being educated, and perhaps to enable you to share your experience with others.

Second, you asked whether the Board of Assessors must keep minutes of its work sessions. By way of background, 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.

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. If none of those actions occur during work sessions, technically, I do not believe that minutes would have to be prepared.

Third, you referred to an advisory opinion prepared on December 6 at the request of person seeking records from the Board. You wrote that there seems to be "no end to it", and you asked "How far do we have to go". I point out in this regard that the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency need not create a record in response to a request. Therefore, while I believe that an agency must disclose existing records to the extent required by law, if, for example, computations or other information sought have not been prepared, you would not be obliged to create new records on behalf of an applicant.

Lastly, you asked whether the Board can meet in private 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 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 short, when the Board seeks the legal advice of its attorney, I believe that the communications in that context would be outside the coverage of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2045

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 18, 1992

Mr. Thomas E. Ramich
Attorney At Law
420 Carroll Street
Elmira, NY 14901-3404

The staff of the Committee on 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. Ramich:

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

In your capacity as Village Attorney for the Village of Elmira Heights, you wrote that a legal action is pending against the Village concerning the non-payment of retiree health insurance benefits. One of the named plaintiffs in the action is a retired Village employee who is currently a member of the Board. At a recent meeting, a motion was made to discuss the litigation in executive session, and you were asked to offer an opinion as to whether the trustee who is a plaintiff in the litigation should be permitted to attend the executive session. In response to the question, you indicated that you "could not advise the Village of the pros and cons of paying or not paying retiree health benefits and its effects on pending litigation if one or more of the named plaintiffs were present and listening to [your] opinion and advice". The trustee-plaintiff has contended that he was wrongfully excluded from the meeting. You have sought an opinion "as to whether a trustee who is also a plaintiff suing the Village can be excluded from a meeting between [yourself] and all other trustees, when the purpose of the meeting is for [you] to advise [your] clients, the other trustees, as to how they might proceed in light of litigation the pending against them."

In this regard, I offer the following comments.

First, it is noted at the outset 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.

Second, with regard to a discussion of litigation, the provision concerning the "litigation" exception for executive session is section 105(1)(d) of the Open Meetings Law. The cited provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors.

Third, however, 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."

Consequently, I believe that any member of the Board of Trustees, including the member-plaintiff, would have the right to attend an executive session.

Finally, in my view, the only manner in which the four members of the Board could gather to discuss the litigation without the presence of the member-plaintiff would involve the assertion of an exemption from the Open Meetings Law, which would render the provisions of that statute inapplicable.

Relevant under the circumstances 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 you, in your capacity as Village Attorney, provide legal advice to or otherwise engage in an attorney-client relationship with your clients, the four members of the Board, your communications would be privileged and, therefore, outside the requirements of the Open Meetings Law. In that kind of situation, I believe that the member-plaintiff could be excluded from the gathering, for, based upon the facts, he could not be characterized as your client, but rather as an adversary in the litigation. Further, in my opinion, the exclusion of the member-plaintiff would be consistent with the thrust of decisional law concerning the intent of section 105(1)(d), the "litigation" exception for entry into executive session.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2046

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 18, 1992

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 February 28 concerning the implementation of the Open Meetings Law by the Board of Trustees of the Village of Airmont.

Attached to your letter is a copy of a paid political advertisement of the Airmont Civic Association, whose president also serves as a member of the Village Board of Trustees. One element of the advertisement states that "[e]xcessive use of private session and secret meetings should be eliminated". You asked how you "can go about viewing minutes of these secret meetings". You added, however, that "[i]t seems there are no minutes kept so how can a citizen who is interested in what her local government is doing find out what is really going on".

In this regard, I offer the following comments.

First, I point out that the Open Meetings Law provides what might be viewed as minimum requirements concerning the contents of minutes. Specifically, 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.

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

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have

> always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415)

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 Village business, in their capacities as Board members, any such gathering, in my opinion, would have constituted 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 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.

Lastly, 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 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 portion of an open meeting. Before conducting an executive session, a procedure must be accomplished during an open meeting. 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..."

Moreover, 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.

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-7056
OML-AO-2047

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 19, 1992

Mr. Jeffrey H. Greenfield
NGL Realty Co.
112 Merrick Road
Box 847
Lynbrook, NY 11563

The staff of the Committee on 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. Greenfield:

I have received your letter of February 28 in which you sought advice concerning the Open Meetings Law and the Freedom of Information Law.

With respect to meetings, you asked whether the Open Meetings Law permits the public to record meetings "either on an audio tape or video tape camcorder", and whether a local government can "bar an individual from recording a session, especially if they use these 2 means of recordings themselves".

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.

If a public body uses audio or video equipment to record its meetings, I believe that the public would be able to use similar equipment in a similar manner. In short, if the use of the equipment by a public body is not disruptive, similar activity by the public could not in my view be characterized as disruptive or prohibited.

It is noted that 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.

With regard to the use of a fax machine to request records under the Freedom of Information Law, I point out that an agency may require that a request be made in writing [see Freedom of Information Law, section 89(3)]. There are no judicial decisions of which I am aware that deal with the use of fax transmissions to request records under the Freedom of Information Law. Absent a judicial determination to the contrary and assuming that such a request is directed to the appropriate person, i.e., the records access officer, I am unaware of any basis for refusing to accept a request made by means of a fax transmission.

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, Village of Lynbrook

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2048

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 19, 1992

Ms. Elizabeth Lynch
[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. Lynch:

I have received your letter of March 3 which relates to the Town of Rotterdam Planning Commission, and the materials attached to it.

You have sought information concerning "laws or rules dealing with public meetings", as well as the propriety of members of a public body engaging in a series of telephone calls for the purpose of taking action.

In this regard, I offer the following comments.

First, enclosed is a copy of the Open Meetings Law. In brief, that statute pertains to meetings of public bodies and requires that meetings be conducted open to the public, unless there is a basis for entry into executive session. The phrase "executive session" is defined 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 subjects that may properly be discussed during executive sessions.

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 be inconsistent with law.

It is noted that the definition of "public body" [see Open Meetings Law, section 102(2)] refers to entities that are required to conduct public business by means of a quorum. In this regard, the term "quorum" is defined in section 41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

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

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. As such, it is my view that a public body has the capacity to 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 members of public bodies may consult with one another by phone, I do not believe that thy could validly conduct meetings by means of telephone conferences or make collective determinations by means of telephonic communications.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to the Planning Commission and its attorney.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Rotterdam Planning Commission
Steven Buchyn, Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1066
OML-AO-2049

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 26, 1992

Mr. David J. Kurzeja
[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. Kurzeja:

I have received your letter of March 7 in which you requested my views concerning the propriety of an action taken during a recent "unadvertised" meeting of the Alexandria Central School District Board of Education.

By way of background, in May of last year, an issue arose concerning "excessive administrative costs", for there had been two principals and a superintendent in a building serving fewer than 700 students. The budget was twice defeated and an austerity budget was adopted. In October, the Superintendent announced that he would retire at the end of the school year. During the ensuing months, based upon discussions with Board members, you wrote that you were led to believe, in view of the Superintendent's upcoming retirement, that there would be two administrators in the future, rather than three. You indicated, however, that on March 2 an "unadvertised and executive meeting" was held solely to discuss "the third administrative position". It is your belief that members of the Board were given notice on February 29 relative to a meeting to be held on March 2, and you wrote that "[t]he secrecy was carried out to the extent that one person was told in the school office on March 2, there was no meeting". I point out that I discussed the matter with Mr. Wiley Keeler, the District's treasurer. Mr. Keeler informed me that the Board, at its preceding meeting held on February 13, scheduled a meeting for March 2, and that reference to that meeting appears in the minutes of the February 13 meeting. He also said, however, that he did not believe that notice was posted or given to the news media. Notwithstanding the foregoing, you and two others went to the school that night, where you found the meeting room locked, knocked on the door and were admitted. Mr. Keeler said that although one door was closed, the main office

door, the usual entrance, was open. After some two hours of discussion, the Board entered into an executive session. You learned the following day that a third administrator position was approved by a 4 to 3 vote. Mr. Keeler informed me that the executive session was held to discuss "administrative alignment" and the duties inherent in certain administrative positions. He also said that, although the public had left the meeting, the Board voted in public following the executive session.

In this regard, I offer the following comments.

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

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

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

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.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

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

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

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

It is noted that a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may properly be considered during an executive session.

Although the issue of creating or retaining a position might be viewed as a personnel matter, I point out that the term "personnel" appears nowhere in the Law. 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.

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 due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, a decision involving the creation or retention of a position or the duties of a position, irrespective of who may hold that position, would not focus on a particular individual.

Lastly, 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.

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.

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 and Mr. Keeler.

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
Wiley Keeler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2050

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 27, 1992

Mr. Christopher A. Rickard
[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. Rickard:

I have received your letter of March 12.

You referred to an advisory opinion rendered on March 10 at your request in which it was advised that a committee consisting of two members of a town board and two members of a planning board in my view constituted a "public body" required to comply with the Open Meetings Law.

In your letter of March 12, you alluded to an entity created by the Town of Poestenkill, and you wrote that:

> "The specifics for this committee are as follows. The committee consisted of four (4) members. The Chairman of the committee was a Town Councilman, and the remaining members were the Chairman for the Town Conservation Advisory Council, the Town Planning Board and the Town Zoning Board. The committee routinely held meetings without public notice, with three (3) or more members present, and the general public was specifically excluded from attending."

You asked whether the committee described above would fall within the scope of the Open Meetings Law.

In my opinion, for the same reasons as those expressed in my opinion of March 10, the committee in question would constitute a public body subject to the Open Meetings Law.

Copies of this opinion, as well as the opinion referenced herein, will be forwarded to the Poestenkill Town Board.

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-2051

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 27, 1992

Mr. Angelo Petrone
[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. Petrone:

As you are aware, I have received your letter of March 2 and the materials attached to it. In your capacity as a member of the Board of Education of the Somers Central School District, you have requested an advisory opinion concerning the Open Meetings Law.

You are also aware that I have discussed the matter in question with various people, in some cases in detail, in others briefly, including the Board President, Mr. Robert MacGregor, and Dr. Joseph G. Ennis, the Superintendent. Since I was not present at the gathering that is the subject of your inquiry, I cannot be aware of what in fact occurred.

Nevertheless, by way of background, you attached a series of exhibits relating to the payment of moving and relocation expenses to the Superintendent. The first is a memorandum of agreement of June 5, 1989 stating in part that the District would provide reimbursement for reasonable moving and relocation expenses, so long as reimbursement is approved by the President of the Board, or in his absence or disability, the Vice President of the Board. The second is a purchase order of June 14, 1989 encumbering funds of up to $30,000, which was later changed to $38,000, designating funds for those expenses. The third is a memorandum of June 20, 1990 from Dr. Ennis to the former Board President entitled "Final Payment on Moving Expenses" reflective of Dr. Ennis' intent not to exceed $38,000 in expenditures. The fourth is a memorandum of January 30, 1992 from the Board President to the Board in which he sought to arrange a meeting between the Board and its attorney, Mr. Murray Steyer, on February 6. The final exhibit is a letter of February 19 from Mr. Steyer to the Board President in which he expressed the opinion that the

meeting of February 6 between himself and the Board was exempt from the Open Meetings Law, because the gathering "was held for the purpose of obtaining Board counsel's interpretation of a provision in the current employment agreement with the School District's Superintendent".

With respect to the foregoing, you wrote that:

> "[w]hile [you] understand that the discussion of a contract is a matter for executive session, it is also [your] understanding that an executive session must be announced, with its purpose, at a public session, as per the Open Meetings Law. This was not done. At this meeting, the Board president sought the Board's authorization, via consensus, to reimburse the Superintendent an additional $24,000 for re-location expenses, as no pre-existing authority was in place beyond the $38,000. The Board approved, by a consensus vote of 4-1-1 (with one member absent), the additional reimbursement. The Board president claimed, when questioned at a public Board meeting on February 24, 1992, that no vote was taken, as no motion was made or that no vote was taken, as no motion was made or seconded, and therefore the consensus vote did not have to appear in Board minutes or be made public."

You wrote further that:

> "In the February 19, 1992 letter from Murray Steyer to Bob MacGregor, Mr. Steyer confirms the purpose of the meeting. He does not comment, however, on the fact that the meeting was not announced to the public nor that after rendering his opinion, that a heated discussion ensued regarding the authorization to pay an additional $24,000 without a public discussion. Further, he does not indicate that a consensus vote was taken. Mr. Steyer was present throughout the entire meeting."

As indicated earlier, the matter was discussed with others. In brief, as I recollect our conversation, Mr. MacGregor said that the sole issue at the meeting involved a legal interpretation of who could approve an increase in expenditures, the Board as a whole or the Board President singly, and that the determination was that the Board President had the sole authority to do so. As such, he contended that the issue could not have been voted on by the Board. Dr. Ennis said that the consensus reached by the Board was only an agreement that it understood what the attorney had presented.

In our recent conversation, you informed me that on March 16, by a vote of four to three, the Board voted to appropriate additional funds for expenses.

In this regard, I offer the following comments.

First, it is emphasized 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 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 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, I point out that there are 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. Therefore, if a public body discusses only a matter exempted from the Law, the gathering may be held in private; there would be no requirement that notice be given or that minutes be prepared, for example.

Relevant under the circumstances 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 the Board's attorney provided legal advice or otherwise engaged in an attorney-client relationship with his clients, the members of the Board, their communications would have been privileged and, therefore, outside the requirements of the Open Meetings Law.

Again, without having been present, I do not know what transpired during the gathering. However, if at some point the Board's attorney stopped providing legal advice, and the Board began to deliberate with respect to the issue, at that point, I believe that the attorney-client privilege would have ended, and that the gathering would have become a "meeting" subject to the Open Meetings Law. If that kind of situation occurred, the Board should in my view have reconvened in public for the purpose of conducting a meeting.

Further, in that event, it does not appear that there would have been a basis for discussing the matter during an executive session. Although you wrote that "the discussion of a contract is a matter for executive session", the facts as I understand them, would not have permitted the Board, following the receipt of legal advice, to discuss the matter during an

executive session. In my view, the only potential basis for entry into executive session would have been section 105(1)(f) of the Open Meetings Law. That provision authorizes 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..."

The language quoted above, is, in my opinion, quite precise, and I do not believe that a discussion involving the reimbursement or allocation of monies relative to moving expenses would have qualified for consideration in executive session.

Third, although you contended that the Board approved an additional reimbursement "by a consensus vote", Mr. MacGregor and Dr. Ennis viewed the vote or consensus differently. 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 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 issue raised, if the Board reached a consensus regarding its understanding of the attorney's advice, I do not believe that would have represented "action" or a determination. On the other hand, if the Board reached a consen-

sus to the effect that the Superintendent should be reimbursed, in my view, that would have constituted an action or determination of the Board that should have been accomplished in conjunction with the requirements of the Open Meetings Law and that minutes reflective of its action should have been prepared.

Lastly, 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 a private or executive session, except in rare circumstances in which a statute permits or requires such a vote.

In sum, to the extent that the gathering in question involved the proper assertion of the attorney-client privilege, I believe that it could have been conducted in private and outside the requirements of the Open Meetings Law. However, insofar as that privilege might have been inapplicable, the Board in my opinion would have been subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2052
FOIL-AO-7071

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 27, 1992

Mr. Gerald Dasch Sr.
Mr. Gregory Quigley
Concerned Taxpayers
[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. Dasch and Mr. Quigley:

I have received your letter of March 13 and the correspondence attached to it. You have sought assistance in relation to certain issues concerning the implementation of the Freedom of Information Law and the Open Meetings Law by the Middle Island Fire District.

One issue involves a directive that you "will not be permitted to have anyone assist you in reviewing" records sought under the Freedom of Information Law. While I believe that an agency is required to maintain custody of its records and may adopt reasonable rules regarding the means by which records are made available, one of the hallmarks of the Freedom of Information Law in my opinion is that records available under the Law should be made equally available to any person, irrespective of one's status or interest [see e.g., M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. If a record is available for inspection to one person, I believe that is must generally be made available to another, including a person who might accompany an applicant. In short, there is nothing in the Freedom of Information Law that authorizes the restriction imposed by the District.

Another issue relates to restrictions on public participation at meetings of the Board of Fire Commissioners. 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 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 reasonable rules that treat members of the public equally.

You also wrote that the Board refers to one of its monthly meetings as a "workshop" that the public cannot attend. In my opinion, there is no distinction between a "workshop" and a meeting.

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

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

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

2d 409, 415)

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 public 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 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.

Lastly, 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 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 portion of an open meeting. Before conducting an executive session, a procedure must be accomplished during an open meeting. 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..."

Moreover, 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.

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 and its Secretary.

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 Fire Commissioners
John A. Mouzakes, Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2053

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 27, 1992

Ms. Linda Grassia
[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. Grassia:

As you are aware, I have received your letter of March 13, which deals with "the abuse of executive sessions" by the West Islip School District Board of Education.

In your letter and during our telephone conversation, you referred to executive sessions held for no stated reason or "without making clear their purpose prior to their vote." Additionally, you raised an issue concerning the public's ability to participate at meetings.

In this regard, I offer the following comments.

First, 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].

In short, in view of judicial interpretations of the Open Meetings Law, motions for entry into executive sessions must describe the subjects to be discussed in a manner that enables the public, as well as members of public bodies, to know that there is an appropriate basis for conducting executive sessions.

Second, with respect to public participation, 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 reasonable 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 meeting, 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

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2054

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 30, 1992

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 March 12 in which you asked that I inform representatives of the New York City Teachers' Retirement System that the Teachers' Retirement Board "must comply with the Open Meetings Law".

Attached to your letter is a photocopy of a notice published in the City Record which states in part that:

> "A PUBLIC MEETING of the Teachers' Retirement Board will be held on Thursday, March 12, 1992, at 9:30 am in Room 1405, 40 Worth Street, New York, New York, for the purpose of holding an investment meeting in executive session."

In this regard, I offer the following comments.

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 a notice indicating that a public body will conduct an executive session technically complies with the Open Meetings Law.

However, I believe that notice could indicate that a meeting will be convened at a certain time and place, and that, immediately after convening, a motion will be made to enter into executive session to discuss whatever the subject or subjects might be.

Lastly, assuming that the meeting was held solely to discuss investments, it appears that two of the grounds for entry into executive session might properly have been asserted. Section 105(1)(f) of the Open Meetings Law permits a public body to conduct an executive session to discuss the financial or credit history of a particular corporation; section 105(1)(h) enables a public body to enter into executive session to consider:

> "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."

A copy of this opinion will be forwarded to Donald S. Miller, Executive Director.

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-2055

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 30, 1992

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 March 15 in which you raised an issue concerning the Open Meetings Law.

Attached to your letter is a copy of the report of the Executive Director of the New York City Teachers' Retirement System concerning a recent meeting. The report makes reference to a resolution "adopted by telephone vote" and presented for ratification. You asked whether the Board of Trustees may adopt resolutions by "telephone vote" and whether the report should be revised.

In this regard, I offer the following comments.

First, 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 be inconsistent with law.

It is noted that the definition of "public body" [see Open Meetings Law, section 102(2)] refers to entities that are required to conduct public business by means of a quorum. In this regard, the term "quorum" is defined in section 41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised

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

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. As such, it is my view that a public body has the capacity to 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 members of public bodies may consult with one another by phone, I do not believe that thy could validly conduct meetings by means of telephone conferences or make collective determinations by means of telephonic communications.

Second, I am unaware of any reason to revise the report, for it apparently accurately reflects events. Further, I believe that the actions of the Board remain valid unless and until a court determines to the contrary.

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-2056

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

March 30, 1992

Mr. Hugo Wiebicke
[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. Wiebicke:

I have received your letter of March 13 in which you requested an advisory opinion concerning "the right of a citizen to tape record the proceedings of a public meeting held by a municipal body, such as a town board". In addition, you asked whether you have the record "to record the comments of other people who also might speak at this meeting".

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. However, several judicial 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.

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In sum, I believe that any person may use a tape recorder in a non-disruptive manner at an open meeting of a public body, irrespective of whose comments might be recorded.

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 Milton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2057

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 1, 1992

Mr. Bernard J. Blum
President
Friends of Rockaway 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. Blum:

I have received your letter of March 18 in which you sought my views concerning issues relating to Community Board 14 in Queens.

The first involves restrictions on the public's ability or right to speak at meetings. In this regard, although 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), the 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 reasonable 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 meeting, 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.

The second issue pertains to "alleged orders" given to the Board's District Manager "not to provide information to Executive Board Members" concerning a meeting with representatives of a City agency, the Borough President and other Executive Board members. You questioned "the legality of giving such orders" and asked whether the public or a representative of a citizens' group has the right to attend such a meeting.

Without more additional information, specific advice cannot be offered. From my perspective, however, the issue is whether the gathering in question would constitute a meeting of a public body. To qualify as a meeting, I believe that there must be an intent on the part of the majority of the membership of a public body to convene for the purpose of conducting public business, collectively, as a body. If that was the intent, the gathering in my view would be a meeting subject to the Open Meetings Law that should be preceded by notice given pursuant to section 104 of that statute and conducted in accordance with the Law. On the other hand, if less than a quorum of a public body sought to meet with representatives of other agencies, I do not believe that the Open Meetings Law would be applicable or that the public would have the right to be present.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Castellano, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7892
OML-AO-2058

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 1, 1992

Mr. Jim Parker
Clapsaddle Farm
[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. Parker:

I have received your recent letter, which reached this office on March 24, as well as the materials attached to it. You have raised a number of issues and sought my views relating to the implementation of the Open Meetings Law and the Freedom of Information Law in the Village of Ilion.

The first issue concerns a hearing and subsequent meeting of the Village Zoning Board of Appeals. In brief, following an expression of concern by many residents pertaining to applications for variances, you wrote that the Acting Chairman "maneuvered" the Board into an executive session. When you questioned the basis for entry into executive session, you wrote that his response was "I'm not going to answer that". You added that, although the Board approved the application, the only people who spoke in favor were attorneys for or officials of the firm seeking the variance.

In this regard, with respect 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, and 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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed. 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.

I point out, too, that the Open Meetings Law has undergone a series of amendments since its initial enactment in 1976. Among the amendments is a change in the Law concerning zoning boards of appeals.

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 or in conjunction with an exemption other than section 108(1). As indicated earlier, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a public body, including a zoning board of appeals, must deliberate in public.

A second issue involves the "rumor" of a lawsuit and the use of the "litigation" exception by the Village Board of Trustees to exclude the public from its meetings.

The "litigation" exception for executive session is section 105(1)(d) of the Open Meetings Law. The cited provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since possible or potential litigation could be the result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a possibility of litigation.

With regard to the sufficiency of a motion to discuss 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].

A third issue involves access to minutes of meetings, particularly minutes of executive sessions. 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). If no action is taken during an executive session, minutes of the

executive session need not be prepared. It is noted that under section 106(3) of the Open Meetings Law minutes of both open meetings and executive sessions are available in accordance with the Freedom of Information Law.

Lastly, you referred to a request made under the Freedom of Information Law on March 12. As of March 23, however, no response had been received. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which an agency 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)].

As you requested, copies of this opinion will be forwarded to the person 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: Hon. Joseph Collea, Mayor
Village Board of Trustees
Chairman, Zoning Board of Appeals
John McGraw, Evening Telegram
Tim Blydenberg, Utica Observer-Dispatch
Molly Graves, WKTV Television

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2059

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 2, 1992

Mr. Art Simmons
[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. Simmons:

I have received your letter of March 23 in which, as a newly elected trustee of the Village of Northville, you raised questions relating to the Open Meetings Law.

The first issue involves a request for minutes of the Village Planning Board Zoning Commission meetings and work sessions. You were informed that "no minutes were kept nor were they required."

In this regard, it is emphasized 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 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 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 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, 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.

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.

The second issue relates to a budget work session and the propriety of discussing salaries of Village employees in executive session. In my opinion, section 105(1)(f) is the sole basis for entry into executive session that would be relevant to the issue, assuming that the matter does not involve collective bargaining negotiations [see section 105(1)(e)].

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 the context of your inquiry, if a discussion relates to a position and the amount of salary that should be accorded to that position irrespective of who holds it, I do not believe that there would be

a basis for entry into executive session. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2068

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 3, 1992

Mrs. Sandra Boss
[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 Mrs. Boss:

I have received your letter of March 27 in which you requested an advisory opinion concerning the ability to tape record a meeting of a board of education.

You wrote that students from a civics class sought to tape record a monthly meeting of the Board of Education of the Tuxedo Union Free School District, but that "[t]hey were told by the administration that they had to turn off the recorder and the meeting could not be taped."

In this regard, I offer the following comments.

First, I point out that the Open Meetings Law does not distinguish among those who may attend meetings of public bodies. 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, I believe that any person may attend a meeting of a public body, whether that person is a child or an adult.

Second, with respect to the matter in question, it is noted 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. However, several judicial 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 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.

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks

> are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In sum, I believe that any person may use a tape recorder in a non-disruptive manner at an open meeting of a public body, irrespective of whose comments might be recorded.

I hope that I 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, Tuxedo Union Free School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2061

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 3, 1992

Hon. Patrick A. Hildreth
Mayor
City of Mechanicville
36 North Main Street
Mechanicville, NY 12118

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

Dear Mayor Hildreth:

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

According to your letter, the charter of the City of Mechanicville provides that meetings must be held in the court chambers at City Hall. However, because that site is not accessible to handicapped persons, you wrote that you have been holding meetings at the Senior Citizens Center, which is accessible to the handicapped. In view of the foregoing, you raised the following question:

> "Do we have to change our charter to state that our meetings will be held at the Sr. Citizen's Center or is it legally correct to put a sign on the door telling where the meeting will be held and also publishing it in the newspapers as we have been doing without changing the charter?"

In my opinion, it is unnecessary to change the charter. Section 110 of the Open Meetings Law pertains to the relationship between the statute and other provisions of law, and subdivision (1) of section 110 states that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or

> regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Since the provision in the charter is "more restrictive with respect to public access" than the Open Meetings Law, it is "deemed superseded".

Finally, as you are aware, section 104 of the Open Meetings Law imposes requirements concerning notice of meetings and states in part that notice of the time and place of meetings "shall be given to the news media and shall be conspicuously posted in one or more designated public locations...".

I hope that I 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-2062

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 3, 1992

Sophia J. Martins, Director
Mineola Memorial Library
Marcellus Road
Mineola, NY 11501

The staff of the Committee on 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. Martins:

I have received your letter of March 20. In your capacity as Director of the Mineola Memorial Library, you raised issues concerning the content of minutes of meetings of the Library Board of Trustees.

In this regard, 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 hearing or the nature of their comments. It is noted, too, that if a public body enters into an executive session but takes no action, minutes of the executive session need not be prepared.

If minutes do contain references to comments made at meetings, it is implicit in my opinion that the minutes must accurately reflect those comments. Similarly, I believe that minutes must accurately reflect the nature of a public body's determination. When minutes are inaccurate, I believe that a public body may amend them to correct errors that might have been made.

The cassette tape recording that you sent 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7096
OML-AO- 2063

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 6, 1992

Robert T. Corey, M.D.
Deputy Commissioner of Health
Cortland County Health Department
60 Central Avenue
P.O. Box 5590
Cortland, NY 13045-5590

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

Dear Dr. Corey:

As you are aware, I have received your letter of March 25 in which you questioned the propriety of an executive session held by the Cortland County Board of Health. In addition, you raised a series of related issues in your correspondence and during our conversation of April 1.

You wrote that:

> "[t]he Cortland County Board of Health met in regular monthly session on March 17, 1992. At the conclusion of the regular listed agenda, a Board member moved that the Board go into Executive Session to discuss 'possible pending litigation concerning a real estate development.' The Chair ruled that this was a legitimate reason to have such a session and there was no second or vote to do so. The entire staff present at the meeting, along with the press and others were asked to leave, even the Secretary to the Board. The Secretary was later called in to be present when the Board adjourned, after returning to regular session. No minutes of the session

> are known to exist. Out of this session have come orders from the Board Chair to the Public Health Director."

You also indicated that "there is no actual litigation concerning any real estate development pending at this time."

In this regard, I offer the following comments.

First, I point out that every meeting must be convened as an open meeting, and 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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. 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.

Second, the "litigation" exception for executive session is section 105(1) (d) of the Open Meetings Law. The cited provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purposes of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens

> to to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since possible or potential litigation could be the result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a possibility of litigation.

With regard to the sufficiency of a motion to discuss 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].

A third issue involves access to minutes, particularly minutes of the executive session. 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). If no action is taken during an executive session, minutes of the executive session need not be prepared. It is noted that under section 106(3) of the Open Meetings Law minutes of both open meetings and executive sessions are available in accordance with the Freedom of Information Law.

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)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, a record of votes is maintained as part of the minutes.

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 Health.

I hope that I 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: Cortland County Board of Health

FOIL-AO-7105
OML-AO-2064

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 7, 1992

Ms. Mary Osgood Reynolds
Attorney at Law
5588 County Route 11
Alpine, NY 14805

The staff of the Committee on 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. Reynolds:

I have received your letter of March 30 in which you requested guidance concerning the time within which minutes of meetings must be prepared and made available. In brief, you described a series of delays in your attempts to obtain minutes of meetings of the Board of Education of the Odessa-Montour Central School District.

In this regard, as you are aware, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, section 106 of that statute provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and 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. 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 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

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 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."

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.

Finally, although you have received the index to advisory opinions, you asked whether you could obtain copies of the opinions. While the Committee lacks the resources to send complete sets of opinions to anyone who may want them, copies of individual opinions can be sent by requesting them by means of number or by key phrase. In addition, copies of opinions are sent to various law libraries, including the Cornell Law School Library, which is not far from 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

cc: Donald E. Gooley, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2065

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 8, 1992

Hon. Jim Jackson
Town Council
Town of Hyde Park
[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 Councilman Jackson:

I have received your letter of March 31. In your capacity as a member of the Hyde Park Town Board, you have sought guidance concerning the Open Meetings Law.

According to your letter, "[o]ften, without appointment and during business hours, three or more town board members will be working on town business in the Supervisor's office." You added that, on occasion, the Supervisor arranges meetings with "professionals involved in town business", such as attorneys or engineers. You asked "[w]here...the line [may be] drawn with regards to a meeting should two other board members arrive and be asked to attend the meeting." In short, you wrote that the Board "would like to abide by the law and still be able to conduct town business in a sane and confident manner."

In this regard, as you are likely aware, the Open Meetings Law pertains to meetings of public bodies, and 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)]. In my opinion, inherent in the definition of "meeting" is the notion of intent. If a majority of a public body gathers in order to conduct public business collectively, as a body, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law. In the decision cited earlier, 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 offici@l document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to form action. Formal acts have always been matters of public records and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

With respect to chance meetings, it was found 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 point just short of ceremonial acceptance'" (id. at 416).

In view of the foregoing, if members of a public body meet by chance or at a social gathering, for example, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body. However, if, by design, the members of a public body seek to meet to discuss public

business, formally or otherwise, I believe that a gathering of a quorum would trigger the application of the Open Meetings Law, for such gatherings would, in my opinion, constitute "meetings" subject to the Law that must be preceded by notice. If less than a quorum is present, the Open Meetings Law would not, in my opinion, be applicable.

In short, if the gatherings that you described occur by chance, or without an intent to discuss or conduct public business, collectively, as a body, I do not believe that the Open Meetings Law would be applicable. Similarly, if several members of the Board are in Town Hall working separately on various matters, the Open Meetings Law, in my view, would not apply. On the other hand, if a quorum of the Board intends to gather for the purpose of conducting public business, I believe agree that the gatherings would be held in a manner inconsistent with the Open Meetings Law. Therefore, if a majority of members is called together or convenes and begins to discuss public business as a body, I believe that kind of situation would represent a meeting. In that event, it is suggested that the members be vigilant, that they determine to end their collective discussion, and that they agree to continue their discussion at a meeting held in compliance with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2066

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 8, 1992

Mr. Ronald D. Gallantier
[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. Gallantier:

As you are aware, I have received your letter, which was delivered to this office on March 31, a tape recording involving a gathering occurring in the Nassau Town Hall on March 25, and a newspaper article describing the gathering.

According to the materials, you and others entered the Supervisor's office on March 25 to attend an "unannounced" meeting. Upon your arrival, you were informed that the Board was in an executive session. Further, although the Supervisor was informed that an open meeting must be convened prior to conducting an executive session, the Supervisor disagreed. You also suggested that the motion to go into executive session must indicate the nature of the subject to be discussed. In response, the Supervisor referred to "legal matters that affect the Town".

In this regard, I offer the following comments.

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

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

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

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 Town business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

Third, I point out that every meeting must be convened as an open meeting, and 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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. 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.

Lastly, a description of the subject to be discussed in an executive session as "legal matters" would in my view be inadequate to comply with section 105(1). Some legal matters might appropriately be discussed in executive session; others likely could not. The provision that deals most closely with the issue is section 105(1)(d) of the Open Meetings Law. The cited provision permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purposes of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in

litigation. Since "legal matters" or possible litigation could be the subject or 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 because it involves a legal matter.

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 compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to the Town Supervisor and the Town Board.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1107
OML-AO-2067

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 13, 1992

Ms. Patricia Fenick
W.A.T.C.H.
P.O. Box 123
Wingdale, NY 12594

The staff of the Committee on 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. Fenick:

I have received your letter of April 1, as well as various materials and a tape recording pertaining to a meeting held by the Dover Town Board on November 12. You have questioned the propriety of an executive session held by the Board. In addition, you raised an issue concerning access to Town records.

With respect to the meeting, according to your letter and the materials, four agenda items were discussed in an executive session. In brief, those items involved complaints relating to the condition of a certain property, empty trailers, "an apparent auto body shop in a residential zone", a "septic problem", and the rental of an apartment in a single family residence. The Board indicated that an executive session could be held because the issues involved "an apparent personnel problem", and because they "might involve" litigation or "contemplated legal action". In addition, the minutes of the meeting indicate that the Board authorized "the parties who are allegedly violating the law" to join the Board in the executive session.

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except to the extent that a closed or executive session may be appropriately held. Further, 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 Open Meetings Law specify and limit the subjects that may properly be considered behind closed doors.

Second, in view of the subject matter in question and the limited grounds for entry into executive session, it does not appear that any basis for conducting an executive session could, under the circumstances, have been justifiably asserted.

One of the reasons cited for holding the executive session involved a claim that it involved "an apparent personnel problem". As I understand the situation, none of the items involved personnel, i.e., officers or employees of the Town; rather they appear to have involved issues relating to the condition or use of real property. 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..."

Based upon the materials that you forwarded, section 105(1) appears to have been inapplicable as a basis for entry into an executive session.

The other reason involved a claim that the items in question concerned possible litigation.

The provision that deals most closely with the issue is section 105(1)(d) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to

> both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since possible litigation could be the subject or 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 because it involves a legal matter. Moreover, one of the decisions cited above, Concerned Citizens, supra, dealt with an executive session held by a public body with its adversary in litigation. As indicated above, the purpose of section 105(1)(d) is to enable a public body to discuss its litigation strategy in privacy. In that decision, due to the presence of the adversary in litigation at the executive session, it was found that an executive session could not legally have been held. Similarly, in this instance, the presence of the subjects of the discussion in my opinion would have resulted in an improper executive session.

The remaining area of inquiry relates to your claim that you "have been denied access to records". You wrote that, until recently, in order to seek zoning or building department records, the "procedure consisted of walking in and requesting such files and being handed them by either the secretary or the C.E.O." [code enforcement officer]. However, most recently, "[i]nstead of the file, they were handed a FOIL request and told this was the new procedure to acquire access to files."

In this regard, while an agency may respond to an oral request and respond instantly to such a request, section 89(3) of the Freedom of Information Law authorizes an agency to require that a request be made in writing and states that the agency has up to five business days from the receipt of a request to respond. More specifically, the cited provision states in relevant 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)].

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 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: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2068

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 15, 1992

Dr. Anthony Rizzuto
[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 Dr. Rizzuto:

I have received your letter of April 1 and the materials attached to it.

As a twelve year member of the Miller Place Board of Education, you complained that the Board, "led by the President", has "violated education Law". You wrote that, although "Board members are required to hold all meetings and make all decisions in public...this Board has asserted positions, taken votes, made policy, and issued directions outside the public realm". You added that the Board has "consistently and intentionally excluded [you] from consultation in many matters relevant to [y]our school district". You attached several documents which suggest that action was taken or consensus was reached by the Board, when, in reality, neither you nor perhaps other members of the Board were consulted or included in the decision-making process. You also alluded to a meeting held last July concerning the budget and "proposed cuts and additions". Since no agreement could be reached, you indicated that the President of the Board "called for a break that lasted approximately 20 minutes", during which time, "she caucused other Board members on the budget and how they would vote. Having achieved a consensus, she called the meeting to order. The budget was then adopted in a matter of minutes. Members of the audience were outraged."

In this regard, I offer the following comments.

First, in my opinion, no law would preclude the president of a board of education or any member of a board from communicating or meeting individually with a superintendent or other members of the District's administration. However, in those situations in which action must be taken by the Board, collectively, as a body, such action may in my view be taken only at a meeting of the Board during which a majority of its members is present and only by means of an affirmative vote of a majority of its total membership.

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

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

I believe that a board of education clearly constitutes a "public body" that is subject to the requirements of the Open Meetings Law.

Also relevant to the issue raised in my view is section 41 of the General Construction Law which provides guidance concerning quorum and voting requirements. Specifically, the cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board 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."

Based upon the language quoted above, a board of education 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 reasonably notice to all of the members. Further, it is my view that a public body has the capacity to act, i.e., to vote, only during duly convened meetings attended by at least a majority of its total membership.

Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Based upon an ordinary dictionary definition of "convene", that term means:

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

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of a board of education, that a majority of a board would constitute a quorum, and that an affirmative majority of votes would be needed for a board to take action or to carry out its duties.

In appropriate circumstances, it is likely that the Board, by means of a vote or rule validly adopted, could delegate certain authority to the president. However, absent such action or delegation, it would be improper in my view for any number of members constituting less than a majority to act on behalf or in the name of the Board as a whole.

Second, it is emphasized that the definition of "meeting" 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 District business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Third, I believe that a discussion of "cuts and additions" should likely have occurred in public. In my opinion, section 105(1)(f) would have been the sole basis for entry into executive session that would have been relevant to the issue.

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 related 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion be forwarded to the Board and others.

I hope that I 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
Robert Cohen, Attorney
Regina Marcazzo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2069

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 20, 1992

Ralph Vinchiarello, Supervisor
Town of Amenia
Mechanic Street
Box 126
Amenia, NY 12501

<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 Vinchiarello:

I have received your letter of April 3 in which you requested an advisory opinion concerning the propriety of the procedure used by the Amenia Town Board concerning the recent appointment of a person to the Town Planning Board.

According to your letter, on February 13, the Town Board held a workshop meeting. You added that the Board regularly conducts workshop meetings a week prior to the monthly regular Town Board meeting. At the workshop, you asked the members of the Board to provide names for consideration to fill an upcoming vacancy on the Planning Board. On February 21, two resumes were received at Town Hall. Another workshop was held on March 12, and no additional resumes had been received as of that date. On the following day, a third resume was hand-delivered to you, and on March 16, a fourth resume was delivered by mail to the Town Hall. You wrote that "[w]ithout calling a Special Town Board meeting, the board could not consider the resumes dated March 13 and March 16", and that the regular Town Board meeting was scheduled for March 19. At that meeting, a motion was made to appoint one of the individuals whose resume reached Town Hall on February 21. No other names were presented for consideration. The Board passed the motion with three affirmative votes and two abstentions, and the individual referenced above was appointed.

In this regard, based upon the facts that you presented, and assuming that the workshops were conducted in accordance with the Open Meetings Law, I believe that the procedure that you described was appropriate.

It is noted that, based upon the judicial interpretation of the Open Meetings Law, there is no distinction between a "workshop" or "work session" and a regular meeting. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened upon 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)]. As such, it is reiterated that a "workshop" is a "meeting" subject to the requirements of the Open Meetings Law. Therefore, I believe that the issue in question could validly have been considered at workshops, as well as the Board's regular meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robin Jones

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2020

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 20, 1992

Ms. Mary Jane Row
[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. Row:

I have received your letter of April 3 in which you sought a clarification with respect to the status of an industrial development agency under the Open Meetings Law.

According to your letter, the current membership of the Town of Clifton Park Industrial Development Agency has served only since January of this year, and it is your view that the members are unfamiliar with the requirements of the Open Meetings Law. You wrote that when you questioned whether "they were following the law's provisions for executive sessions, the Agency's attorney said they were not subject to the Open Meetings Law."

In this regard, I offer the following comments.

First, the provisions concerning industrial development agencies are found in Article 18-A of the General Municipal Law, and section 856(2) of the General Municipal Law states in part that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation". A public benefit corporation is a "public corporation" as that term is defined by section 66(1) of the General Construction Law. Further, section 856(3) of the General Municipal Law states that a majority of the members of an industrial development agency "shall constitute a quorum".

Second, the Open Meetings Law is applicable to meetings of public bodies, and section 106(2) of the Open Meetings 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 upon the foregoing, it is clear in my view that the members of an industrial development agency constitute a "public body" subject to the Open Meetings Law, for they perform a governmental function for a public corporation. Moreover, section 925-p of the General Municipal Law established the Clifton Park Industrial Development Agency and states that the agency is "a body corporate and politic", that its members "shall be appointed by the governing body of the town of Clifton Park", and that it is governed by the provisions of Article 18-A of the General Municipal Law.

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

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made

> aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

Based upon the direction given by the courts, if a majority of the Agency gathers to discuss public business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Lastly, I point out that every meeting must be convened as an open meeting, and 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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. 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.

As you requested, in an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion as well as "Your Right to Know" will be forwarded to the Chairman 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
Executive Director

RJF:jm

cc: Timothy Brock, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2071

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 20, 1992

Mr. Steve Laws
[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. Laws:

I have received your letter of April 3 and the materials attached to it.

You referred to "work sessions" held by the Salina Town Board and indicated that no agenda is published with respect to those sessions, that the Board holds work sessions in a different room than its regular meetings, and that "there is no conspicuous public notice posted to inform the general public of where these 'work sessions' are held in the building."

In this regard, I offer the following comments.

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

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell

outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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 Town business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, there is no distinction between a meeting and a work session; when a work session is held, a public body has the same obligations in terms of notice, openness and the ability to conduct executive sessions as in the case regular meetings.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

Third, I point out that every meeting must be convened as an open meeting, and 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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. 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.

Lastly, there is nothing in the Open Meetings Law that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. Similarly, the Open Meetings Law does not require that a prepared agenda be followed. However, a public body on its own initiative could adopt rules or procedures concerning the preparation and use of agendas.

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

OML-AO-2072

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 28, 1992

Mr. Steve Laws
[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. Laws:

I have received your letter of April 9, which relates to notice of a meeting held by the Salina Town Board on March 27.

As I understand your letter, a special meeting was held on March 27. The Supervisor explained that a meeting was necessary in order to deal with an issue requiring consideration prior to March 31. Although you and others contend that the meeting was not "publicized", Supervisor Ward stated that the Board complied by giving notice to a radio station and by posting on a bulletin board. You contend further, that based upon an opinion addressed to you on February 28, "if a meeting is held on less than 72 hour notice, a public notice must be placed in more than one public location", and that "merely posting a single public notice on a bulletin board in such circumstances would not be sufficient to meet the public notice requirements."

In this regard, it appears that you may have misinterpreted my comments. I do not believe that posting notice in a single location prior to a meeting would comply with the Open Meetings Law, for section 104 of the Law contains a dual requirement in that notice must be posted and given to the news media as well. As stated in the earlier opinion:

> "If a meeting is scheduled less than a week in 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."

Posting alone, without notice given to the news media, would in my view be inadequate. However, if, as in the situation you described, notice was posted and given to the news media in accordance with section 104(2) of the Open Meetings Law, it appears that the Board complied with law.

I hope that the foregoing serves to enhance your understanding of the Open Meetings Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Ward, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1134
OML-AO-2023

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 30, 1992

Mr. J. Paul Kolodziej
Attorney & Counsellor at Law
19 West Fulton Street
Gloversville, NY 12078

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

Dear Mr. Kolodziej:

I have received your letter of April 22 and the materials attached to it. You asked that I consider the letter an appeal relating to an alleged denial of access by the City of Gloversville.

By way of background, you made a request on April 6 to the City's records access officer for minutes of meetings of the Common Council held on March 23 and the Planning and Economic Development Committee held on March 18. Expansive minutes of a Common Council meeting of March 24 were made available on April 8. Although you referred in your request to a meeting held on March 23, it appears that minutes made available are those in which you are interested. With respect to the Committee meeting of March 18, you were furnished with brief minutes that were based on a Councilman's report to the Common Council on March 24. It appears that those minutes are the subject of your appeal, for you enclosed an appeal directed to the records access officer dated April 9 in which you referred to "a complete copy of the minutes" of the March 18 meeting.

In this regard, I offer the following comments.

First, since you characterized your letter to this office as an "appeal", I point out that the Committee on Open Government is authorized to advise with respect to the Freedom of Information

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marie Keator, Records Access Officer

Law. This office is not empowered to render determinations following appeals or enforce the Freedom of Information Law. The provisions concerning the right to appeal a denial of access are found in §89(4)(a) of the Freedom of Information Law.

Second, in order to obtain a clarification of the matter, I contacted Marie Keator, who serves as City Clerk and Records Access Officer. Based upon my conversation with her, the response to the request was proper, for there was no denial.

It is noted that provisions concerning the contents of minutes are found in §106 of the Open Meetings Law. Those provisions, in my view, prescribe minimum requirements concerning the contents of minutes. Specifically, §106 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 on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said at a meeting. Further, in a technical sense, if no motions or proposals are made, and if there are no resolutions or actions taken during meetings, minutes need not be prepared.

Ms. Keator explained that the meeting of March 18 involved an "informal question and answer" session, and that none of the activities required to be recorded under §106 occurred. As such, I do not believe there would have been an obligation to prepare minutes. Nevertheless, Ms. Keator indicated a willingness to type notes concerning the meeting.

In sum, based upon my understanding of the matter, there was neither a denial of access to a record nor an obligation to prepare expansive minutes of the meeting in question.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7137
OML-AO-2074

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

April 30, 1992

Mr. Myron H. Blumenfeld
[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. Blumenfeld:

I have received your letter of April 20. In your capacity as Chairman of the Town of North Hempstead's Ecological Commission, which was created pursuant to §239-x of the General Municipal Law, you asked whether the Commission is subject to the Freedom of Information Law and the Open Meetings Law. Section 239-x pertains to the creation and functions of "conservation advisory councils".

In my view, the entity in question is subject to both statutes.

The Freedom of Information Law is applicable to agency records, and §86(4) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of 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 entity is a "municipal...commission" or council that carries out its statutory duties pursuant to §239-x of the General Municipal Law. Further, I believe that records produced or maintained by the Commission would fall within the scope of the

Freedom of Information Law, for §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."

Based upon the definitions of "agency" and "record", I believe that the Freedom of Information Law would apply to the Commission and its records.

The Open Meetings Law is applicable to meetings of public bodies, and §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."

It is noted that recent decisions indicate generally that ad hoc 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)]. However, because the Commission was created through specific statutory authority conferred upon the Town, and because the Commission performs what appear to be governmental functions for the Town, I believe that the Commission constitutes a public body required to conduct its meetings in accordance with the Open Meetings Law. In referring to the tasks of a conservation advisory council, subdivision (1) of §239-x of the General Municipal Law states in part that:

"(c) It may advertise, prepare, print and distribute books, maps, charts, plans and pamphlets which in its judgment it deems necessary for its work;

(d) It shall keep an inventory and map as defined in section two hundred thirty-nine-y of this article, of all open areas within the municipality with the plan of obtaining information pertinent to proper utilization of such open lands including lands owned by the state, any other municipality within the state or by the particular municipality itself;

(e) It shall keep an inventory and map of all open marsh lands, swamps and all other wet lands in a like manner, and may recommend to the governing body of the municipality a program for ecologically suitable utilization of all such areas;

(f) It shall keep accurate records of its meeting and actions and shall file an annual report with the local legislative body of the municipality on or before the thirty-first day of December of each and every year. Once approved, such legislative body shall forward a copy of this report to the state commissioner of environmental conservation."

Further, under subdivision (2), a council is authorized to accept gifts, grants, money or property "in the name of the municipality." Subdivision (4) permits a local legislative body (i.e., a town board), to remove members of a council only "for cause, after a hearing", and to compensate council members.

In my opinion, in view of the foregoing, the Council performs a governmental function for a public corporation, the Town of North Hempstead, and constitutes a "public body" subject to the requirements of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2025

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 1, 1992

Mr. Donald A. Perry
[redacted]

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

Dear Mr. Perry:

I have received your letter of April 18. In your capacity as a member of the Royalton-Hartland Central School District Board of Education, you raised a series of issues relating to the Open Meetings Law.

According to your letter, the Board for many years has conducted business through the "'Superintendent Committee' system which excludes public attendance at the meetings." You wrote that, under that system, "no relevant school district business is discussed in any detail in the public portion of the regular School Board meetings", and that "[t]he presumption is that all decisions acted upon by the School Board, no matter how trivial or important, are a 'done deal' when they are presented for action at the public meetings of the Board."

You questioned how the Open Meetings Law would apply to budget preparation, "interviewing of superintendent candidates", "Board policy developments", and "Superintendent's recommendations regarding action items."

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of the Law defines the phrase "pubic 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, a board of education clearly constitutes a public body. In addition, since the last clause of the definition refers to "any committee or subcommittee or similar body of such public body", I believe that committees designated by the Board that consist of at least two of its members would also constitute public bodies subject to the requirements of the Open Meetings Law.

Second, with respect to the subjects that you identified, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except to the extent that a topic may properly be considered 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 §105(1) of the Open Meetings Law specify and limit the subjects that may appropriately be considered behind closed doors.

I believe that discussions by a public body concerning "budget preparation" must generally occur in public. In my view, §105(1)(f) of the Open Meetings Law may represent the only basis for entry into executive session concerning a discussion of that subject. In its original form, §105(1)(f) of the 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 §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 §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 §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 §105(1)(f) could be asserted, even though the discussion may relate 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held.

Interviews of candidates for the position of superintendent could in my view be conducted in executive session under §105(1)(f), for the Board would be discussing a matter leading to the appointment of a particular person.

Discussions of policy development would likely have to be discussed in public, because none of the grounds for executive session would appear to apply.

With respect to discussions regarding a superintendent's recommendations, the nature of the subject of the recommendation would determine whether there may be a basis for entry into an executive session. For example, a recommendation to change the curriculum would have to be discussed in public; a recommendation to hire a particular individual could be discussed in executive session.

Enclosed are copies of the Open Meetings Law and "Your Right to Know", which deals with both 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

OML-AO-2076

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 4, 1992

Mr. Peter W. Sluys
Managing Editor
Our Town
39 East Central Avenue
Pearl River, NY 10965

<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. Sluys:

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

You wrote that "[t]he Village of Piermont has taken the position that they do not have to send notices of meetings to Our Town Newspaper". Our Town is a weekly newspaper and is the official newspaper for the Town of Orangetown, which includes the Village of Piermont within its borders. You added that the Village of Piermont Board of Trustees has held "workshop meetings and other meetings... without any notification whatsoever to Our Town, though they have posted notices of meetings generally in the Village Hall, and have also - they allege - notified the daily newspaper of the meetings." It is your view that a "conscious decision...not to notify Our Town of workshop meetings and Village meetings is in violation of the Open Meetings Law". You have sought my opinion concerning the matter.

In this regard, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based upon the foregoing, although it is clear that notice must be given to the news media prior to every meeting, §104 does not specify which members or outlets of the news media must be given notice.

In many instances, there are many news media outlets, i.e., newspapers, radio and television stations, that operate in the vicinity of a public body. So long as notice of a meeting is given to at least one news media outlet prior to a meeting, I believe that a public body would be acting in compliance with the requirement that notice be given to the news media.

However, in my opinion, every law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to the intent of the law. It would be unreasonable in my view for the Village Board to transmit notice to the Washington Post or a New York City radio or television station, for those outlets would not likely reach residents of the Village, nor would they assign a reporter to attend a meeting of the Board. If notice is posted and given to a newspaper that has a significant circulation in the Village or to a radio station situated in or near the Village, I believe that the Board would be in compliance with the Open Meetings Law. Nevertheless, if Our Town is the newspaper that reaches the most residents in the Village, and if representatives of Our Town have asked the Village Board to provide that newspaper with notices of meetings, failure to do so may be unreasonable in view of the intent of the Open Meetings Law.

In short, there is nothing in the Open Meetings Law that would require that notice of meetings be given to a particular newspaper. However, if that newspaper has a significant circulation in a municipality, it might be considered to be unreasonable to avoid providing notice to the newspaper.

I hope that I 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2077

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 4, 1992

Hon. Margaret J. Orrange
North Collins Town Clerk
2501 Spruce Street
Box 688
North Collins, NY 14111

<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. Orrange:

I have received your letter of April 22 in which you, as well as members of the North Collins Town Board and the Town Attorney, requested an advisory opinion concerning the Open Meetings Law.

By way of background, you wrote that the Office of the State Comptroller audited the Town in 1990, during the administration of a former supervisor. Following the completion of the audit, the auditor met with the Supervisor and others who had been invited to engage in an "exit interview". Although the auditor told the Supervisor that the public and members of the news media could not attend, no issue involving the Open Meetings Law arose, because only the Supervisor, one other member of the Board, and the bookkeeper attended. Most recently, the new supervisor asked the auditor to explain the report to him and the Board. You wrote, however, that:

> "[t]he Town Clerk and Town Attorney were not even notified of this meeting. Because the Board members did not want to be accused of attending an 'illegal meeting' only one attended, and the others were criticized by the Supervisor for not attending. When the Supervisor questioned Audit and Control about the legality of this meeting, he was told that 'if the public or the media were in attendance

> he would pack up and leave.' Now, this was not the exit conference. This was not the Supervisor who had been audited. This was a meeting to explain the report of the 1990 audit to the Town Board members. Several members of the public were interested, but were not allowed. The Town Attorney, Richard Schaus, called Gerald Kelly, Chief Examiner of the Buffalo office of the State Comptroller, and he was told that this was his policy even though he knew of no law to support his position."

In this regard, I offer the following comments.

It is noted at the outset that I have discussed the status of so-called "exit conferences" with representatives of the Department of Audit and Control on various occasions. Those officials contend that those gatherings are convened by an auditor, that there is no intent on the part of municipal officials to deliberate or take action and that, therefore, they are not subject to the requirements of the Open Meetings Law. The issue has not been reviewed by any court, to the best of my knowledge, and the status of such gatherings is not completely clear.

Nevertheless, if indeed a quorum of a public body attends an exit conference, or convenes at any time for the purpose of conducting public business, collectively, as a body, I believe that such a gathering would constitute a "meeting" that falls within the requirements of the Open Meetings Law. It is emphasized that the term "meeting" has been broadly construed by the courts. In a landmark decision rendered approximately fourteen years ago, the Court of Appeals held that any gathering of a quorum held for the purpose of conducting public business constitutes a meeting subject to the Open Meetings Law, even if there is no intent to take action and irrespective of the manner in which a gathering may be characterized [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NYS 2d 947 (1978)]. The gatherings in question in that case, which were held solely for the purposes of discussion without intent to take action or vote, were found to be meetings.

With respect to an exit conference, if the members of the public body attend, presumably they do so in the performance of their official duties and for the purpose of conducting public business. Therefore, based upon the judicial interpretation of the Open Meetings Law, I believe that the presence of a quorum at an exist conference would constitute a meeting subject to the Open Meetings Law.

I point out that local governments operate differently in many cases from most state agencies. Usually, state agencies are headed by an executive rather than a governing boy. Exit conferences held with respect to audits of state agencies likely include the staff of an agency; no public body would be present or otherwise involved. Moreover, since municipalities are headed by governing bodies, I believe that those bodies have generally become used to conducting their business in public. Similar business conducted by state agencies, for reasons mentioned earlier, likely would not involve a public body and the Open Meetings Law does not become an issue.

From my perspective, the policy of the Office of the State Comptroller places municipal bodies in an anomalous position. When a quorum of such a body wants to attend an exit conference or meet with an auditor, if they accede to the policy of the Office of the State Comptroller, they are faced with the possibility of violating the Open Meetings Law. Moreover, since the municipality is the subject of the audit, any criticism or embarrassment that might arise if an exit conference is held in public would likely be directed to the municipality rather than an auditor or the office that person represents. If municipal officials are willing to subject themselves to openness, it is difficult to understand why the Office of the State Comptroller would object. It has been suggested by officials of that agency that if the meetings are held in public, auditors will not attend, and municipal officials would, therefore, be unable to gain the benefit of an auditor's explanation of findings or expertise. Consequently, while I disagree with the position taken by the Department of Audit and Control, it appears that the only sure method of avoiding a controversy regarding the Open Meetings Law would involve insuring that less than quorum of the Board be present.

I hope that I 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-1149
OML-AO-2078

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 4, 1992

Mr. Steve Laws
[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. Laws:

I have received your letter of April 23, as well as the materials attached to it. You have sought assistance in obtaining information from the Town of Salina.

In this regard, having reviewed your correspondence and for purposes of clarification, I offer the following comments.

First, with respect to your written request for "information", I point out that the title of the "Freedom of Information Law" may be somewhat misleading. The Freedom of Information Law is a vehicle under which the public may request existing records; it is not a vehicle that requires agencies to answer questions. Certainly agency officials may provide information by answering questions; however, the Law does not require that records be prepared in order to provide responses to questions. Section 89(3) of the Freedom of Information Law states that, as a general rule, an agency need not create or prepare records in response to requests.

In your letter of March 10, in five of the six items, you sought information, i.e., answers to questions. Only in the last item did you request a record, minutes of a meeting. Again, insofar as the information requested does not exist in the form of a record or records, the Freedom of Information Law in my view would be inapplicable.

Second, with respect to public participation at meetings, 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, §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 reasonable 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 meeting, 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 the foregoing serves to enhance your understanding of the Freedom of Information and Open Meetings Laws.

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-2029

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 4, 1992

Hon. Susan A. Querns
Town Clerk
Town of Owasco
2 Bristol Avenue
Auburn, NY 13021

<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. Querns:

As you are aware, I have received your note of April 27.

In your capacity as Clerk of the Town of Owasco, you asked whether "minutes have to be read at a Board meeting". You indicated that the minutes are mailed to Town Board members prior to meetings.

In this regard, although some public bodies, as a matter of policy or tradition, read minutes at meetings, the Open Meetings Law does not require that minutes be read. Further, I am unaware of any other provision of law that would require that minutes be read at meetings.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2080

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 5, 1992

Mr. Alonzo H. Roberts
[redacted]

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

Dear Mr. Roberts:

I have received your letter of April 24 in which you requested a booklet concerning the Open Meetings Law and raised questions pertaining to the conditions under which a public body may conduct executive sessions. You wrote that your local school board "uses the old 'personnel' or 'personnel matters' quite often to go into executive session without any explanation before or after such sessions."

In this regard, enclosed is a copy of "Your Right to Know", which describes both the Open Meetings Law and the Freedom of Information Law. The grounds for entry into executive session are listed on pages 13 and 14.

With respect to your questions, 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)].

Second, I point out that every meeting must be convened as an open meeting, and 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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. 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.

Third, although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. Further, although one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. By way of background, 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 related 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held.

Further, due to the insertion of the term "particular" in section 105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of section 105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Another ground for entry into executive session that is often cited involves "litigation" or "legal matters". In my opinion, those minimal descriptions of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is section 105(1)(d) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since "legal matters" or possible litigation could be the subject or 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 because it involves a legal matter.

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

FOML-AO-2081

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 5, 1992

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, unless otherwise indicated.

Dear Mr. Luebbert:

I have received your letter of April 24, which reached this office on April 30.

By way of background, you appealed a denial of access to a report that you requested from the Town of Newburgh. Based upon previous correspondence, it appears that your appeal would be determined by the Town Board. In response to your appeal, you received a letter from the Town Supervisor advising you "that the denial of your Freedom of Information appeal dated April 1, 1992 is supported by a majority of the Newburgh Town Board." You have inferred that the Town Board never conducted a meeting to determine your appeal and that the Supervisor polled the members of the Board, perhaps by means of a series of telephone calls. In conjunction with your assumptions, you asked whether "the Supervisor has now violated the Open Meetings Law..."

In this regard, assuming that your inferences are accurate, I offer the following comments.

First, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone. However, a series of communications between individual members or 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" [see Open Meetings Law, §102(2)] refers to entities that are required to conduct public business by means of a quorum. In this regard, the term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board 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."

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 reasonably 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, §102(1) of the Open Meetings Law defines the term "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 sny see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the 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 be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

In sum, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they could validly conduct meetings by means of telephone conferences or make collective determinations by means of a series of "one on one" conversations or 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert H. Kunkel, Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2082

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 5, 1992

Ms. Louise G. Snyder
[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. Snyder:

I have received your letter of May 1 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, you have attempted without success to review minutes of the Town of Irondequoit Planning Board pertaining to meetings held in December, January and February, as well as minutes of the Zoning Board of Appeals concerning meetings held in January and on April 6. You also wrote that certain determinations issued by the entities in question "do not reflect the findings or decisions [you] have noted as observers..."

In this regard, as you may be aware, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. 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.

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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

It is also noted, based upon the language of section 106, 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. Nevertheless, it is implicit in my opinion that the minutes must accurately reflect what transpired at meetings. Similarly, I believe that minutes must accurately reflect the nature of a public body's determination.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board
Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2083

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 5, 1992

Mr. Peter Murphy
[redacted]

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

Dear Mr. Murphy:

I have received your letter of April 30 in which you sought assistance concerning the Open Meetings Law.

According to your letter and our conversation, it is your belief that the Board of Trustees of the Village of Voorheesville is "in violation" of the Open Meetings Law. You indicated that notice of a recent meeting was given by the Board, but that it did not indicate the location of the meeting. Although you attempted unsuccessfully to locate the site of the meeting, after the meeting, you were informed that notice was posted on a door at Village offices indicating that the meeting was being held at the American Legion Hall. Nevertheless, you informed me that you did not see the notice because it was not conspicuously posted.

In this regard, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. Therefore, the location of a meeting must be stated in the notice. Further, any such notice must be "conspicuously posted in one or more designated public locations." Therefore, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. Finally, to meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2054

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 6, 1992

Lee H. Turner, Esq.
22 S. Main Street
P.O. Box 223
Norwood, NY 13668

The staff of the Committee on 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. Turner:

I have received your note of April 30, which appears on a photocopy of a news article published in the Watertown Times concerning a meeting held by the Norwood-Norfolk Central School District Board of Education.

According to the article, during the meeting, the President of the Board announced that the Board "would discuss the budget recommendations as well as personnel issues in a closed meeting immediately following the open session." Although reporters objected to closing the meeting "for purposes of discussing budgetary items and positions", an executive session was held for a period of one and half hours. Following the executive session, the meeting reopened, and the article indicates that the President said that the Board did not discuss proposed budget cuts. The article also states, however, that the Board "unanimously agreed to cut...two positions and accepted the $8.92 million budget without discussion in the open meeting".

You have questioned the propriety of the executive session held by the Board. In this regard, I offer the following comments.

First, by way of background, I point out that every meeting must be convened as an open meeting, and that §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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Second, although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. Further, although one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §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 §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 §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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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 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 §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 §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 that discussions relating to the budgetary matters, such as the funding or reduction of positions, could appropriately be discussed during an executive session.

Finally, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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.

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-7156
OML-AO-2585

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 6, 1992

Ms. Victoria 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 Ms. Siegel:

I have received your recent letter, which reached this office on May 4.

You have raised a series of issues concerning meetings of the Board of Trustees of the Village of Bayville. You wrote that the Board conducted executive sessions on 22 occasions between July of 1990 and January of 1992, but that minutes of the meetings do not indicate actions that might have been taken during the executive sessions. In addition, you have been told "to shut up" when you attempted to speak at meetings and have been informed that "the Board does not have to listen to what [you] have to say." Finally, at a recent meeting reference was made to litigation and a stipulation of settlement. When you raised questions concerning the settlement, Village officials refused to answer.

You have asked whether the practices described above are consistent with the requirements of the Open Meetings Law. In this regard, I offer the following comments.

First, by way of background, I point out that every meeting must be convened as an open meeting, and that §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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Second, §106 of the Open Meetings Law pertains to minutes, and subdivision (2) of that provision deals with minutes of executive sessions and states that:

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

In addition, subdivision (3) of §106 provides that:

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

Based on the foregoing, when a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. It is noted, however, that if a public body merely 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.

Second, with respect to public participation at meetings, 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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer questions or permit 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 answer questions and permit public participation, and many do so. If a public body does permit the public to speak, I believe that it may do so based upon reasonable 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 meeting, 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.

Finally, while the Board in my view was not obliged to answer questions relating to the stipulation of settlement, I believe that you could seek information concerning the matter under the Freedom of Information Law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, a stipulation of settlement would be available, for none of the grounds for denial would appear to be applicable. Further, it has been held judicially that a stipulation of settlement involving a municipality and a litigant is accessible under the Freedom of Information Law (Malman v. Supervisor and Town Board of the Town of Islip, Supreme Court, Nassau County, August 20, 1981).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2086

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 11, 1992

Mr. William F. Kocher
Sapienza & Kocher
330 East Main Street
P.O. Box 237
Palmyra, NY 14522

The staff of the Committee on 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. Kocher:

I have received your letter of May 5. In your capacity as the attorney for the Horsemen's Benevolent & Protective Association, Finger Lakes Division (HBPA), you have sought an advisory opinion concerning the status of the New York Jockey Injury Compensation Fund, Inc. (the Fund) under the Open Meetings Law.

The Fund was created by the enactment of §213-a of the Racing and Wagering Law as a not-for-profit corporation. According to §213-a, the Fund's board of directors consists of seven members, six of whom are designated by boards of directors of horsemen's associations; the seventh is a representative of the Jockeys' Guild, Inc. The primary function of the Fund is to "secure workers' compensation insurance coverage on a blanket basis for the benefit of all jockeys, apprentice jockeys and exercise persons licensed pursuant to article two or four of this chapter who are employees under section two of the workers' compensation law" [§213-a(6)]. The fund determines the amount of money needed to pay for insurance, and monies "are to be paid annually and equally by each owner and trainer licensed or required to be licensed...to obtain the total funding amount required" [§213-a(7)]. Trainers and owners are required to participate in the Fund, and the Fund must submit a "plan of operation" to the Racing and Wagering Board [§213-a(8)] and is subject to "examination and regulations" by the Board [§213-a(9)].

You have compared the situation of the Fund to other not-for-profit entities that were the subject of an earlier advisory opinion. You wrote that the earlier opinion indicated "that the not for profit corporations are subject to the Open Meetings Law where the relationship includes the conduct of public business and the designation of the corporation to perform a governmental function."

In this regard, I offer the following comments

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

Second, the opinion to which you alluded (OML AO 1046) advised that not-for-profit entities are generally not subject to the Open Meetings Law, but that in that particular instance, community action agencies, despite their corporate status, appeared to contain the ingredients necessary to suggest that they are covered by the Open Meetings Law. Those agencies, which were created by federal law, appeared to "conduct public business", for their purposes included efforts to enable low income families to become self-sufficient and to provide for "basic education, health care, vocational training and employment opportunities" to poor people. Those functions were, by law, carried out for the state and/or municipalities. Further, the federal legislation pertaining to those agencies contains requirements designed to ensure accountability to the public, including provisions requiring reasonable public access to records and the holding of public hearings. In short, entities that were the subject of the earlier opinion clearly conducted public business and, in my view, performed governmental functions for the state and its municipalities.

There is no language in §213-a that could, in my opinion, be considered analogous to the provisions of law pertaining to community action agencies. A requirement that employees be covered by workers' compensation insurance does not in my view indicate that an entity conducts public business, for employers generally, public and private, operate under and comply with the Workers' Compensation Law. Similarly, I do not believe that anything in

§213-a indicates or suggests that the Fund performs what could be characterized as a governmental function.

In sum, as I understand §213-a of the Racing and Wagering Law, the Board of Directors of the Fund would not constitute a public body subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2087

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 18, 1992

Mr. William Watson
[redacted]

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

Dear Mr. Watson:

I have received your recent letter, which reached this office on May 11.

Attached to your letter are materials indicating that the City of Tonawanda Board of Education established two committees. One committee appears to consist of members of the community. With respect to the other, a budget committee, it is unclear whether it consists of members of the Board or others. You added that the budget committee meets in the Board office. You have asked whether meetings of the committees are "public or private".

In this regard, I offer the following comments.

First, it is noted that recent decisions indicate generally that ad hoc 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)]. Therefore, an advisory body such as a citizens' advisory committee would not in my opinion be subject to the Open Meetings Law.

Second, however, when a committee consists solely of members of a public body, such as a board of education, I believe that the Open Meetings Law is applicable. The phrase "public body" is defined in section 102(2) of the Open Meetings Law to include:

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

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 definition of "public body", I believe that any entity consisting of two or more members of a public body would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, 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 budget committee consists of Board members, it would in my view constitute a public body that is required to provide notice prior to its meetings pursuant to section 104 of the Open Meetings Law and conduct its meetings in accordance with law.

Lastly, depending upon its purpose, an event held on school property might be required to be conducted in public, even though the event does not involve a public body or the Open Meetings Law. The Education Law enables a board of education to authorize that school property be used for various purposes, including:

> "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."

Therefore, if an entity, such as a PTA, or perhaps a citizens' committee meets on school property for a "civic" purpose, or for a purpose "pertaining to the welfare of the community", those meetings would appear to be open to the public, even if the Open Meetings Law does 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2088

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 18, 1992

Ms. Betsy Sandberg
The Gazette Newspapers
2345 Maxon Road
Schenectady, NY 12301-1090

The staff of the Committee on 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. Sandberg:

I have received your recent letter, which reached this office on May 13.

You have requested an advisory opinion concerning "whether a city school board may go into executive session to discuss layoffs of certain employees". Specifically, you wrote that the Schenectady City School District has sent layoff notices to approximately sixty teachers and several administrators, but that "[t]here was no public discussion by board members about the possibility of the layoff notices at open meetings." Further, because the Board conducted "lengthy executive sessions at least six times in March", it is your belief that the Board discussed the elimination of positions and programs in the course of developing its budget.

In this regard, I offer the following comments.

First, by way of background, I point out that every meeting must be convened as an open meeting, and that §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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Second, although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. Further, although one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §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 §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 §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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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 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 §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 §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 that

discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

Finally, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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- 7165
OML-AO- 2089

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 18, 1992

Ms. Marie A. Perkins
[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. Perkins:

I have received your letter of May 5, which reached this office on May 11.

Your letter and the materials attached to it relate to an annexation study involving the Ripley and Westfield Central School Districts. Your inquiry pertains to a "dinner meeting" held at the request of the BOCES District Superintendent, Gary Barr, during which members of the Ripley and Westfield Boards of Education were present. According to your letter, a Ripley School District administrator stated that "this was Gary Barr's meeting, not the Board of Education, and it was his understanding the meeting is not open to the Press or Public." You also asked whether the cost of the dinner meeting was "pre-approved in the BOCES Budget" and raised related questions concerning the manner in which and amounts of payment that might have been made in conjunction with the meeting.

In this regard, I offer the following comments.

First, it is emphasized that the definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of

the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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 a board of education 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.

If a majority of the members of a public body gather to engage in a social function, or to have dinner, and if there is no intent to discuss public business, I do not believe that the Open Meetings Law would be applicable. However, if the same people gather with an intent to have dinner and discuss public business, collectively, as a body, such a gathering would in my view be a meeting that falls within the requirements of the Open Meetings Law.

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)], and that in a recent decision, it was held 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 District Superintendent, I believe that it was a meeting, assuming that a quorum of the Board was present for the purpose of conducting public business.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

Lastly, I believe that the Freedom of Information Law would serve as a vehicle by which you could obtain records relating to expenditures. In this regard, 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. With respect to expenses incurred by an agency, as a general matter, 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.

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, Ripley School District
Richard E. Miga, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2090

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 19, 1992

Mr. William H. Mycek
School Board Attorney
146 Market Street
Amsterdam, NY 12010

<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. Mycek:

I have received your letter of May 18. In your capacity as the attorney for the Greater Amsterdam School District, you requested an advisory opinion concerning the validity of a policy recently adopted by the Board of Education.

The policy provides as follows:

> "The Board of Education encourages public comment and opinions by the public at its meetings.
>
> "The Board also recognizes its responsibilities to conduct meetings in an orderly and businesslike manner, free of disruption and distraction. Therefore, the Board hereby prohibits the use and/or display of placards, posters, bills, signs, banners, or the like inside the meeting place of the Board of Education."

You wrote that some have contended that the policy represents "an unconstitutional interference with the rights of free speech and petitioning the government"; the Board, however, maintains that the policy is appropriate because "it is content neutral and necessary to control the decorum and conduct of its own 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, §100). However, the Law is silent with respect to the issue of public participation or the use of placards, posters, banners and the like. Consequently, by means of example, if a public body does not want to answer questions or permit 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 answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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. In my view, the issue in this instance involves the reasonableness of the policy and the extent to which disruption or distraction may occur when those who attend meetings use or display signs, posters and the like. In a decision rendered in 1963 concerning the use of tape recorders, it was found that the presence of a tape recorder, which then was a large and obtrusive device, would detract from the deliberative process and that, therefore, a policy prohibiting its use was reasonable [Davidson v. Common Council, 40 Misc.2d 1053]. However, when changes in technology enabled the public to use portable, hand-held tape recorders, it was found that their use would not detract from the deliberative process, because those devices were unobtrusive. Consequently, it was also found that rules adopted by public bodies prohibiting their use were unreasonable [People v. Ystueta, 99 Misc.2d 1105 (1979); Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985). Specifically, in Mitchell, it was held that:

> "While Education Law §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."

Based on the foregoing, relevant in my opinion is the extent to which the use of signs or posters would disrupt or interfere with meetings. I believe that the Board could clearly adopt rules to prevent verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs; similarly, I believe that the Board could regulate movement on the part of those carrying signs or posters so as not to interfere with meetings or prevent those in attendance from observing or hearing the deliberative process. Whether the Board could, however, prohibit

the use of all signs or posters, or perhaps symbolic gestures (i.e., wearing armbands) is, in my view, questionable.

In short, due to the absence of statutory guidance, and since the issue involves the reasonableness of the policy, it appears that a clear and final determination of the matter could be gained only by means of judicial review.

I regret that I cannot be of greater assistance. If you would like to discuss the matter, 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- 7171
OML-AO- 2091

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 26, 1992

Mrs. Norma Gonyea
Secretary of the Supervisor
Town of North Greenbush
2 Douglas Street
Wynantskill, NY 12198

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

Dear Mrs. Gonyea:

I have received your letter of May 19 in which you requested an advisory opinion concerning the Freedom of Information Law.

Based upon your letter and our telephone conversation, the issue involves the application of the Freedom of Information Law with respect to tape recordings of meetings of the North Greenbush Town Board that are made by the Town Clerk with her own tape recorder and cassettes as an aid in the preparation of minutes. Your questions are whether the tape recordings are subject to the Freedom of Information Law and, if so, how long they must be kept and "how long one must wait to hear the tapes once the tapes have been requested."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" to include:

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

> opinions. folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Since the tape recordings are produced by the Clerk in the performance of her official duties for the Town, I believe that they constitute "records" subject to rights of access. I point out by means of analogy that, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

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

Third, it is noted that there are laws and rules dealing with the retention of records. Specifically, pursuant to §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 scheduled adopted by the Commissioner, or 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.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) states in relevant 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..."

Therefore, an agency must respond to a request within five business days of the receipt of a request. If, for example, the clerk is using a tape recording to prepare minutes, and if the tape would be in use beyond five business days from the receipt of a request, I believe that the receipt of the request could be acknowledged, indicating an approximate date when the tape can be made available. Presumably that date would represent the time when preparation of the minutes has been completed. I point out, too, that §106(3) of the Open Meetings Law states that minutes of meetings "shall be available to the public...within two weeks from the date of such meeting..."

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2092

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 26, 1992

Ms. Beverly Choltco-Devlin
[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. Choltco-Devlin et al.:

I have received your letter of May 14, which pertains to your belief that the Board of Education of the Morrisville-Eaton School District has engaged in "willful and/or neglectful disregard" of the Open Meetings Law, the Education Law, and its own policy.

More specifically, you wrote that, in your view, the Board has consistently "abused the power to convene in executive session" by using that vehicle as a means of discussing "issues of a controversial nature in order to prevent the public from hearing their deliberation". For example, at a recent meeting concerning the budget, you wrote that the Board "raised a question of how to pay for four newly created positions", and that "[w]ithout answering that question the Board voted to go into executive session (for unspecified 'personnel' reasons)", returned to the open meeting and "immediately voted to abolish two positions..." Soon thereafter, the Board approved the final budget. You also wrote that "[t]he Board has been observed meeting behind closed doors at least a half hour prior to scheduled meetings", that action is taken concerning significant issues without any public discussion, that matters have been scheduled in a manner that effectively precludes the public from communicating its feelings, that the District has not designated a public location for posting notice, and that minutes have not been made available in a timely manner.

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, §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 a board of education 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, if the Board intends to gather to discuss public business prior to its scheduled meeting, and if a majority of its members is present, such a gathering in my view would be a "meeting" that falls within the requirements of the Law that should be preceded by notice.

Second, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. Therefore, the location of a meeting must be stated in the notice. Further, any such notice must be "conspicuously posted in one or more designated public locations." Therefore, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. Finally, to meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

Third, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Fourth, although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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 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 §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 §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 that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Lastly, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, §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.

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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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 an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to members 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: James Monahan
Dorrie McKay
Cynthia Ewing
Lowell Lingo
Dr. Thomas Learner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2093

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

May 27, 1992

Mr. Sanitor Kopecri-Deak
[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. Kopecri-Deak:

I have received your letter of May 22 in which you complained that minutes of meetings of the Board of Trustees of the Village of Pawling are not being made available to the public in a timely manner.

You have sought my assistance in the matter. In this regard, I offer the following comments.

First, §106 of the Open Meetings Law pertains to minutes of meetings and provides direction concerning their contents and the time within which minutes must be made available. Specifically, the cited provision states that:

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

made public by the freedom of information law as added by article six of this chapter.

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

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

Second, 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

As requested, in an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the Village 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: Clerk, Village of Pawling

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2094

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 1, 1992

Ms. Donna J. Keem
President
Concerned Citizens of Eagle
P.O. Box 86
Arcade, NY 14009

The staff of the Committee on 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. Keem:

I have received your letter of May 26 and the materials attached to it. You have raised two issues concerning the Open Meetings Law pertaining to the Eagle Town Board.

According to your letter, the Town Supervisor has expressed an intent to conduct Board meetings in a room that accommodates a maximum of 60 people. However, you indicated that in recent months, 150 to 200 people have sought to attend meetings and hearings conducted by the Town Board. With one exception, those events were held at the Town Recreational Hall, which apparently can accommodate all of those who might seek to attend. Since you believe that "public meetings should be accessible to anyone who wishes to attend and that attempts to limit public attendance are contrary to the spirit of open and democratic government", you requested my view of the matter.

In this regard, although the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

> "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 an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

The second issue that you raised involves a private meeting between the Town Board and an attorney it subsequently hired as special counsel that was held at the attorney's office. You wrote that no mention was made at any previous meeting concerning an effort or intent to hire an attorney, and your question concerns "the propriety of the meeting itself and the inherent decision which led to the meeting." The news article attached to your letter indicates that the Board went to the attorney's office "to consult with him" and that the Board asked him to draft a resolution concerning the Board's intention to consider the development of a landfill within the town." The Supervisor is quoted as stating that "This is not considered a secret meeting when the board consults with a lawyer."

In my view, the facts as you presented them, and as described by the newspaper, raise a series of questions and issues.

For instance, ordinarily, when a public body considers whether it should seek legal counsel, that kind of consideration is discussed at a meeting. In my opinion, a discussion of whether there is need to hire counsel is a matter of policy that should occur in public. If there is agreement regarding the need to hire an attorney, a public body may seek resumes or perhaps interview

particular attorneys or firms, and a review of the relative qualifications of attorneys could be accomplished during an executive session [see Open Meetings Law, §105(1)(f)]. It is unclear whether the Board conducted a meeting to carry out the activities described in this paragraph. However, I believe that any decision to hire an attorney, either in terms of policy or in relation to a particular individual, could properly have been reached only at a meeting preceded by notice given in accordance with §104 of the Open Meetings Law that was convened open to the public. It is noted that the phrase executive session is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Further, §105(1) of the Law requires that a procedure be accomplished, during an open meeting, before an executive session may be held. Specifically, that provision states in relevant part that:

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

Based on the foregoing, an executive session is not separate from a meeting; rather it is a portion of an open meeting from which the public may be excluded.

A second question involves when the Board collectively decided to have a resolution prepared concerning its intent to consider the development of a landfill within the Town. For reasons analogous to those discussed above, I believe that such a decision could only have been made during a meeting held pursuant to the Open Meetings Law.

Third, notwithstanding the content of the newspaper article on the subject, an additional question relates to the purpose or purposes of the meeting between the Board and the attorney. If the sole purpose of the meeting involved an intent on the part of the Board to seek legal advice from its attorney and to direct its attorney to take certain measures, the gathering in my opinion could have been conducted outside the requirements of the Open Meetings Law. As indicated earlier, an executive session, a portion of an open meeting, serves as one kind of vehicle for discussing public business in private. Another vehicle that authorizes private discussion arises under §108 of the Open Meetings Law. Section 108 contains three "exemptions", and if a matter is "exempted" from the Open Meetings Law, that statute is not applicable.

Of potential relevance is §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, the communications made pursuant to that relationship are considered confidential under §4503 of the Civil Practice Law and Rules. Consequently, 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 (1989); 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)].

I am not fully aware of the purpose or purposes of the meeting between the Town Board and the attorney, and it is unclear when the Board became the client of the attorney. If the Board met with the attorney to interview or determine whether to retain him, I do not believe that the attorney-client privilege would have been applicable at that point. Rather, although that kind of discussion could in my view have validly occurred during an executive session, such a session, for reasons described earlier, should have been held as part of an open meeting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2095

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 3, 1992

Mr. David C. Woodward
[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. Woodward:

I have received your letter of May 27. As a member-elect of the Peekskill Board of Education, you have contended that the Board has failed to comply with the Open Meetings Law.

Specifically, you wrote that at several recent closed sessions, the Board discussed and voted to cut programs and positions. You added that no minutes were prepared concerning those gatherings. Further, you referred to another meeting for which notice was apparently not given.

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, §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 a board of education 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, if the Board intends to gather to discuss public business prior to its scheduled meeting, and if a majority of its members is present, such a gathering in my view would be a "meeting" that falls within the requirements of the Law that should be preceded by notice.

Second, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. Therefore, the location of a meeting must be stated in the notice. Further, any such notice must be "conspicuously posted in one or more designated public locations." Therefore, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. Finally, to meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

Third, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Fourth, although it is used in conjunction with a variety of subjects, including issues relating to the preparation of budgets, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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 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 §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 §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 that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Lastly, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, §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.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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 an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to the Board.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2096

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 8, 1992

Hon. Howard Rose, Jr.
Councilman
Town of Volney
[redacted]

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

Dear Councilman Rose:

I have received your letter of May 30 which focuses upon "work sessions" held by the Town of Volney Planning Board, as well as the Town Board.

In this regard, I offer the following comments.

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

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

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

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 a public body (i.e., the Town Board or the Planning Board) gathers to discuss Town business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, there is no distinction between a meeting and a work session; when a work session is held, a public body has the same obligations in terms of notice, openness and the ability to conduct executive sessions as in the case regular meetings.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media 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. It is also noted that subdivision (3) of §104 specifies that a public body is not required to place a legal notice prior to a meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Lastly, provisions concerning the contents of minutes are found in §106 of the Open Meetings Law. Those provisions, in my view, prescribe minimum requirements concerning the contents of minutes. Specifically, §106 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.

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said at a meeting. Further, in a technical sense, if no motions or proposals are made, and if there are no resolutions or actions taken during meetings, minutes need not be prepared. Therefore, the preparation of minutes should not be burdensome in most instances.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kevin Connelly, Chairman, Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7185
OML-AO- 2097

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 12, 1992

Mr. David Woodward
[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. Woodward:

I have received your letter of June 1 and the materials attached to it.

Your first area of inquiry relates to a contract agreement reached by the Peekskill School District and the Peekskill Faculty Association. You expressed the belief that "all discussion [was] held in executive session, plus an approving vote, all done without minutes or recording of how each member voted." You asked whether the foregoing constitutes "a basis for finding agreement unlawful - null and void." With respect to your second question, having attended executive sessions as a member-elect prior to beginning your term as a member of the Board of Education, you asked whether "a recorded vote, by present members, [was] required."

In this regard, I offer the following comments.

First, it appears that the agreement to which you referred was the result of collective bargaining negotiations. If that is so, I believe that the discussions leading to the agreement could properly have been discussed during executive sessions. Section 105(1)(e) of the Open Meetings Law permits a public body to enter into executive session to discuss or engage in collective bargaining negotiations.

Second, as indicated in an opinion of June 3 that was addressed to you, §106 of the Open Meetings Law pertains to minutes and states that:

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

It was also noted that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. To reiterate, 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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, 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.

With regard to "a recording of how each member voted", I direct your attention to the Freedom of Information Law. 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 §86(3)], such as a school board, a record must be prepared that indicates the manner in which each member who voted case his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §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 §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."

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 §87[3][a]; §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)], which involved a board of education in Westchester County, 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 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 aware 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, reaches agreement on a particular subject, I believe that the minutes should reflect the actual votes of the members.

In contrast, a so-called "straw vote", which is not binding and does not represent members' action that could be construed as final, could in my view be taken in executive session when it represents a means of ascertaining whether additional discussion is warranted or necessary. If a "straw vote" does not 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.

Lastly, if action is taken in violation o the Open Meetings Law, a court in certain circumstances may nullify that action. Section 107(1) of the Open Meetings Law states in part that:

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

or part thereof taken in violation of this article void in whole or in part."

Similarly, some decisions involving the interpretation of §1708 of the Education Law indicate that courts have invalidated action taken in private. However, it is emphasized that action taken by a public body remains valid unless and until a court renders a determination to the contrary, and that the authority to invalidate is discretionary on the part of the Court.

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

OML-AO-2098

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 12, 1992

Mr. Robert L. Pratt
[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. Pratt:

I have received your recent letter in which you described a series of issues relating to the adoption of a budget in the Stillwater School District.

In brief, you wrote that taxpayers were not permitted to attend a meeting by the Board of Education held "to determine what they were putting into the budget". If the Board "passed the budget illegally", you asked "why can't the state step in and enforce them to do it the way they are supposed to do it."

In this regard, to the best of my knowledge, no state agency has the general authority to compel a board of education to comply with law. The Commissioner of Education has certain powers that can be asserted with respect to school districts and boards of education. Those powers, however, do not include the enforcement of the Open Meetings Law. Further, although this office may provide advice concerning the Open Meetings Law, the Committee cannot compel a public body to comply. The Open Meetings Law does include provisions concerning enforcement (see enclosed, Open meetings Law, §107), and any "aggrieved person" may initiate a lawsuit under that statute. I recognize, however, that bringing a lawsuit is costly and time consuming, and that judicial decisions are not necessarily predictable.

Although advice rendered by this office cannot change what has occurred during meetings, it is hoped that the advice serves to educate, to persuade, and to encourage compliance in the future.

Therefore, a copy of this opinion will be forwarded to the Board. Perhaps a review of the following comments will result in compliance with the Open Meetings Law.

First, by way of background, it is emphasized that the definition of "meeting" [see Open Meetings Law, §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 a board of education 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.

Second, §104 of the Open Meetings Law pertains to notice of meetings 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."

Third, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Fourth, although it is used in conjunction with a variety of subjects, including issues relating to the preparation of budgets, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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 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 §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 §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 that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the

subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Once again, 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 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

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7191
OML-AO- 2099

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 15, 1992

Ms. Ellen Simpson
Director
Valley Cottage Library
Route 303
Valley Cottage, NY 10989

The staff of the Committee on 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. Simpson:

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

Your inquiry involves "distinctions concerning Association and Public Libraries as they relate to the Freedom of Information Law and the Open Meetings Law." It is apparently the view of certain of your colleagues that "any entity receiving any tax money must provide salary schedules, telephone bills or any other type of operating expense to any member of the public demanding such" (emphasis yours).

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of 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."

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Valley Cottage within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities

> cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

With regard to the Open Meetings Law, which is codified as Article 7 of the Public Officers Law, I believe that statute is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §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."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7189
OML-AO-2100

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 15, 1992

Mr. Michael De Vitto
[redacted]

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

Dear Mr. De Vitto:

I have received your letter of May 20. For reasons unknown, it did not reach this office until June 5.

In your capacity as a member of Community Board #2 on Staten Island, you questioned the propriety of the Board's procedure for entering into executive sessions. Attached to your letter is a copy of an agenda relating to a recent meeting of the Board. One of the references on the agenda indicates that an executive session "was scheduled to be one of the last pieces of business the Board would discuss". In conjunction with the foregoing, you wrote that:

> "By the time the Board advanced to item V - Acceptance of agenda there were about 41 members present and 7 members absent. After a voice vote (no actual count was taken) on the acceptance of the agenda, the Chairman declared the agenda accepted. The meeting progressed until it was time for the executive session, at which point the Chairman requested all those that were not members of the Board to leave the room. The Chairman began the executive session. The Chairman was then questioned by a member as to whether a vote had to be taken to go into executive session. The Chairman responded that no vote was required since the earlier vote to accept the agenda sufficed. He stated that since the

> executive session was noted on the agenda, the members' voice vote to accept the agenda made a separate executive session vote unnecessary."

You asked whether that is so, or whether "an actual-count/roll call vote [would] have been required before going into executive session."

In this regard, I offer the following comments.

First, in a technical sense, a public body cannot schedule an executive session in advance of a meeting. 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Since a public body cannot know in advance of a meeting that a motion to enter into executive session will be approved, technically, an executive session should not be scheduled. I believe, however, that a public body could schedule a motion to enter into an executive session in its agenda.

Second, the agenda attached to your letter refers to topics to be discussed during the meeting. While reference is made to an executive session, there is no indication in the agenda of the topics intended to be discussed during the executive session as required by §105(1). Although a motion was carried to approve the agenda, that motion in my view merely approved the scope of the subjects intended to be considered; that motion was in my view separate and distinct from a motion required to be made and carried to enter into an executive session pursuant to §105(1) of the Open Meetings Law. Further, since the notation in the agenda to an executive session did not refer to the subject or subjects to be discussed behind closed doors, the members could not have known of the basis for entry into executive session. In short, I believe that an executive session must always be preceded by accomplishing the procedure described in §105(1) of the Open Meetings Law.

Third, with regard to "an actual-count roll call vote", I direct your attention to the Freedom of Information Law. 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 §86(3)], such as a community board, a record must be prepared that indicates the manner in which each member who voted case his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §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 §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."

It is noted 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 §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)]. While the Board may not have engaged in a secret ballot vote, I believe that the requirements of §87(3)(a) would be applicable.

Moreover, in a decision that dealt 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 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, if indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, reaches agreement on a particular subject, I believe that minutes should reflect the actual votes of the members.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2101

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 16, 1992

Ms. Marie A. Perkins
[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. Perkins:

I have received your letter of June 4 in which you raised two issues relating to the Open Meetings Law.

The first involves the use of tape recorders and camcorders at open meetings of public bodies. You referred to an unsuccessful attempt to enact an amendment to the Open Meetings Law concerning the issue.

In this regard, although legislation has been introduced to authorize the use of recording, broadcasting and video equipment in a non-disruptive manner at open meetings, those efforts have, to date, been unsuccessful. Further, 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. However, several judicial 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 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. Although there are no judicial decisions of which I am aware that deal with the use of camcorders at open meetings, a court in my opinion would likely determine that issue based upon the same principles as those considered regarding the use of tape recorders.

The second issue pertains to the status of "liaison committees" designated to work on an annexation plan involving two school districts. The newspaper article attached to your letter indicates that the liaison committees consist of two members of each school board.

In my opinion, when a committee consists solely of members of a public body, such as a board of education, the Open Meetings Law is applicable. The phrase "public body" is defined in section 102(2) of the Open Meetings Law to include:

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

> subcommittee or other similar body of such public body."

Although the original definition of that term 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 definition of "public body", I believe that any entity consisting of two or more members of a public body would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, section 41).

If a liaison committee consists of Board members, it would in my view constitute a public body that is required to provide notice prior to its meetings pursuant to section 104 of the Open Meetings Law and conduct its meetings in accordance with law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Ripley Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2102

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 18, 1992

Armand Daversa, Chairman
Jamestown Housing Authority
Hotel Jamestown Building
Jamestown, NY 14701

Frederick A. Larson, Esq.
408 West Fifth Street
Jamestown, NY 14701

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

Dear Messrs. Daversa and Larson:

I have received your correspondence of June 8 and June 11 respectively. In both instances, the issues relate to minutes of executive sessions conducted by the Jamestown Housing Authority.

According to Mr. Daversa, Mr. Larson advised that executive sessions "must either be taped with an electronic device or have a designated secretary take minutes of the sessions whether or not any action is taken in the executive session." Mr. Daversa added that, in his view, "nothing within [the Open Meetings Law] requires what Mr. Larson advised was necessary." Mr. Daversa indicated that he was seeking opinions on the matter from Mr. Larson and from me. Having reviewed Mr. Larson's opinion, I do not believe that he advised that executive sessions should be tape recorded. While I am in general agreement with his views, I offer the following the following comments.

First, as you are aware, 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, §105(1) states in relevant part that:

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

The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. The clear implication of the language quoted above is that a public body may vote or take action during a proper executive session, unless the vote involves the appropriation of public money, in which case, the body must return to an open meeting for the purpose of voting.

Second, §106 of the Open Meetings Law pertains to minutes, and subdivision (2) of that provision deals with minutes of executive sessions and states that:

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

In addition, subdivision (3) of §106 provides that:

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

Based on the foregoing, when a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. It is noted, however, that if a public body merely 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.

Lastly, unlike an open meeting, when comments are conveyed with the public present, an executive session is generally held in order that the public cannot be aware of the details of the deliberative process. For example, one of the grounds for entry into executive session, §105(1)(d), pertains to litigation, and it has been held that the purpose of that exception is 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 in attendance at the meeting [see e.g., Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)]. When representatives of public bodies have asked whether they should tape record executive sessions, I have suggested that doing so may result in unforeseen and potentially damaging consequences. A tape recording is a "record" as that term is defined in §86(4) of the Freedom of Information Law and, therefore, would be subject to rights conferred by that statute. Further, a tape recording of an executive session may be subject to subpoena or discovery in the context of litigation. Disclosure in that kind of situation may place a public body at a disadvantage should litigation arise relative to a topic that has been appropriately discussed behind closed doors. In short, I am suggesting that tape recording executive sessions could potentially defeat the purpose of holding executive sessions. More appropriate in my view would be the preparation of minutes to the extent required by §106(2) of the Open Meetings Law. Again, that provision requires the preparation of minutes of an executive session only when action is taken 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2103

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 19, 1992

Ms. Gail Shariff
[redacted]

Dear Ms. Shariff:

As you are aware, I have received your recent letter, which reached this office on June 15.

In brief, you complained that the Board of Education of the Cherry Valley-Springfield Central School District has been "conducting most of the school's business in executive session." You referred, by means of example, to several meetings in which the Board's public discussions transpired for approximately twenty minutes, while their executive sessions lasted for two hours or more. Although you did not refer to specific subjects that might properly have been discussed in public, I offer the following comments.

First, by way of background, it is emphasized that the definition of "meeting" [see Open Meetings Law, §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)].

Second, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this response will be forwarded to the Superintendent and the Board of Education. In addition, enclosed for your review and forwarded to District officials are copies of "Your Right to Know". That brochure describes the provisions of the Open Meetings Law and the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education
Michael Marcelle, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2104

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 22, 1992

Mr. John Penney
Managing Editor
Adirondack Daily Enterprise
P.O. Box 318
Saranac Lake, NY 12983

The staff of the Committee on 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. Penney:

I have received your letter of June 16, as well as the news articles attached to it. You have requested confirmation of your view that the Harrietstown Town Board engaged in a "baseless use of executive session on Thursday, June 11, 1992."

According to one of the articles, June 12 was:

> "the deadline the Franklin County Solid Waste Management Authority set for Harrietstown and the village of Saranac Lake to settle differences over the placement of county transfer station facilities. The county has said that unless the two municipalities decide jointly on one site - either next to the village landfill or next to the Harrietstown dump in Lake Clear - the authority would back the town landfill location."

As such, the locations of the two potential sites, one of which would presumably be chosen, were known to the public prior to the meeting of June 11. Moreover, later in the same article, reference was made to the approximate purchase price of both parcels. Nevertheless, the Town Board conducted an executive session to discuss and determine the matter, and the members agreed that they would not comment on the decision "until the village trustees had been notified in writing."

In this regard, I offer the following comments.

First, 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 the subject matter under consideration may properly be discussed during an executive session.

Second, the grounds for entry into executive session are specified and limited in paragraphs (a) through (h) of §105(1) of the Law. Although one of the grounds for conducting an executive session relates to real property transactions, based upon the facts, that provision in my view would not have applied. Specifically, §105(1)(h) permits a public body to enter into executive session to discuss "the proposed acquisition, sale or lease of real property...but only when publicity would substantially affect the value..." of the property. The facts indicate that the parcels under consideration and the general prices of those parcels were known to the public in advance of the meeting. That being so, I do not believe that publicity would have had any effect upon the value of the property. Therefore, I believe that the executive session was improperly held.

Lastly, if the discussion had been conducted in public in compliance with the Open Meetings Law, any member of the public, including members of the Saranac Village Board of Trustees, could have been present and been made aware of the Town Board's action.

As requested, a copy of this opinion will be sent to the Harrietstown Town Board in an effort to enhance compliance with and understanding 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: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2105

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 22, 1992

Ms. Geraldine Richtmyer
[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. Richtmyer:

I have received your letter of June 17 in which you raised the following question:

> "Can a Fund Balance of a school district be discussed in Executive Sessions?"

In this regard, it is noted at the outset that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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. In my opinion, it is unlikely that a discussion by a school board concerning a fund balance would fall within any of the grounds for entry into executive session.

Further, although it is used in conjunction with a variety of subjects, including issues relating to expenditures and the preparation of budgets, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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 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 §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 §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 that discussions relating to a fund balance or budgetary matters, such as the funding or elimination of positions or programs, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 2106

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 23, 1992

Mr. Garry Biggs
[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. Biggs:

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

According to your letter, the Board of Trustees of the Village of Lindenhurst on June 2 voted to rezone property from residential to industrial. You wrote that "there was no public deliberation" by the Board at the meeting concerning "the merit or considerations taken into account for the rezoning." Although the Board held a meeting on the preceding evening that began at 7 p.m., the public "was not invited in to attend until 840PM". From that time until the end of the meeting, no mention was made of the rezoning matter. When the Board was asked at its meeting of June 2 when it discussed the matter, the public was informed that the discussion occurred "when you were not in the meeting". You added that the Village Attorney indicated that the issue "was deliberated during executive session due to the sensitive nature of the covenants and restrictions that needed to be discussed." Further, you wrote that "there was never a publicly declared executive session" at the beginning of the meeting on June 1.

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, §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)].

Second, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Lastly, based upon your description of the facts, the discussion of the rezoning matter could not in my opinion have properly been discussed during an executive session, for none of the grounds for entry into executive session would apparently 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
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2107

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 24, 1992

Ronald P. Bennett, Esq.
DiFlippo, Bennett & Daumen
Two North Main Street
Holland, NY 14080

Dear Mr. Bennett:

As you are aware, your letter addressed to the Office of the State Comptroller has been forwarded to the Committee on Open Government.

In your letter and in your capacity as a municipal attorney, you wrote that an issue has arisen "concerning the use of video cameras at Town Board meetings." The question that you raised is "whether the Town Board under Section 63 of the Town Law can prohibit or regulate the use of video cameras during a Town Board meeting." That provision states in part that a town board "may determine the rules of its procedure."

Although I believe that we discussed the matter, I offer the following comments.

It is noted at the outset that no law deals specifically with the issue. Further, although I am unaware of any judicial decision involving the use of video cameras at open meetings, there are several decisions pertaining to the use of audio tape recorders.

By way of background, until 1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in

which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

Most recently, the Appellate Division, Second Department, unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meeting and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "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 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 and the similarity between §§1709(1) of the Education Law and 63 of the Town Law, 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. Although there are no judicial decisions of which I am aware that deal with the use of video cameras at open meetings, a court in my opinion would likely determine the issue based upon the same principles as those considered regarding the use of tape recorders.

I point out, too, that the Court in Mitchell found that:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

I hope that I 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-2108

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 25, 1992

Mr. Joseph J. Giglio
600 Crescent
Ogdensburg, NY 13669

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

Dear Mr. Giglio:

As you are aware, I have received your letter of June 20 and the materials attached to it.

You have raised questions concerning a meeting of the Board of Education of the Ogdensburg City School District held on June 18. According to a newspaper article of that date published prior to the meeting, the Board would be meeting "in executive session to determine whether the district should offer a retirement incentive package to teachers 52 years old and older that could save money but make classes more crowded". It is your view that:

> "(1) proper notice was not given to the public because the newspaper could only publish the notice on the date of the meeting;
>
> (2) apparently only one topic was discussed at the executive session - that being a retirement incentive for teachers and administrators. This is a totally improper topic for executive session;
>
> (3) the school board had a regularly scheduled meeting on 6/15/92 - no emergency existed to call another meeting on 6/18/92 only 3 days later..."

The agenda concerning the meeting of June 18 indicates that "personnel" and "litigation", as well as other topics would be discussed in executive session.

In this regard, I offer the following comments.

First, in a technical sense, a public body cannot schedule an executive session in advance of a meeting. 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Since a public body cannot know in advance of a meeting that a motion to enter into executive session will be approved, technically, an executive session should not be scheduled. I believe, however, that a public body could schedule a motion to enter into an executive session in its agenda.

Second, in my opinion, a discussion involving the possibility of developing or offering a retirement incentive plan to a class of employees (i.e., those older than a certain age) could not validly have been conducted during an executive session.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Further, although one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. By way of background, 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, or when the issue bears upon a group of employees, I do not believe that section 105(1)(f) could be asserted, even though the discussion relates to "personnel". In the context of your inquiry, while the consideration of a retirement incentive plan relates to personnel, it would not pertain to any specific employee; on the contrary, it would have involved a fiscal issue pertinent to a class of employees.

Further, due to the insertion of the term "particular" in section 105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of section 105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Since another ground for entry into executive session cited in the agenda involved "litigation", minimal description of the

subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is section 105(1)(d) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since "legal matters" or possible litigation could be the subject or 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 because it involves a legal matter.

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, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

However, the judicial interpretation of the Open Meetings Law indicates that the propriety of scheduling a meeting less than a week in advance may be 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" [524 NYS 2d 643, 645 (1988)].

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
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2108

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 25, 1992

Mr. Joseph J. Giglio
[redacted]

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Dear Mr. Giglio:

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> "(1) proper notice was not given to the public because the newspaper could only publish the notice on the date of the meeting;
>
> (2) apparently only one topic was discussed at the executive session - that being a retirement incentive for teachers and administrators. This is a totally improper topic for executive session;
>
> (3) the school board had a regularly scheduled meeting on 6/15/92 - no emergency existed to call another meeting on 6/18/92 only 3 days later..."

The agenda concerning the meeting of June 18 indicates that "personnel" and "litigation", as well as other topics would be discussed in executive session.

In this regard, I offer the following comments.

First, in a technical sense, a public body cannot schedule an executive session in advance of a meeting. 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Since a public body cannot know in advance of a meeting that a motion to enter into executive session will be approved, technically, an executive session should not be scheduled. I believe, however, that a public body could schedule a motion to enter into an executive session in its agenda.

Second, in my opinion, a discussion involving the possibility of developing or offering a retirement incentive plan to a class of employees (i.e., those older than a certain age) could not validly have been conducted during an executive session.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Further, although one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. By way of background, 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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, or when the issue bears upon a group of employees, I do not believe that section 105(1)(f) could be asserted, even though the discussion relates to "personnel". In the context of your inquiry, while the consideration of a retirement incentive plan relates to personnel, it would not pertain to any specific employee; on the contrary, it would have involved a fiscal issue pertinent to a class of employees.

Further, due to the insertion of the term "particular" in section 105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of section 105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Since another ground for entry into executive session cited in the agenda involved "litigation", minimal description of the

subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is section 105(1)(d) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since "legal matters" or possible litigation could be the subject or 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 because it involves a legal matter.

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, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

However, the judicial interpretation of the Open Meetings Law indicates that the propriety of scheduling a meeting less than a week in advance may be 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" [524 NYS 2d 643, 645 (1988)].

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
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2109

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 26, 1992

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 June 23 and the correspondence attached to it.

According to your letter:

> "A committee was formed by either the Supervisor or the Town Board to review the subdivision regulations of the Town of Newburgh last year. My understanding is that the committee was to review and propose changes for a new set of subdivision regulations in conjunction with the revised zoning regulations that were recently adopted by the town board."

Although you raised a series of questions concerning meetings of the committee, responses to them are dependent upon whether that entity constitutes a public body subject to the Open Meetings Law.

In this regard, I offer the following comments.

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

Second, recent decisions indicate generally that advisory ad hoc entities, other than committees consisting solely of 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)]. Therefore, an advisory body such as a citizens' advisory committee would not in my opinion be subject to the Open Meetings Law.

I point out that the first decision cited above dealt with the status of a zoning revision commission designated by a town board to recommend changes in the town's zoning ordinance. Since the Appellate Division, Second Department, found that the entity in that case was not subject to the Open Meetings Law, and due to the apparent similarity between that entity and the committee that is the subject of your inquiry, I do not believe that the committee would constitute a public body.

Lastly, while the committee in question does not appear to be subject to the Open Meetings Law, there is no provision that would preclude the committee from conducting open meetings or that would prohibit the Town Board from requiring the committee to conduct open meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7220
OML-AO-2110

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

June 26, 1992

Ms. Darlene Humphrey
Village of Lancaster
[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. Humphrey:

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

According to your letter, the Lancaster Village Board of Trustees conducted an executive session relating to the discipline of a police officer. After a lengthy discussion, a vote was taken and entered into the minutes of the executive session. You wrote, however, that "it was unclear to the Board what information the Mayor was required to give to the public in regards to what transpired in the executive session." You indicated that you "took the position that to leave executive session and discuss publicly the details of that session defeats the purpose of the executive session", and you assumed that the Board was "not obligated to announce the discussion or the vote."

In this regard, I offer the following comments.

First, §106 of the Open Meetings Law pertains to minutes and provides what might be viewed as minimum requirements concerning the contents of minutes. Subdivision (2) of §106 deals with minutes of executive sessions and states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter

> which is not required to be made public by the freedom of information law as added by article six of this chapter.

In addition, subdivision (3) of §106 provides that:

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

Based on the foregoing, when a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. Additional detail is not required to be included or disclosed. It is also noted that if a public body merely discusses an issue or issues during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared. Although the discussion to which you referred might have been lengthy, minutes of the executive session may be brief. Further, while public bodies may and many do announce their action in public following action taken during an executive session, in a technical sense, I do not believe that a disclosure must be made until minutes are prepared and made available. Again, that must occur one week of the executive session.

Second, §87(3) of the Freedom of Information Law states in relevant part that:

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

Since a village board of trustees is an "agency" as that term is defined in the Freedom of Information Law [§86(3)], I believe that a record must be prepared that indicates how each member cast his or her vote when final action is taken. Ordinarily, the record of votes is part of the minutes.

Lastly, since the issue related to a police officer, if such officer was found to have engaged in misconduct, I believe that minutes identifying that person would be public. If, however, the Board determined that there was no misconduct and that no

disciplinary action should be imposed, and if that person's name had not been previously disclosed, his or her name could in my view be withheld or deleted from the minutes.

If you would like more detailed information concerning records relating to the discipline of police officers, that issue can be considered separately and in detail.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2116

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 9, 1992

Ms. Elizabeth Lynch
[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. Lynch:

I have received your letter of June 19. In brief, you wrote that no minutes are prepared concerning "workshop" meetings of the Rotterdam Town Board. You also indicated that, although no formal votes are taken at the workshops, discussions are often significant and that, in your view, it would be beneficial to have minutes "detailing all occurrences and discussions before the Board."

You have sought my views on the matter. In this regard, I offer the following comments.

First, it is noted that the definition of "meeting" [see Open Meetings Law, §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.

Second, 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, §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; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. 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. If those kinds of actions, such as motions or votes, do not occur during workshops, technically I do not believe that minutes must be prepared.

Lastly, since the Open Meetings Law does not require the preparation of detailed or expansive minutes, I point out that it has been held that a member of the public may use a tape recorder at open meetings.

Enclosed as you requested are eight copies of "Your Right to Know".

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: James Constantino, Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 7233
OML-AO- 2112

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 15, 1992

Mr. Anthony S. Derico
[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. Derico:

I have received your letter of June 26, which pertains to public participation at meetings of the Halfmoon Town Board.

According to your letter, the Board permits members of the public to speak for up to three minutes during each of two portions of its meetings. One of those opportunities involves the ability to comment concerning subjects listed on an agenda. However, you wrote that the agenda is not available until the day of the meeting. The second opportunity involves the ability to comment on issues other than agenda items. Nevertheless, it is your view that three minutes may be inadequate "to answer the lengthy and often inaccurate rebuttals of Town Officials."

You have asked whether "the failure to provide the public with a timely and adequate copy of the Agenda represent[s] a deliberate attempt by the Town not to comply with its own meetings procedures -- procedures established by the Supervisor at the Town's organizational meeting."

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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to permit 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, and many do so. When a

public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally, which would appear to be so in this instance. By authorizing the public to speak during two portions of its meetings, the Board appears to be acting beyond the requirements of the Open Meetings Law.

As in the case of public participation, the Open Meetings Law is silent with respect to agendas. Neither the Open Meetings Law nor any other statute of which I am aware requires that agendas be prepared or specifies when they must be disclosed. Most public bodies prepare agendas based upon practice, policy or rule, rather than pursuant to any statutory requirement.

In my view, once an agenda has been prepared, it constitutes a "record" subject to rights conferred by the Freedom of Information Law [see Public Officers Law, §86(4)]. Further, since they are disclosed on the day of a meeting, I believe that agendas would be available to the public, essentially as soon as they exist, even if they are prepared prior to the dates of meetings.

Lastly, although you referred to procedures established at the Board's organizational meeting, you did not describe any such procedures in relation to the issue that you raised. If, for example, one aspect of the Board's procedures requires that agendas be prepared or disclosed at least three days prior to meetings, a failure to do so would in my opinion be inconsistent with its own rules. It is noted, however, that such inconsistency would not represent a violation of the Open Meetings Law; again, that statute does not deal with the preparation or disclosure of agendas.

I hope that I 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- 7239
OML-AO- 2113

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Stanley Pawenski
Mr. Arthur Gleason
Mr. John Niedbalec
Cohoes City School District
20 Page Avenue
Cohoes, NY 12047

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

Dear Board Members Pawenski, Gleason and Niedbalec:

I have received your letter of July 8 and the materials attached to it.

According to your letter, the first issue involves a "workshop" session of the Cohoes Board of Education begun on the evening of June 22, during which the Board entered into an executive session and "voted to appoint" a particular individual to the position of principal of the Middle School. You wrote that:

> "No formal motion or second was made, nor was there a recording of the 'ayes' and 'nays'. The Board President characterized this as a 'polling' of the Board, with the aim of getting a 'consensus'. The seeking of a 'consensus' was presented as routine practice of the Board.
>
> "The Board president again 'polled' the Board seeking another 'consensus', this time seeking to reverse the Board's stated intention to defer its vote on the principal's position until after July 1st, the start of the District's new fiscal year and instead scheduled the vote for a special meeting which would be held immediately following the Board's Public Hearing on its annual budget which was scheduled for Wednesday, June 24th. Again the Board was 'polled' and a 'consensus' obtained in the same manner as set forth above. The reason stated by the Board

> president for these actions was that the June 24th meeting would be the last one wherein he would have a majority in favor of appointing this individual."

In this regard, although it is unclear whether the vote to appoint a particular individual to a position was taken in public or during an executive session, I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote of the members must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

When action is taken, minutes must be prepared in accordance with §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."

Additionally, in one of the few instances in the Freedom of Information Law that requires that records be maintained, §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 §86(3)], such as a town board, 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.

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 of remedies" (id. 646).

In the context of the situation 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 to indicate the nature of the action taken and 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 an 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 a public body in effect reaches agreement on a particular subject, I believe that the minutes should be prepared and should reflect the actual votes of the members.

In contrast, if a consensus 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.

The second issue involves a hearing and an agenda relating to it that pertains to the budget, and an agenda concerning a "special meeting" that would follow the hearing. You wrote that legal notices were published regarding the hearing but that "[n]o public notice of the second special meeting was provided, nor did the District notify the press of any change in the agenda."

It is noted initially that there is a distinction between a meeting and a hearing. A hearing is generally held to enable members of the public to express their views concerning a particular issue. A meeting is generally held by a public body discuss, to deliberate, and potentially, to take action. Further, the notice requirements may differ in the case of a hearing as opposed to a meeting. Prior to a hearing, there may be a requirement that a legal notice be published that indicates the subject of the hearing, the time and place. In contrast, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. However, notice of a meeting need not indicate the subjects to be considered. Moreover, although notice of a meeting must be given to the news media and posted, there is no requirement that a public body pay to place a legal notice in advance of a meeting.

Similarly, there is nothing in the Open Meetings Law pertaining to agendas. While many public bodies routinely prepare and disclose agendas, there is no requirement that agendas be prepared.

Lastly, you asked whether "budget related discussions can properly be held in executive session." In this regard, by way of background, every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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" (<u>Doolittle v. Board of Education</u>, 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 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 §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 §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 that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7245
OML-AO-2114

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 20, 1992

Mr. Henry Cassell
[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. Cassell:

I have received your letter of July 2 which relates to the Peekskill Board of Education.

According to your letter, at a meeting held on June 16, it was stated by three of the six Board members that "no guidelines or objectives were presented last year by the Board to the Peekskill Superintendent of Schools". You wrote that the renewal of the Superintendent's contract was a matter of controversy, that "the Board used the lack of guidelines as the basis for their inability to perform a formal evaluation", and that the contract was renewed. Nevertheless, at the next meeting, another Board member "publicly revealed that written guidelines and objectives were in fact provided to the Superintendent and all Board Trustees", and that "several months after these guidelines were presented changes in them were imposed, and objected to by the Superintendent on the basis that it was too late in the year to alter his objectives, thereby apparently satisfying the formal nature of the original guidelines."

It is your belief that there was a "deliberate deception" and you questioned what "legal recourse [is] available...for what [you] consider a blatant violation of the public trust and obvious effort to disregard the "sunshine laws."

In this regard, in my opinion, it is questionable whether prior discussions involving the development of guidelines or objectives could properly have been discussed in private. Further, I believe that action to adopt or apply any such guidelines or objectives should have occurred in public, and that records containing guidelines or objectives would be or should have been available under the Freedom of Information Law. 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, §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)].

Further, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §105(1)(f) are considered.

When a discussion concerns matters of policy, I do not believe that §105(1)(f) could be asserted, even though the discussion involves a "personnel" matter. 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). In the context of your letter, insofar as discussions might have involved the Superintendent's strengths and weaknesses and his or her performance, I believe that an executive session could properly have been held. On the other hand, insofar as the discussion involved policy in the nature of goals or objectives inherent in the position of superintendent that would be applicable to any person who might serve in that position, I do not believe that there would have been a basis for conducting an executive session.

The Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, §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.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

Based on the foregoing, if the Board adopted guidelines or objectives, I believe that minutes so indicating should have been prepared and made available. Moreover, any vote or action taken should, in my opinion, have occurred in public.

Although it is unclear whether a request was made for records in the nature of goals or objectives applicable to staff, those kinds of records in my view would be available. I point out that 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. 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 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. While two of the grounds for denial may be relevant to the kind of record in question, neither in my opinion cold be appropriately asserted.

Section 87(2)(g) 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 could appropriately be asserted. 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. From my perspective, guidelines or objectives adopted by the Board would be reflective of its policy regarding the manner in which duties imposed upon a person or inherent in a person are intended to be carried out, and, therefore, would be available under §87(2)(g)(i).

Also significant is §87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear 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. Second, with regard 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 e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

While standards, goals, guidelines or objectives might apply to a particular employee, those records would clearly be relevant to the performance of that person's official duties. Consequently, I believe that they would be available.

When a request for records is made, and an agency official asserts that no such records exist, knowing that they do exist, §89(8) of the Freedom of Information Law may be relevant. That provision states that:

> "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."

Lastly, since I am not an expert on the subject, I am unaware of what avenues of recourse might exist under the Education Law or regulations regarding the matter that you described. In some instances, appropriate "recourse" may involve the election of new members to a board.

I hope that I have been of some assistance.

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-2115

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 21, 1992

Ms. Toni Rhodes
[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. Rhodes:

I have received your letter, which reached this office on July 13.

Your inquiry concerns the ability of some people to speak at meetings of the Bennington Town Board, and the absence of permission to enable others to do so.

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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit 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 answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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 the 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.

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:jm

cc: E. Bissell, Town Attorney
Leslie Huber, Town Supervisor
Richard Stevens

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2116

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 24, 1992

Hon. Deb Moltere
Town Clerk
Town of Delhi
Depot Street
Delhi, NY 13753

<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. Moltere:

I have received your letter of July 13. In your capacity as Clerk of the Town of Delhi, you raised a question concerning the propriety of "minutes being changed or corrected in any way or form prior to the Board meetings by the Supervisor."

In this regard, I offer the following comments.

First, the Open Meetings Law provides direction concerning the contents of minutes and when they must be disclosed. Specifically, §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."

Second and perhaps most importantly, §30(1) of the Town Law states in part 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..." Based upon the foregoing, the clerk, not the town supervisor, has the statutory responsibility to prepare minutes and ensure their accuracy. Further, the supervisor in my view, has no right, acting unilaterally, to change or correct minutes.

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 in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181).

Moreover, 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. Additionally, in another opinion of the State 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).

In short, it is my view that you, in your position as clerk, have the responsibility and the authority to prepare minutes and to insure their accuracy. While the Supervisor may have other areas of authority, I do not believe that the alteration of minutes is among them.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO. 7254
OML-AO-2117

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

July 24, 1992

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

The staff of the Committee on 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. Maxam:

I have received your letter of July 15. You asked that I provide advice to Mr. Raymond Ciccarelli, Superintendent of the Minerva Central School District, concerning the Freedom of Information Law and the Open Meetings Law.

The first issue involves discussions of a "twice defeated budget" in executive session "by using the excuse of 'personnel'." In this regard, by way of background, I point out that every meeting must be convened as an open meeting, and that §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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. Further, although one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §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 §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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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 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 §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 §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 that discussions relating to the budgetary matters, such as the funding or reduction of positions, could appropriately be discussed during an executive session.

Further, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

The second issue involves a request for minutes of a meeting of May 28 that was rejected because the minutes had not been

approved. The Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, §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, for §106(3) states that minutes must be made available "within two weeks of the date of such meeting."

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 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

The third issue pertains to fees for copies of records. In my view, for the following reasons, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee of more

than twenty-five cents per photocopy or for searching for records, no such fee may be assessed.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

A fourth issue involves an unanswered request for salary information concerning District officials.

In terms of 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.

With certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the 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 in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision 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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries 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 [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 notion that records that are relevant to the performance of the official duties of public employees are generally 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)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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 §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 §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)].

As you requested and in an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be forwarded to Mr. Ciccarelli.

I hope that I 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: Raymond Ciccarelli, Jr., Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7356
OML-AO-2118

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Mr. John S. Dzielak
[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. Dzielak:

I have received your letter of July 17 in which you complained that your assessor refused to allow you to gain access to an "agricultural assessment application for exemption" concerning a parcel adjacent to your property. You also wrote that you would like to inspect "the Assessment Review Board Applications and minutes of the hearings for the years 1990-1991-1992."

You have asked that I send a "letter of authorization" to the Assessor and the Chairman of the Assessment Review Board.

In this regard, it is noted at the outset that the Committee on Open Government is permitted to provide advice concerning access to records. This office cannot compel an agency to grant access to records or to "authorize" the disclosure of records. However, in an effort to assist you, I offer the following comments.

First, 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. Moreover, long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969).

Second, two of the grounds for denial may be relevant to your inquiry.

Specifically, §87(2)(b) of the Freedom of Information Law enables an agency to withhold records or portions of records the disclosure of which would result in an "unwarranted invasion of personal privacy." While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view enable government to prevent disclosures concerning the personal or intimate details of individuals' lives.

From my perspective, a disclosure that permits the public to determine the general income level of an individual would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means at a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Moreover, the New York State Tax Law contains provisions that require the confidentiality of records submitted to the Department of Taxation and Finance reflective of the particulars of a person's income or payment of taxes (see e.g., §697, Tax Law). Although those provisions are not directly relevant in this instance, it would appear that the Legislature felt that disclosure of records concerning income and related information would constitute an improper or "unwarranted" invasion of personal privacy. Insofar as applications for exemptions contain personal financial information, I believe that those portions of such records could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. On the other hand, if there is no personal financial information in an application and if no other basis for withholding can be asserted, that kind of record must, in my opinion, be made available.

The other ground for denial of possible significance is §87(2)(d), which enables an agency to withhold records or portions of records that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Although I am unaware of whether §87(2)(d) is relevant to your inquiry, it authorizes an agency to withhold records submitted by a commercial entity, or information derived from those records, when disclosure would cause substantial injury to the entity's competitive position.

In sum, if neither §§87(2)(b) nor (d) is applicable, I believe that the application must be disclosed. Further, if, for example,

personal financial information is contained within an application, that portion of the record may be deleted, but the remainder should be disclosed.

Lastly, since you referred to "minutes of hearings", I point out that such records may but likely need not exist. While the Open Meetings Law includes provisions pertaining to minutes of meetings of public bodies, I know of no requirement that minutes of hearings be prepared. As you may be aware, there is a distinction between a hearing and a meeting. A hearing generally involves a situation in which members of the public are entitled to speak with respect to a certain issue, or in which a person or entity (such as an assessment board of a review) hears testimony regarding an issue. A meeting generally involves a gathering of a public body for the purpose of discussion, deliberation and perhaps taking action.

If there are no minutes of hearings, the Freedom of Information Law would not be applicable. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

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

In an effort to enhance compliance with and understanding of the issues you raised, copies of this opinion will be forwarded to the officials 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: Ruth Brooks, Assessor
Henry Toland, Chairman, Assessment Review Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2119

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 10, 1992

Ms. Nancy J. Langer
[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. Langer:

I have received your letter of July 15 in which you raised questions concerning the implementation of the Open Meetings Law by the Zoning Board of Appeals of the Town of Bristol.

The first issue involves the procedure for entry into executive session. According to your letter:

> "[a]s soon as the meeting had been called to order, the Chairman stated the Board was going into executive session. There was no formal motion or vote taken, nor was the subject of such session given."

In this regard, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing

provisions of §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.

The second issue involves the capacity of the public to videotape Board meetings. You wrote that, while videotaping had been permitted in the past, "the town attorney recommended to the board that they not allow videotaping, saying it would be disruptive, would inhibit people from speaking their minds and that the law was on their side in making such a decision."

Here I point out that although legislation has been introduced to authorize the use of recording, broadcasting and video equipment in a non-disruptive manner at open meetings, those efforts have, to date, been unsuccessful. Further, 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. However, several judicial decisions have been rendered concerning the use of audio 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 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.

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

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. Although there are no judicial decisions of which I am aware that deal with the use of camcorders at open meetings, a court in my opinion would likely determine that issue based upon the same principles as those considered regarding the use of tape recorders.

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: Zoning Board of Appeals
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2120

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 11, 1992

Mr. Alexander J. Rogers
[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. Rogers:

I have received your letter of July 23 in which you requested "a ruling, or judgement" relating to the Open Meetings Law.

According to your letter, following the completion of the regular business at meetings of the Deerfield Town Board, the Supervisor announces that the Board will permit "privilege of the floor." At that time, those in attendance may make statements or ask questions to the Board as a whole or to individual members, including the Supervisor. You wrote, however, that:

> "Sometimes, a question/statement is interpreted by the Supervisor as overly critical of him, or his actions. Discussion may follow. As a result, the Supervisor lets it be known that this person will never again be granted, 'privilege of the floor.' Our Supervisor has done this on two different occasions."

You asked whether the Supervisor can "'legally' do this..."

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 is not empowered to render a "ruling" that is binding.

Second, with respect to your question, 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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit 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 answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law, §63), 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 the 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

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1780
OML-AO-2121

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 12, 1992

Ms. Carole F. Fowler
Jervis Public Library
613 N. Washington Street
Rome, NY 13440

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

Dear Ms. Fowler:

As you are aware, I have received your letter of July 30 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, the Jervis Public Library Association, Inc., which you serve as Director, contracts with the City of Rome "to provide library services to the community." The contract with the City states in part that the Library is an "independent contractor", and that its officers, agents, directors and employees "will neither hold themselves out as, nor claim to be, officers or employees of the City of Rome." The Library is incorporated as a not-for-profit corporation and is exempt from tax under the Internal Revenue Code. You added that the City provides about 69% of your budget, the County about 10% and that a contribution from the School District varies between 2% and 3%. Further, although employees "are not civil service classified", the Library's clerical, maintenance and guard personnel are members of CSEA.

The CSEA unit has requested "copies of individual itemized annual salaries for all library employees" for the years 1987 to 1992. In view of its significant receipt of government funding, you have asked whether the Library must disclose the information sought under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of 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."

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Valley Cottage within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private

> organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to association libraries has arisen in other instances, perhaps because a companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §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."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with that 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2122

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 13, 1992

Mr. M.P. FitzSimons
[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. FitzSimons:

I have received your letter of July 30 in which you sought advice concerning the procedure for gaining access to minutes of executive sessions held by local school boards. You wrote that "it is in these sessions where our tax dollars are spent via decisions as to major expenditures, personnel hiring and salary increases, extensions and increases to existing contracts, etc."

In this regard, I offer the following comments.

The Open Meetings Law contains provisions pertaining to minutes of meetings and provides what might be characterized as minimum requirements concerning the contents of minutes. 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.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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. Unless those rare circumstances are present, in order to take action, a school board must return from an executive session to an open meeting, where a vote may be taken. Further, since a school board cannot generally take action or vote during an executive session, minutes of executive sessions ordinarily need not be prepared.

Perhaps more important than minutes of executive sessions is whether boards of education are properly conducting executive sessions. With respect to that issue, it is noted that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

One of the reasons that is frequently used to conduct an executive session is that the discussion pertains to personnel matters. Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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 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 §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 §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 that discussions relating to the budgetary matters, such as the funding

or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

As you requested, enclosed is a copy of the Open Meetings Law. In addition, enclosed is "Your Right to Know", which describes 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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1282
OML-AO-2123

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 13, 1992

Ms. Tinker Twine
Woodstock Times
P.O. Box 808
Woodstock, NY 12498

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

Dear Ms. Twine:

I have received your letter of August 3 and the material attached to it.

You have sought an advisory opinion concerning a denial by the Woodstock Town Supervisor of your request for "correspondence from the Town's adversary in a lawsuit regarding the Town's zoning law." You added that the letter might have been the subject of a recent executive session held by the Town Board. In his denial of your request, the Supervisor wrote that "letters pertaining to lawsuits and other matters discussed in executive session are confidential."

In this regard, I offer the following comments.

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

Second, whether the record in question was discussed in executive session is in my view largely irrelevant. It is emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session [see Open Meetings Law, §105(1)(a) through (h)] are separate and distinct, and that they are not necessarily

consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and vice versa. Further, in a decision in which the issue was whether discussions occurring during an executive session 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). In this instance, since the Town is involved in litigation, it appears that an executive session to discuss the litigation could properly have been held under §105(1)(d) of the Open Meetings Law. That provision authorizes a public body to conduct an executive session to discuss "proposed, pending or current litigation." Nevertheless, the validity of the executive session does not necessarily result in a conclusion that there is a basis for withholding a record under the Freedom of Information Law that might have been discussed during an executive session.

Third, because the letter in question was transmitted by the Town's adversary in litigation to the Town, I do not believe that it could be characterized as privileged or confidential. The initial ground for denial in the Freedom of Information Law pertains to records that are "specifically exempted from disclosure by state or federal statute." While several statutes relate to records used or prepared for litigation, it does not appear that any of them could properly be asserted in this instance. For example, in general, pursuant to the attorney-client privilege, which is embodied by statute in §4503 of the Civil Practice Law and Rules (CPLR), communications between at attorney and a client may often be privileged and, therefore, exempted from disclosure by statute. However, if a communication is made or disclosed to a person other than the attorney or the client, the privilege is waived. Similarly, although §3101(c) and (d) of the CPLR authorize confidentiality, respectively, regarding the work product of an attorney or material prepared for litigation, those kinds of records remain confidential in my opinion so long as they are not disclosed to an adversary or a court, for example. I do not believe that materials that are served upon or shared with an adversary would be privileged or confidential.

Assuming that the letter in question could not be characterized as "confidential" or exempted from disclosure by statute, I believe that it should be disclosed, for none of the other grounds for denial listed in the Freedom of Information Law would appear to be applicable.

As you requested, in an effort to enhance compliance with and understanding of the issues, copies of this opinion will be forwarded to the persons and entities 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: John Mower, Town Supervisor
Bonnie Lobel, Town Clerk
Town Board
Planning Board
Zoning Board of Appeals
Zoning Evaluation Committee
Joel Sachs, Esq.
James Myers, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2123A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 13, 1992

Mr. Gerard J. Glass
Glass, Lazio & Glass
262B East Main Street
Babylon, NY 11702

Dear Mr. Glass:

I have received your letter of July 15, which relates to an advisory opinion prepared at the request of Mr. Gary Biggs. Mr. Biggs' inquiry involved certain meetings of the Board of Trustees of the Village of Lindenhurst.

As you are aware, opinions are based upon materials provided to this office, and on rare occasions, inconsistent information may exist regarding an event. Nevertheless, in conjunction with your comments and for purposes of clarity, I offer the following general remarks.

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 §105 of the Law. The other arises under §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 likely relevance to the matter is §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 §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 you, in your capacity as Village Attorney, provide legal advice to or otherwise engage in an attorney-client relationship with your clients, your communications would be privileged and, therefore, outside the requirements of the Open Meetings Law. However, when the rendition of legal advice has ended and the Board commences to deliberate or discuss a matter at issue, I believe that the attorney-client relationship ends and the application of the Open Meetings Law begins.

With regard to the other basis for exclusion of the public that might have been relevant to the facts as I understand them, as you are aware, §105(1)(d) permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v.Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an

> executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply by expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors.

I hope that the foregoing has been useful and that the earlier opinion has not caused hardship.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2124

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 14, 1992

Mr. Edmund Rusin
[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. Rusin:

As you are aware, I have received your letter of July 29, which reached this office on August 10, and the news article attached to it.

It is noted at the outset that the primary function of the Committee on Open Government involves providing advice with respect to public access to records under the Freedom of Information Law and to meetings of public bodies under the Open Meetings Law. As we discussed, the substance of your letter is unrelated to either the Freedom of Information Law or the Open Meetings Law. However, you asked that I comment with respect to a controversy described in the news article. In brief, the issue pertains to the status of "workshops" held by the Town of Irondequoit Zoning Commission.

In this regard, I offer the following comments.

First, based upon §266 of the Town Law, I believe that a zoning commission constitutes a "public body" subject to the requirements of the Open Meetings Law.

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

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

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

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 a public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, there is no distinction between a meeting and a "workshop" or work session; when a workshop is held, a public body has the same obligations in terms of notice, openness and the ability to conduct executive sessions as in the case of regular meetings.

Enclosed for your review are copies of the Open Meetings Law and "Your Right to Know", which describes that statute 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
Executive Director

RJF:jm

cc: Zoning Commission
Frederick W. Lapple, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2125

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 14, 1992

Mr. George Heidcamp
[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. Heidcamp:

I have received your letter of August 4 in which you raised the following questions relating to the Open Meetings Law:

> "1. If a Town Board meets once a week for a workshop meeting to discuss public business prior to its regularly scheduled monthly meeting, is it required by law that the Town publicly post these meetings.
>
> 2. Can a Town Supervisor make a motion (or second a motion) at a regular public Town Board meeting or at a workshop meeting? (If you can't answer that will you please advise me where I might obtain that information)
>
> 3. Can a Town Board vote to go into 'executive session' at a workshop meeting."

In this regard, I offer the following comments.

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

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

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

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 town business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, there is no distinction between a meeting and a "workshop" or work session; when a workshop is held, a public body has the same obligations in terms of notice, openness and the ability to conduct executive sessions as in the case regular meetings.

In conjunction with your first question, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting, which, again, would include workshops. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

Lastly, since a "workshop" is a "meeting" that falls within the scope of the Open Meetings Law, executive sessions may be held during workshops to the extent permitted by the Open Meetings Law. I point out that every meeting of a public body must be convened as an open meeting, and 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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. 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.

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-2126

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 14, 1992

Ms. Myra Schoenberg
Chester Public Library
16 Abel Noble Drive
Chester, NY 10918

The staff of the Committee on 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. Schoenberg:

I have received your letter of August 3 in which you wrote that, despite repeated efforts by the Board of Trustees of the Chester Public Library, the Board's secretary fails to prepare minutes of Board meetings in a timely manner. You asked what steps might be taken to avoid "this deliberate flaunting of the Board's directives."

In this regard, I offer the following comments.

First, §260-a of the Education Law states in part that "[e]very meeting... of a board of trustees of a public library system, cooperative library system, public library or free association library, shall be open to the public" and that "[s]uch meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law." Article 7 of the Public Officers Law is the Open Meetings Law. Therefore, a library board of trustees is subject to the requirements of that statute.

Second, as you are aware, the Open Meetings Law requires that minutes of meetings be prepared and made available in accordance with §106 of that statute. That section 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, I believe 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, but the language of section 106(3) is clear, in that minutes must be made available "within two weeks of the date of such meeting."

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 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Lastly, it is my hope that this opinion will be shared with the secretary to the Board and that its contents will serve to educate and encourage compliance. If this effort fails, it is assumed that the Board would have the authority to designate a different person as secretary.

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-2127

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 14, 1992

Mr. David C. Becker
[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. Becker:

As you are aware, I have received your letter of August 2.

You referred initially to a meeting held by the Community Affairs and Housing Committee of the Westchester County Board of Legislators. Your complaint is that the Committee "failed to include key statements made during that meeting in the minutes."

In this regard, §106 of the Open Meetings Law pertains to minutes of meetings of public bodies and contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 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 on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said at a meeting or that minutes must include reference to each statement made during a meeting. Although a public body may choose to prepare expansive minutes, I

believe that minutes must only include the kinds of information described in the language quoted above. I point out that it has been held that anyone can use a portable tape recorder at an open meeting of a public body [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)]. As such, to acquire an accurate account of statements made at meetings, a tape recorder could be used.

You also referred to a request for minutes of meetings of the Board of Trustees of the Westchester Library System. Although some of the minutes that you requested were disclosed, others apparently were not made available.

In my opinion, minutes of the board of trustees of a library system must be prepared and made available in accordance with the Open Meetings Law. Section 260-a of the Education Law states in part that "[e]very meeting...of a board of trustees of a public library system, cooperative library system, public library or free association library, shall be open to the public" and that "[s]uch meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law." Article 7 of the Public Officers Law is the Open Meetings Law. Therefore, a library board of trustees is subject to the requirements of that statute.

Further, subdivision (3) of §106 of the Open Meetings Law 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."

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."

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 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2128

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 17, 1992

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 August 6 and the materials attached to it.

Your inquiry relates to a lawsuit brought against members of the Newburgh Town Board and its "indemnification law". You referred to §105.5 of that law, which states that:

> "The determination of an issue of whether or not an employee was acting within the scope of his public employment or duties at the time of the occurrence, act or omission giving rise to a claim, shall be made by the Town Board, on advice from the Town Attorney or Attorney for the Town. Any such determination shall be subject to review by a court of competent jurisdiction in the manner prescribed by law."

In conjunction with the foregoing, you asked whether the Town Board is "required to vote to make a determination" under §105.5 and whether such a vote can "take place in an executive session." You also referred to the Board's practice of carrying out motions to enter into executive session by describing the subject matter to be discussed only as "litigation."

In this regard, I offer the following comments.

First, since §105.5 of the indemnification Law requires that a "determination...shall be made by the Town Board...", I believe that a vote must be taken by the Board to make such a determination. Further, such a vote must, in my view, occur during a meeting of the Town Board.

The Open Meetings Law is applicable to public bodies, and §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 town board is clearly a public body and may conduct public business only when a quorum is present at a meeting.

Quorum requirements are found in §41 of the General Construction Law, which states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board 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."

Based upon the language quoted above, a town board cannot in my opinion carry out its powers or its 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. Further, it is my view that a public body has the capacity to act, i.e., to vote, only during duly convened meetings attended by at least a majority of its total membership. I point out, too, that §63 of the Town Law states in part that "[e]very act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board."

With respect to voting in executive session, §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 addition, §106(2) of the Open Meetings Law makes reference to minutes of action taken during executive sessions. Based upon those provisions, I believe that a public body may vote during a proper executive session, unless the vote involves the appropriation of public monies.

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

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2129

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 18, 1992

Ms. Leslie Farhangi
[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. Farhangi:

As you are aware, I have received your letter of August 10 and the materials attached to it. You have sought assistance and comment concerning alleged violations of the Open Meetings Law by the Town Board of the Town of North East.

In your letter, you summarized a series of "potential violations" of the Open Meetings Law. Because several of those alleged violations involve similar or related issues, the following paragraphs will contain general commentary. In addition, 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.

By way of background, it is noted at the outset that the definition of "meeting" 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 a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law.

However, in order to constitute a valid meeting, I believe that all of the members of a public body must be given reasonable notice of a meeting. Relevant in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. The cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board 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."

Based upon the language quoted above, a public body, such as a town board, 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. Therefore, if, for example, three of five members of a public body meet without informing the other two, even though the three represent a majority, I do not believe that they could vote or act as or on behalf of the body as a whole; unless all of the members of the body are given reasonable notice of a meeting, the body in my opinion is incapable of performing or exercising its power, authority or duty.

Similarly, although a town supervisor has a variety of powers and duties conferred by §29 of the Town Law, I do not believe that a supervisor may act unilaterally on behalf of the town board when the issue falls within the board's power or authority. As stated in §63 of the Town Law: "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board."

With respect to executive sessions, I point out that every meeting of a public body must be convened as an open meeting, and 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. Therefore, 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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §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.

While reference is made to motions to conduct executive sessions in the minutes that you forwarded, the minutes do not indicate the reasons for conducting executive sessions. Again, a motion to enter into executive session must indicate the basis for so doing.

In addition, as stated above, the grounds for entry into executive session are limited. In my opinion, a discussion of legislation would not fall within any of the grounds and a discussion of that topic must be conducted in public.

A related issue involves executive sessions held to discuss litigation. The provision that deals with litigation is section 105(1)(d) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply 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)].

Therefore, if a public body is not a party to "proposed, pending or current litigation", I do not believe that it could conduct an executive session pursuant to §105(1)(d).

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, 444 NYS 2d 44, 46 (1981), emphasis added by court].

You also criticized the appointment by the Town Board of a new member to the Planning Board, rather than reappointing a person who had expertise and significant public support. Although that issue involves the extent to which elected officials represent the views of members of the public, it is largely unrelated to the Open Meetings Law.

Lastly, with regard to public participation at meetings, 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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit 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 answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law, §63), 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 the 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
Executive Director

RJF:jm

cc: Town Board
Nancy Lewis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7298
OML-AO-2130

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 19, 1992

Ms. Julianne Russell
Secretary
Board of Trustees
Julia Butterfield Library
Morris Avenue
Cold Spring, NY 10516

The staff of the Committee on 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. Russell:

I have received your letter of August 12 in which you raised questions concerning the Freedom of Information Law and the Open Meetings Law in relation to the Julia Butterfield Library and its Board of Trustees.

By way of background, you wrote that the Julia Butterfield Library, an association library, was established through Julia Butterfield's will in 1913. The Library's income is derived from investment of monies in the will and public funding, which accounts for approximately 43% of its budget. As a result of the recent elimination of a position "due to financial constraints", you have received requests for the last two annual budgets, the Library's charter, a financial report and a budget statement.

In relation to the foregoing, you raised the following questions:

> "1. What is the difference between an Association Library and a Public Library?
>
> 2. What are our legal obligations for providing these documents and others, including minutes of the Board, first as an Association Library with the above cited funding and secondly, under the provisions of the Freedom of Information Act?
>
> 3. What are our legal responsibilities for informing the public of our meetings,

advertising and holding open meetings, and putting the public on the agenda?

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of 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."

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Cold Spring within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253

> of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law. This is not suggest that you could not disclose all or part of the records sought, but rather that the records are not subject to disclosure under the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to association libraries has arisen in other instances, perhaps because a companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states 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, and 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 news media at least one week prior to such meeting."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with that statute.

I point out that the Open Meetings Law has been renumbered since the enactment of §260-a of the Education Law and that §104, formerly §99, deals with notice of meetings. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

When read in conjunction with §260-a of the Education Law, if a meeting is scheduled at least a two weeks in advance, notice must be given to the news media and posted at least one week prior to the meeting. If a meeting is scheduled at least one week but less than two weeks in advance, notice of the time and place must be given to the news media and to the public by means of posting 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, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

With respect to minutes, §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."

In view of the foregoing, I believe 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, but the language of section 106(3) is clear, in that minutes must be made available "within two weeks of the date of such meeting."

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 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Lastly, nothing in the Open Meetings Law pertains to agendas or "putting the public on the agenda". Further, with regard to public participation at meetings, 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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit 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 answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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 the 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 OML-AO-2131

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 20, 1992

Mr. Paul D. West, Sr.
[redacted]

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

Dear Mr. West:

I have received your letter of August 12 concerning the notice requirements imposed by the Open Meetings Law and the enforcement of that statute.

In this regard, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

With respect to the enforcement of the Open Meetings Law, although the Committee on Open Government is authorized to provide advice concerning the Law, neither the Committee nor any other agency is empowered to enforce its provisions. However, §107(1) of the Open Meetings Law states in part that:

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

I hope that I 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: Ann M. Adams, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2132

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 21, 1992

Mr. Wm. Scott Copp
[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. Copp:

I have received your letter of August 14 and the materials attached to it.

In your capacity as president of an association of property owners, you wrote that the Zoning Boards of Appeals of the Village of Sodus Point "conducts all of its discussion on applications in executive session." If that practice is inconsistent with law, you expressed the hope that "the State will step in to take corrective action if it can."

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. While the Committee cannot compel a public body to comply with the Open Meetings Law, it is my hope, as in this instance, that advice rendered by this office serves to enhance compliance with and understanding of that statute.

Second, with respect to the issue and 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. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of

appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law. Further, due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108(1). Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a zoning board of appeals must deliberate in public.

It would be rare in my opinion that any of the grounds for entry into executive session could properly be asserted when a zoning board of appeals deliberates with regard to an application.

I hope that I 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

FOIL-AO-2133

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 21, 1992

Mr. John T. Doherty
Staff Writer
Syracuse Herald-Journal
Clinton Square
P.O. Box 4915
Syracuse, NY 13221-4915

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

Dear Mr. Doherty:

I have received your letter of August 14 in which you requested an advisory opinion concerning practices of the Village of Manlius Board of Trustees relative to the Open Meetings Law.

By way of background, you wrote that the Board routinely enters into executive sessions following discussion of agenda items and cites "personnel" as the basis, "without further explanation." It is your understanding that various topics have been discussed under the "personnel" exception, including the purchase of fire department vehicles, public works and traffic matters, and you questioned the propriety of the executive sessions. In addition, you raised a question concerning the ability of the Board to engage in "votes taken over the telephone when the board is not in session."

In this regard, it is noted at the outset that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Perhaps the most frequently cited ground for entry into executive session is the basis that is the focus of your inquiry, the so-called "personnel" exception. Although it is used often, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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).

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 that discussions relating to budgetary matters, purchasing and the like, could appropriately be discussed during an executive session.

In addition, due to the presence of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

With respect to casting votes by phone, I point out initially that there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone. However, a series of communications between individual members or 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" [see Open Meetings Law, §102(2)] refers to entities that are required to conduct public business by means of a quorum. In this regard, the term "quorum" is defined in §41 of the General Construction Law,

which has been in effect since 1909. The cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board 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."

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 reasonably 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, §102(1) of the Open Meetings Law defines the term "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 sny see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the 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 be performed in an open and public manner and that the citizens of this state be fully aware

> of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

In sum, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they could validly conduct meetings by means of telephone conferences, vote or make collective determinations by means of telephonic communications.

As you requested and in an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be sent 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: Hon. Angelo Albanese, Mayor
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2134

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

August 21, 1992

Mary Zysk, Alderman
City of Little Falls
Common Council
659 E. Main Street
Little Falls, NY 13365

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

Dear Alderman Zysk:

I have received your letter of August 10 in which you raised questions concerning the Open Meetings Law.

By way of background, you wrote that the City of Little Falls Civil Service Commission held a meeting in City Hall on August 3, but that "[n]o prior notice of this meeting was given to the public." When you contacted the Commission's secretary to discuss the matter, you were informed that the Commission is "exempt" from the Open Meetings Law, "since most of their discussions and actions concerned personnel matters."

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

> "1) Does the Open Meetings Law exempt certain committees, Commissions or Boards of a governmental unit?
>
> 2) Was this meeting considered illegal in accordance with the Open Meetings Law?
>
> 3) If this was an illegal meeting, is the action taken during the meeting considered null and void?"

In this regard, I offer the following comments.

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

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

Based upon the language quoted above, the Open Meetings Law generally includes within its scope state and municipal legislative boards, commissions and the like, as well as committees and subcommittees consisting of members of those entities. Further, in view of the provisions of Article II, Title B of the Civil Service Law, a municipal Civil Service Commission in my opinion clearly constitutes a public body subject to the Open Meetings Law. The only "governmental units" that could be considered exempt from the Law would likely involve those operating in the judicial branch [see Open Meetings Law, §108(1)] and in rare circumstances in which, due to their functions, certain entities engage in matters made confidential by state or federal law that would not be applicable in this instance.

Second, it is noted that the definition of "meeting" 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)].

Third, even when the subject matter to be considered at a meeting could be discussed in executive session, a meeting must in my opinion be convened open to the public and preceded by notice.

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, 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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §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.

Fourth, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

Fifth, one of the reasons that is frequently asserted to conduct an executive session is that the discussion pertains to personnel matters. Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §105(1)(f) are considered.

Lastly, based upon the preceding analysis, it appears that the meeting in question was held in a manner inconsistent with the Open Meetings Law. However, I believe that action taken at the meeting would remain valid unless and until a court determines to the contrary. With respect to the enforcement of the Open Meetings Law, §107(1) of the Open Meetings Law states in part that:

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

However, that provision also states that:

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Civil Service Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

2135
OML-AO

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 8, 1992

Ronald D. Gallantier
[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. Gallantier:

I have received your letter of August 20, as well as written materials and a tape recording of a portion of a meeting of the Nassau Town Board.

As I understand your letter, on August 6 a meeting was held in the Supervisor's office, ostensibly by the Town's Highway Committee. However, the Supervisor, three other members of the Town Board, and two members of the Highway Committee were present. You wrote that there was no public notice of the meeting and questioned the legality of the meeting.

According to the tape recording, the Highway Committee, not the Town Board, scheduled the meeting. Although it was public, there was apparently no notice to the effect that the Town Board would be present. The tape indicates that one person, presumably a member of the Board, said that no decisions were made, perhaps inferring that the absence of an intent to make decisions would remove the gathering from the Open Meetings Law. Relevant in my view is a document entitled "Scope of Projects" that appears to have been prepared by the Highway Committee. At the end of the document is a note addressed to Town Board members, stating that: "[t]here will be a meeting to begin reviewing the above returns August 6th at 7:00 p.m. at the Town Hall.

In this regard, I offer the following comments.

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

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

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

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

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 a town board gathers to discuss public town business, in their capacities as board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

If a majority of the members of a public body gather to engage in a social function, for example, and if there is no intent to discuss public business, I do not believe that the Open Meetings Law would be applicable. However, if the same people gather with an intent to discuss public business, collectively, as a body, such a gathering would in my view be a meeting that falls within the requirements of the Open Meetings Law.

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)], and that in a recent decision, it was held 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 Highway Committee, I believe that it was a meeting of the Town Board, assuming that a quorum of the Board was present for the purpose of conducting public business.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media 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, the

notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2136

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 8, 1992

Mr. Gerald L. Goodman
Ms. Muriel B. 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 Ms. Goodman:

I have received your letter dated August 13, which is postmarked August 19.

According to your letter, you learned that the members of the Town of Phelps Planning Board and Zoning Board of Appeals received letters from the Town Attorney "confirming a joint meeting with the Town Board..." You wrote that the meeting was to be held "to review the duties of the Boards during an executive meeting."

You questioned the propriety of the meeting in question and requested the "rules and regulations" concerning open meetings, as well as those involving the duties and responsibilities of a town attorney.

In this regard, by way of background, I point out 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).

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 a public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

It has also 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)], and that in a recent decision, it was held 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 an official who was not a member of the city council, the city's

attorney [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the gathering in question might have been called by the Town Attorney, I believe that it was a meeting, assuming that a quorum of a public body was present for the purpose of conducting public business.

Further, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media 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, 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 may be aware, every meeting must be convened as an open meeting, and §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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. From my perspective, a discussion of duties of public bodies would not fall within any of the grounds for entry into executive session.

Lastly, enclosed are copy of the Open Meetings Law and "Your Right to Know", which describes the provisions of both the Open Meetings Law and the Freedom of Information Law. With respect to the duties of a town attorney, although §20(2) of the Town Law refers to the authority to establish an office of town attorney or employ an attorney, I am unaware of any statute that specifies the duties of town attorneys. In general, however, I believe that town attorneys are employed to advise and or represent a town as a public corporation.

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 Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7320
OML-AO-2137

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 10, 1992

Ms. Jeannette Armstrong
Springfield Town Clerk
P.O. Box 235
Springfield Center, NY 12468

The staff of the Committee on 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. Armstrong:

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

The issue that you raised involves the inclusion of reference to a discussion in minutes of a meeting that you prepared in your capacity as Town Clerk of the Town Springfield. The correspondence indicates that Town Board meetings are scheduled to begin at 7 p.m. The discussion in question began at that time, but before the meeting was officially called to order, concerning a refund of a boat slip reservation that was effectively revoked. At the end of that discussion, a motion was made and seconded to raise the issue again after the arrival of the Town Attorney. You wrote that the Supervisor said "all in favor? Passed" and you added that "[a]ll did not vote but the Supervisor said passed so it must have been the majority."

Nevertheless, the Supervisor has "directed [you] to strike everything written before the call to order at 7:40 p.m." In a related issue, you were told to strike a paragraph in the minutes concerning a zoning matter, even though a tape recording of the meeting indicates that "three of the Board members were involved in an important discussion that lasted several minutes."

The question is whether the deletions from the minutes ordered by the Supervisor must be made.

In this regard, I offer the following comments.

First, on the basis of correspondence, it is clear that the Board was scheduled to meet at 7 p.m. and that it began its deliberations, as a body, at that time. From my perspective, whether or not the meeting was "officially" called to order at that time is largely irrelevant. To characterize the gathering as

something other than a meeting because there was no call to order would, in my view, place form over substance in a manner inconsistent with the Open Meetings Law. Further, a motion was made and carried during the period prior to the official call to order.

I point out 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).

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 a public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. In this instance, if the Board intended to convene at 7 p.m. and a majority did so for the purpose of discussing public business, I believe that the meeting began at that time, even though it might not officially have been called to order until 7:40.

Second, §30 of the Town Law is entitled "Powers and duties of town clerk" and states in part that the clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting." Therefore, as town clerk, I believe that you have a responsibility to maintain minutes that are "complete and accurate". Further, a town supervisor does not in my opinion have the authority to alter minutes or to direct the town clerk to make deletions from minutes. In short, the preparation of minutes is a "power and duty" of a clerk, not a supervisor or a board.

Further, even if the minutes did not make reference to the matters of discussion to which you alluded, it is noted that a tape recording of an open meeting is a record accessible under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, Dec. 27, 1978). In addition, it has been held that any person may tape record open meetings [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)].

Lastly, with respect to a record of votes by the Board, §87(3)(a) of the Freedom of Information Law requires that each agency, such as a town board, shall maintain "a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, when votes are taken on motions, for example, a record must be prepared, generally as part of the minutes, that indicates how each member cast his or her vote. Similarly, §63 of the Town Law states in part that "[t]he vote upon every question shall be taken by ayes and noes..."

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 2138

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 10, 1992

Ms. Betty June 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 Ms. Siegel:

I have received your letter of August 27 in which you requested an advisory opinion concerning events that occurred at a recent meeting of the Babylon Board of Education, to which you were recently elected.

Based upon your commentary, I believe that there are several issues, and I will address them separately.

First, you wrote that prior to the meeting, notice was given to the effect that the Board would meet in executive session at 7:30 p.m., and that the "public meeting would begin at 8:15 in the High School Library."

In this regard, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. 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, §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.

In addition, it has been consistently advised that a public body, in a technical sense, 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 an open 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. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

Second, according to your letter, the major topic under consideration involved a vacancy in the position of principal at a grade school. You wrote that the President of the Board "stated that we are in the process of looking for an appropriate person, that in all probability we would not have a new principal before school opened, and that we will be interviewing applicants." Following the completion of agenda items, the President asked for a motion to adjourn. The motion was seconded and carried. However, you wrote that "[h]e then said we are going into Executive Session." Notwithstanding the foregoing, you wrote that the "public and the Board socialized for quite some time", and that after the public left, the Board entered into an executive session, which lasted for two hours. During the executive session, a candidate was interviewed for the position of principal. Following the interview, the President asked that the Board vote to offer the position to the applicant. You objected, stating that the vote

must be taken in public. You were told, however, that "since Executive Session is part of a general meeting, the public session is still going on." The Board "then went into an unlit room with no one present and voted." It is your view that the foregoing procedure is "undesirable", for it "antagonizes the public."

Assuming that the facts that you presented are accurate, at the very least, it appears that the public was misled. Further, it is unclear whether the public was clearly aware that an executive session was about to be held or of the basis for conducting an executive session. As indicated earlier, a motion to enter into an executive session must state the reason, which apparently did not occur.

In my opinion, if a motion to adjourn has been passed, that signifies the end of a meeting. Any new convening or collective discussion by a public body would represent a new meeting.

I agree with your contention that the Board, based upon judicial interpretations of §1708(3) of the Education Law, could only have voted during an open meeting. I also agree that, following a proper executive session, the Board could have returned to an open meeting, even if no members of the public were present, for the purpose of taking action. Nevertheless, in the situation that you described, despite the apparent public interest in the subject, the public was given no indication that an interview would be conducted or that there was a possibility that action would be taken at that meeting to hire a new principal. From my perspective, irrespective of whether the Board's activities were technically legal, its actions were in my view inconsistent with the spirit and intent 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-7326
OML-AO-2139

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 11, 1992

Mr. Clifford Richner, Publisher
Richner Publications, Inc.
379 Central Avenue
Lawrence, NY 11559

The staff of the Committee on 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. Richner:

I have received your letter of August 31, as well as the materials attached to it. You have sought an advisory opinion concerning issues that have arisen in the Village of Hewlett Bay Park. One involves the denial of a request made under the Freedom of Information Law; the other pertains to the Open Meetings Law and the propriety of an executive session held by the Village Board of Trustees.

By way of background, you wrote that the Village Board "is currently considering whether to take, by eminent domain, the land commonly known as the Lawrence County Day School (LCDS) property." You added that:

> "This acquisition is controversial because the property was purchased by a group which intends to operate a parochial high school for Orthodox Jewish girls on the site. The Herald has taken the editorial position that the motivation for the proposed condemnation is not a suddenly recognized need for parkland in the village, but rather a desire to keep the Orthodox out.
>
> "The Village conducted a survey of its residents soliciting their opinion on what should be done regarding the LCDS property."

Having requested "surveys completed by the residents", the Village denied access in response to your initial request and the ensuing appeal, citing §87(2)(g) of the Freedom of Information Law in both instances.

In this regard, I offer the following comments.

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

Second, §87(2)(g) pertains to "inter-agency" and "intra-agency" materials. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of 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."

Therefore, an agency is an entity of state or local government. Based on the definition of "agency", "inter-agency materials" would involve written communications between or among officials of two or more agencies; "intra-agency materials" would consist of communications between or among officials within an agency. When a member of the public, acting in that capacity, communicates with government, the communication, in my view, could not be characterized as "inter-agency or intra-agency materials", for that person neither is nor represents an agency.

In the context of your request, the records sought, "surveys completed by the residents", would have been exchanged or communicated between an agency, the Village, and residents. Since a resident would not constitute an agency, a response to a survey by a resident would fall outside of the scope of §87(2)(g), for it would not consist of inter-agency or intra-agency material.

In a case dealing with dissimilar facts but the same principle as that described above, the court referred to an advisory opinion prepared by this office concerning access to communications between a New York City agency and "outside parties" with whom the agency was negotiating. The court agreed with the opinion that §87(2)(g) was "not relevant because the communication sought is not between officials within an agency of the City or among officials of different agencies of the City" (Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Similarly, in rejecting a denial based upon §87(2)(g) involving correspondence between the New York City Bureau of Labor Services and private child care institutions, it was determined that those institutions "cannot satisfy the term 'agency' as defined in Public Officers Law §86(3)..."(Lowry v. Bureau of Labor Services, Supreme Court, New York County, March 9, 1984).

Based upon the foregoing analysis, I do not believe that §87(2)(g) is applicable as a basis for denial.

I am unfamiliar with the residents' responses to the survey. If, for example, they include names or addresses of those who responded, I believe that those identifying details could be withheld on the ground that disclosure would result an "unwarranted invasion of personal privacy" under §87(2)(b) of the Freedom of Information Law. If identifying details are included in the responses, they could be deleted from the records pursuant to §89(2)(a), and the remainder of the responses would be available, for no other ground for denial would be in my view be applicable. If no identifying details are included in the responses, I believe that the responses would be available in their entirely.

The second issue relates to the same controversy. You wrote that on August 18, the Board held a special meeting to discuss the LCDS property, and that, on the advice of its attorney, the Board entered into executive session on the ground that it would discuss "proposed, pending or current litigation." You added, however, that "[t]he only litigation cited was the application by the former owners of LCDS to construct swimming pools on the property", and that "[g]iven that the property has since changed hands and the new owners have not indicated any desire to construct swimming pools, citing this case as the basis for executive session was merely a ruse to avoid public scrutiny of their deliberations". You contended further that "to allow a government body to go into executive session when it is discussing a controversial subject on the theory that its decision is likely to provoke litigation in the future, would undermine the guiding purpose of the law..." You indicated that the village attorney also mentioned "the exemption for the proposed acquisition of real property."

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that the subject matter may properly be considered during executive sessions. 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §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.

One of the grounds for entry into executive session is §105(1)(d), which permits a public body to conduct 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 is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meeting' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply 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)].

Therefore, unless the Board was discussing litigation strategy, it does not appear that §105(1)(d) could justifiably have been cited to conduct an executive session. Further, as indicated in the passage quoted above, the possibility that litigation might ensue would not constitute a valid basis for entry into executive session.

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, 444 NYS 2d 44, 46 (1981), emphasis added by court].

Lastly, since the Village Attorney alluded to a provision involving discussions relating to real property transactions, I point out that the exception concerning issues pertaining to such transactions is limited. Specifically, §105(1)(b) permits a public body to enter into an executive session to discuss:

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

Therefore, a public body may discuss the proposed acquisition of real property, for example, behind closed doors "only when publicity would substantially affect the value" of the property. Under the circumstances described in your correspondence, the location of the property in question and various issues relating to it are well known to the public. Consequently, I do not believe that publicity would have affected the value of the property or that §105(1)(h) could properly have been asserted as a basis for entry into executive session.

In an effort to enhance compliance with and understanding of the Freedom of Information Law and the Open Meetings Law,and to obviate the need to engage in litigation, 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:pb
cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2140

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 11, 1992

Thomas J. Robarge
[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. Robarge:

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

One of the attachments is a memorandum prepared by the Superintendent of the Hermon DeKalb Central School, in which he indicated that he invited Board members and others to his home "to discuss some of our plans, concerns, and have some coffee and dessert". A second attachment, according to your letter, refers to a report given by three members of the Board at the "get together" described above. You wrote that the third attachment consists of notes prepared by the Board president describing the progress that occurred at the gathering in question.

You characterized the gathering as an "unadvertised private meeting" and questioned its legality.

In this regard, I offer the following comments.

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

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the

purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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 a public body gathers to discuss public business, in their capacities as members of a public body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

If a majority of the members of a public body gather to engage in a social function, for example, and if there is no intent to discuss public business, I do not believe that the Open Meetings Law would be applicable. However, if the same people gather with an intent to "have some coffee and dessert" and discuss public

business, collectively, as a body, such a gathering would in my view be a meeting that falls within the requirements of the Open Meetings Law.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

Lastly, 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, it, 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.

Further, I do not believe that a person'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 person'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 school officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Richard J. Nelson, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2141

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 15, 1992

Mr. John J. Johnson
[redacted]

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

Dear Mr. Johnson:

I have received your letter of August 29 in which you raised a number of issues relating to the Mechanicville School District. Many involve the implementation of the Open Meetings Law by the Board of Education.

It is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Open Meetings Law, and I will offer advice concerning the issues that you raised concerning that statute. Those issues pertain to notice requirements, so-called "agenda meetings" held by the Board, executive sessions, and minutes of executive sessions. You suggested that executive sessions have been held to discuss, among other things, a surplus and the manner in which public monies should be allocated.

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, §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 majority of a board of education 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, if the Board intends to gather to discuss public business prior to its scheduled meeting, and if a majority of its members is present, such a gathering in my view would be a "meeting" that falls within the requirements of the Law that should be preceded by notice.

Second, §104 of the Open Meetings Law pertains to notice of meetings 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."

Based on the foregoing, it is clear that notice of a meeting must include reference to the "time and place" of a meeting. Therefore, the location of a meeting must be stated in the notice. Further, any such notice must be "conspicuously posted in one or more designated public locations." Therefore, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. Finally, to meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

Third, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Fourth, although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction

with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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 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 §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 §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 that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Lastly, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, §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.

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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §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.

As you requested, the news clippings attached to your letter are enclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2142

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 17, 1992

Frederick B. Cohen
Vice President & General Counsel
Independent Health
777 International Drive
Buffalo, NY 14221

The staff of the Committee 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. Cohen:

I have received your letter of August 31 in which you seek a "decision" concerning the status under the Open Meetings Law of a Technical Advisory Committee ("the Committee") created by Chapter 501 of the Laws of 1992.

In good faith, it is noted that, following the receipt of your correspondence, I was contacted by a representative of the State Insurance Department, who asked that I wait to respond until receipt of his points of view concerning the issue. A letter from the Department prepared by Alan Rachlin, Supervising Attorney, was received by this office on September 15. A copy is enclosed.

I point out, too, that the Committee on Open Government is authorized to advise with respect to the Open Meetings Law. The Committee cannot render a binding decision or rule on a matter.

With regard to the issue, according to a memorandum attached to your letter, it is your view that the Technical Advisory Committee is a public body required to comply with the Open Meetings Law; Mr. Rachlin has taken a contrary position. By way of background, §6 of Chapter 501 added a new §3233 of the Insurance Law. Subdivision (a) of §3233 requires the Superintendent of Insurance to promulgate regulations by October 1 of this year "to assure an orderly implementation and ongoing operation of the open enrollment and community rating" as mandated by law. Subdivision (b) deals with the creation of the Committee and states in part that:

> "Prior to adopting such regulations the superintendent shall convene a technical advisory committee to provide advice and recommendations to the superintendent on issues including, but not limited to, voluntary reinsurance, pooling, risk sharing, the moderation of initial community rates as compared to prior rates, or premium stabilization methods."

The remainder of subdivision (b) involves the membership of the Committee, which consists of the Superintendent or his designee, who serves as chair, two members appointed by the Superintendent, and three members each appointed by the Temporary President of the Senate and the Speaker of the Assembly, for a total of nine members. The members appointed by the legislative leadership must be representatives of commercial or not-for-profit health insurers, health maintenance organizations and purchasers of insurance.

In brief, it is your view that the Committee, based largely upon §41 of the General Construction Law, which pertains to quorum requirements, and the holding in MFY Legal Services v. Toia [93 Misc. 2d 147, 402 NYS 2d 510 (1977)], is a public body subject to the Open Meetings Law, and that the status of the Committee may be distinguished from several judicial decisions in which it was held that various advisory bodies fell beyond the requirements of the Open Meetings Law.

Mr. Rachlin has taken a contrary view, for he contends that the Committee "does not meet the requirements" of §41 of the General Construction Law, that it is "not charged with any public duty", for any member of the public could comment with respect to proposed regulations, and that the Committee is not a public body. He added that you appear to have assumed that "the Superintendent cannot act prior to obtaining advice and recommendations from" the Committee, but that the statute "does not require" that the Committee "provide advice and/or recommendations by or on a particular date". In addition, Mr Rachlin wrote that: "The statute does not require the Superintendent to receive advice and or recommendations from the TAC before so acting nor does the statute prohibit the superintendent from acting without receiving such advice and/or recommendations. In addition, the advice received from the TAC prior to final adoption of the regulation has no more weight than that received from any member of the public."

In this regard, I offer the following comments.

First, from my perspective, if Mr. Rachlin's views are accurate, subdivision (b) of §3233 would be all but meaningless. In my opinion, in enacting subdivision (b), the State Legislature must have intended that the Committee perform some function, and that its members should have some influence in relation to the regulations to be promulgated above and beyond that of the public generally, particularly since a majority of the members must

represent interests directly affected by the Insurance Law and regulations. It is noted that §96 of McKinney's Statutes states in part that: "Statutes always have some purpose or object to accomplish...and a basic and necessary interpretation of a statute is the general spirit and purpose underlying its enactment." That section also states that "...the legislative intent is to be effectuated; not frustrated, and a particular provision of a statute is not to be given a special meaning at variance with the general purpose, unless it is clear that the Legislature so intended." Similarly, §92 of McKinney's Statutes states that "...no statute may be construed so strictly as to result in perversion of legislative intent", and §94 provides that "...the literal meaning of a statute may be avoided to effectuate the legislative intent. A strict literal construction is not always to be adhered to, and the literal wording of a statute may be required to give way to the expressed object of the lawgivers."

To suggest that the Superintendent "must convene" the Committee, which by statute is designated "to provide advice and recommendations to the superintendent" but not require the receipt of its advice prior to the adoption of regulations would in my view represent a perversion of the statute and potentially render any meaning that it might have a nullity. Similarly, in view of its functions in relation to the adoption of regulations, to suggest that the Committee is not required to advise and recommend by a particular date would, when considering the first sentence of subdivision (b), conflict with its apparent intent. In my opinion, the plain meaning of that sentence involves two requirements: first, that prior to promulgating regulations, the Superintendent must convene a Technical Advisory Committee consisting of a membership described in the statute; and second, that prior to promulgating regulations, the Committee must provide advice and recommendations pertaining but not limited to the subjects identified in the statute. I believe that such an interpretation would give reasonable effect to the language and intent of subdivision (b).

Second, if my contentions are accurate, the Committee would constitute a public body subject to the requirements of the Open Meetings Law. 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."

I am mindful of the decisions cited by Mr. Rachlin in which the courts have held in several contexts that advisory bodies are

not public bodies and that the Open Meetings Law is inapplicable to meetings of those kinds of entities. However, none of those decisions involved entities created by statute, and none were designated by statute to carry out any particular duty. More analogous in my opinion is a decision cited earlier, MFY Legal Services, supra, which also involved an advisory body created by statute. In that case, it was found that "the giving of advice by the Committee either on their own volition or at the request of the Commission is a necessary governmental function for the proper actions of the Social Services Department (id., 511-512). In the case of the Technical Advisory Committee, I would contend, based upon §3233 of the Insurance Law, that it performs a necessary governmental function, for I believe that, prior to the adoption of regulations, the Superintendent must seek and the Committee must provide advice and recommendations. While the Committee has no authority to make decisions or to bind the Superintendent or the Insurance Department in any way, and while the Superintendent is not obliged to heed its advice, both the Superintendent and the Committee must carry out statutory duties prior to the adoption of regulations. If my contention is accurate, that the rendition of advice by the Committee, whether accepted or rejected by the Superintendent, is a necessary preliminary to taking action, i.e., to the promulgation of regulations by the Superintendent, the Committee would be involved in conducting public business and performing a governmental function.

With respect to a quorum requirement or the applicability of §41 of the General Construction Law, that statute provides that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board 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."

Irrespective of the absence of authority to take any kind of binding action, the Technical Advisory Committee consists of nine members, at least one but not more than three of whom are public officers, at least six and up to eight are members of the public.

By statute, the members have been given a responsibility to perform a public duty, to provide advice and recommendations to the Superintendent regarding subjects identified in that statute. Further, since the Superintendent is required to "convene" the Committee, it appears that the Committee may exercise its statutory function only collectively, as a body. If the foregoing is accurate, I believe that the Technical Advisory Committee could carry out its statutory duties only at meetings during which a quorum is present and that §41 of the General Construction Law would be applicable.

Based upon the preceding analysis, it is my opinion that each of the components necessary to conclude that the Technical Advisory Committee is a "public body" is present and that it is, therefore, subject to the Open Meetings Law. Again, the views offered by Mr. Rachlin are in my view unduly restrictive and would render the statutory language pertaining to the Committee essentially ineffective.

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: Alan Rachlin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO 2143

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 17, 1992

Edna M. Verrilli
[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>

I have received your letter of September 2, in which you and other residents of the Town of Henderson "lodge[d] a formal complaint", and asked that the Committee on Open Government declare a meeting of the Town Board "be declared null and void and that any action taken at the meeting be declared null and void.

By way of background, you wrote that the Board held a special meeting on August 26, "for the sole purpose of dissolving the Town's Recreation Commission in violation of the open meetings law." You added that:

> "The meeting was called without legal notification to the general public. No legal notice of meeting was posted at any of the Town's locations for public notices. No legal notice of meeting was published in the official newspaper."

In this regard, I offer the following comments.

First, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

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

> shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media 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, 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 a public body to pay to place a legal notice prior to a meeting.

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

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

The same provision also states that:

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

A finding of a failure to comply with the notice requirements imposed by the Open Meetings Law, intentional or otherwise, would, in my opinion, be dependent upon the attendant facts. Further, I believe that action taken by a public body generally remains valid unless and until a court determines to the contrary.

Lastly, although the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law, it

has no power to enforce the law or to invalidate action taken by a public body.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7336
OML-AO 2143A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 18, 1992

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 September 1, and materials related to it. You have sought an advisory opinion concerning rights of access to materials requested from the Town of Newburgh.

The first aspect of the request involves minutes of executive sessions held to discuss litigation by the Newburgh Town Board, as well as "a delineation of 'all matters currently being handled by'" Gallagher and Bassett.

In this regard, §106(2) of the Open Meetings Law deals specifically with minutes of executive sessions and states that:

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

In addition, subdivision (3) of §106 provides that:

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

> available to the public within one week from the date of the executive session."

Based on the foregoing, when a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. It is noted, however, that if a public body merely 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 am unaware of whether the Board took action by means of formal vote at the executive sessions to which you referred. Again, if no action was taken, minutes need not have been prepared. Further, even if action was taken, there would be no requirement that the minutes include reference to statements by or conversations among the members or others. In short, minutes need not be so detailed as to contain reference to those kinds of commentary.

With respect to a "delineation" of matters being handled by a particular firm, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if no delineation exists, the Town in my opinion would not be required to create such a record on your behalf. However, for reasons to be discussed in conjunction with the second aspect of your request, I believe that records indicating the general nature of services for which a firm is retained or indicating services rendered would be available.

The second portion of the request involves vouchers for legal bills relating to certain litigation in which the Town is involved.

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. From my perspective, none of the grounds for denial could appropriately be asserted in conjunction with a claim that disclosure would be "strategically unsound".

Second, with regard to expenses incurred, as a general matter, 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. With specific 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 and other details to be discussed further 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, in Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the applicant ("petitioner") sought billing statements for legal services provided to the Board ("respondents") by a law firm. Since the statements made liable included "only the time period covered and the total amount owed for services and disbursements, petitioner contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". As in the situation in which you are involved, "[r]espondents maintain[ed] that releasing any additional information on the billing statement would jeopardize the client confidentiality protected by CPR 4503(a)...".

In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct

relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)

"There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters was not privileged...

"...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)...Therefore, Petitioner's request for disclosure of the fee, type of matter and names of parties to pending litigation on each billing statement must be granted."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys should 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
Executive Director

RJF:pb
cc: Doris Greene, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2144

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 21, 1992

Ms. Harriett Tangorra
[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. Tangorra:

I have received your letter of September 1 in which you requested an advisory opinion concerning the Herkimer Village Board of Trustees.

According to your letter, Mayor Carol Aiello convened an "informal meeting" of the Board of Trustees to discuss issues relating to a police officer who had recently been indicted. Following that gathering, you wrote that the Mayor contended that "the informal meeting on Sunday was not official and that no action was to take place and therefore, it's perfectly legal to meet with her board without notification to the public." You added that the Mayor stated "that it's legal to have a meeting that is closed to the public, if only executive session is on the agenda."

In this regard, it is noted that I spoke with Mayor Aiello on September 8 and explained the requirements of the Open Meetings Law in a manner consistent with the ensuing comments.

First, by way of background, it is emphasized that the definition of "meeting" [see Open Meetings Law, §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 informal

gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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 a public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Second, §104 of the Open Meetings Law pertains to notice of meetings 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, 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 a public body to pay to place a legal notice prior to a meeting.

Third, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

As I understand the circumstances, following the convening of an open meeting, an executive session could properly have been held. Section 105(1)(f) permits a public body to enter into an executive session to discuss:

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

As you requested, enclosed is a copy of the Open Meetings Law.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to Mayor Aiello and the Board of Trustees.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Hon. Carol Aiello, Mayor
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2145

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 21, 1992

Ms. Sharon L. Salvi
Pres. Mobile Home Assoc.
P.O. Box 788
Nassau, N.Y. 12123

<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. Salvi:

I have received your letter of August 24, which reached this office on September.

You referred to a meeting called by the Town of Nassau Highway Committee that was apparently attended by the Town Board, as well as a request for an advisory opinion on the subject from Mr. Ronald Gallantier. Since the issue in both correspondences involves the same situation, enclosed is a copy of the opinion prepared in response to Mr. Gallantier's inquiry.

In addition, I would like to offer the following remarks for purposes of clarification. Based on your letter, it appears to be your understanding that a public body must provide notice at least ten days prior to a meeting, that the notice must be "advertised", and that it should appear in a municipality's official newspaper. I direct your attention to page three of the opinion in which the provisions concerning notice of meetings are quoted. To reiterate, §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."

Therefore, 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.

There is no requirement in the Open Meetings Law that ten days notice be given prior to a meeting, and the Law indicates that a public body need not pay to place a legal notice in a newspaper. Since the Law does not specify which news media outlet should be given notice, it has been suggested that notice be given to those news media organizations that would most likely publicize that a meeting will be held or which would likely send reporters to cover 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:pb
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2146

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 22, 1992

Ms. Wanda McCabe
[redacted]

Mr. Chris Ferencsik
[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. McCabe and Mr. Ferencsik:

I have received your letter of September 7, in which you complained with respect to the manner in which the Mayor and Board of Trustees of the Village of Lindenhurst have implemented the requirements of the Open Meetings Law. You asked that this office "inform the Village Board how to conduct themselves within the boundaries of the Open Meetings Law."

In this regard, based on the contents of your letter, I offer the following comments.

First, by way of background, it is emphasized that the definition of "meeting" [see Open Meetings Law, §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 informal gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose

determination was unanimously affirmed by the Court of Appeals, stated that:

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

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 a public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Second, §104 of the Open Meetings Law pertains to notice of meetings 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, 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 a public body to pay to place a legal notice prior to a meeting.

Third, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my

view be appropriately held. 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).

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Since your letter refers to a discussion regarding litigation, I point out that §105(1)(d) of the Open Meetings Law permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply 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)].

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, 444 NYS 2d 44, 46 (1981), emphasis added by court].

Lastly, you referred to and enclosed an agenda of a meeting. In this regard, there is nothing in the Open Meetings Law that pertains to agendas or their status. Consequently, unless the Board of Trustees has adopted rules or procedures concerning the status or use of agendas, there is no provision of which I am aware that requires the preparation of an agenda, its contents, or that it must be followed.

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.

Enclosed for your review is a copy of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2147

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

September 25, 1992

Mr. Richard L. Taczkowski
Village Trustee
P.O. Box 306
North Collins, N.Y. 14111

<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. Taczkowski:

I have received your letter of September 11, in which you raised a series of questions concerning the Open Meetings Law.

As a new member of the Village of North Collins Board of Trustees, you wrote that you voted in the negative at a recent meeting on a motion to enter into executive session "because it was worded, as is our custom, 'to discuss personnel'." You added that your "right to vote 'No' and then participate in the executive session was questioned by the Clerk, though not by the Board."

In conjunction with the foregoing, you have sought the opinion of this office concerning the following questions:

> "a) Whether a majority vote must pass to enter into executive session,
>
> b) Whether a 'No' vote negates the right of a Board member to be present at and participate fully in an executive session,
>
> c) Whether 'to discuss personnel' is sufficient reasons for entering into executive session, and
>
> d) Whether 'final determinations' (please define) must be recorded in the minutes and how confidentiality can still be maintained."

In this regard, I offer the following comments.

By way of background, it is emphasized that the definition of "meeting" [see Open Meetings Law, §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 every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Notwithstanding a negative vote on a motion to enter into an executive session, I believe that any member of a public body has the right to attend an executive session. Section 105(2) of the Open Meetings Law states in part that: "Attendance at an executive session shall be permitted to any member of the public body..."

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981).

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 that discussions relating to public or budgetary matters, such as the

funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Lastly, in my view, a final determination generally is a final decision made by a public body or an officer, a decision upon which an agency or agency official relies in carrying out official duties. In the context of the Open Meetings Law, final determinations are generally contained within minutes. 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.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §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 §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 minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, even when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have include reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)]. Again, however, it is rare in my view that a determination made by a public would properly be withheld under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2148

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 9, 1992

Mr. Howard W. Ostrander
[redacted]

Ms. Leona Irwin
[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 Mr. Ostrander and Ms. Irwin:

I have received your letter of September 4, which, for reasons unknown, did not reach this office until September 17. You have asked for an "investigation" of various actions of Gilbertsville-Mt. Upton Board of Education and a clarification of its responsibilities under the Open Meetings Law.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advisory opinions concerning the Open Meetings Law. Although the Committee cannot conduct an investigation, I will attempt to provide clarification of the Law in the following remarks.

You referred to a meeting scheduled to begin at 6:30 p.m. on August 22, but which did not start until 7:30. At that meeting, the Board conferred with architects who are overseeing the construction of a new school building concerning bids for the drilling of a new well. The next meeting involved "the appointment of a clerk of the works for the new construction", and the applicants were interviewed in executive session. You have questioned the propriety of the executive session and wrote that you have protested several executive sessions held "for personnel reasons" for as long as three hours.

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, §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 informal gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

Second, §104 of the Open Meetings Law pertains to notice of meetings 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, 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 a public body to pay to place a legal notice prior to a meeting.

Third, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §105(1)(f) are considered. Interviews of persons who have applied for a position would in my opinion likely involve considerations of the "employment history...or matters leading to the appointment...of a particular person" that could be conducted in executive session.

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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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).

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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.

Enclosed for your review is a copy of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 2149

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 13, 1992

Hon. Gary L. Rhodes
Supervisor
Town of Henderson
RR1, Box 668
Henderson, NY 13650

The staff of the Committee on 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 Rhodes:

I have received your letter of September 24, which pertains to an advisory opinion prepared on September 17 in response to a complaint made by Ms. Edna Verrilli. You asked that I "compare" her allegations with the facts.

In short, Ms. Verrilli alleged that a meeting of the Henderson Town Board on August 26 was held without notice having been given. Nevertheless, attached to your letter is a memorandum "To Whom It May Concern" dated August 27 concerning the meeting in question in which you wrote that you "posted a notification of the meeting on the posting area of the Town office door which is the site for legal notice" and "notified the Watertown Daily Times and the Jefferson County Journal that a special meeting was going to be held."

Based upon the forgoing, it appears that you complied with the notice requirements imposed by §104 of the Open Meetings Law. To reiterate what was stated in the opinion addressed to Ms. Verrilli, §104 provides that:

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

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, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations. I also pointed out that the Open Meetings Law does not require a public body to pay to place a legal notice prior to 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2150

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 16, 1992

Michael J. Fogarty, IAO
Sole Assessor
Town of Newburgh
20-26 Union Avenue Extension
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. Fogarty:

I have received your letter of September 28 in which you raised a series of questions concerning the Open Meetings Law and the application of that statute to "Boards within the Executive Department."

Specifically, it is your observation that, after lengthy executive sessions, no minutes are recorded. Further, you wrote that it has been your view that "personnel topics were the only business that should be carried our in executive session", and that, following an executive session, a public body must reconvene "if only to close the meeting."

In this regard, I offer the following comments.

First, the Open Meetings Law applies equally to all public bodies, whether they are boards within the executive branch or entities of local government.

Second, by way of background, it is emphasized that the definition of "meeting" [see Open Meetings Law, §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 every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify eight grounds for entry into an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice, and although some issues involving "personnel" may appropriately be discussed during an executive session, other topics might be considered in private as well.

Third, the Open Meetings Law provides minimum requirements concerning the contents of minutes. 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."

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §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 §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

Lastly, in most instances, technically, I agree that a motion to adjourn should be made and approved during an open meeting. However, in others, there may be no need to do so. For example, if a sufficient number of members of a public body leave a meeting, thereby diminishing those present to less than a quorum, a meeting would end, even without a motion to adjourn.

Enclosed for your review are copies of the Open Meetings Law and "Your Right to Know", which describes that statute, as well as the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2151

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 20, 1992

Ms. Wanda McCabe
[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. McCabe:

I have received your letter of October 16 concerning a recent meeting of the Village of Lindenhurst Zoning Board of Appeals from which you were excluded. You have questioned your right to attend such meetings.

In this regard, 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. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law. Further, due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108(1). Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a zoning board of appeals must deliberate in public.

It would be rare in my opinion that any of the grounds for entry into executive session could properly be asserted when a zoning board of appeals deliberates with regard to an application.

You also raised a question concerning the Board's ability to reopen consideration of an application that had previously been denied. Since the advisory jurisdiction of the Committee on Open Government involves the Open Meetings and Freedom of Information Laws, I have neither the authority nor the expertise to answer that question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc : Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMLAO- 2152

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 20, 1992

Mr. Richard J. Nelson
Superintendent
Hermon-Dekalb Central School
Dekalb Junction, NY 13630

The staff of the Committee on 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. Nelson:

I have received your letter of September 25 in which you raised questions concerning the status of committees designated by the Board of Education and the steps that should be taken to ensure compliance with the Open Meetings Law.

In this regard, I offer the following comments.

First, it is noted that recent decisions indicate generally that ad hoc 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)]. Therefore, an advisory body such as a citizens' advisory committee would not in my opinion be subject to the Open Meetings Law.

Second, however, when a committee consists solely of members of a public body, such as a board of education, I believe that the Open Meetings Law is applicable. 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 §102(2) to include:

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

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 a committee of a board of education, 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, §41). As such, in the case of a committee consisting of three, for example, a quorum would be two.

Lastly, when a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct

executive sessions, as a governing body. With respect to notice, §104 of the Open Meetings Law requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

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-2153

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 20, 1992

Mr. William W. Watson
[redacted]

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

Dear Mr. Watson:

I have received your letter of September 30 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, a recent meeting of the City of Tonawanda Board of Education "was not posted". You added that the attorney for the School District "believes there is case law exempting school districts from [§104(2)] of the Open Meetings Law."

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and §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 on the foregoing, it is clear that a board of education constitutes a public body required to comply with the Open Meetings Law.

Second, §104 of the Open Meetings Law pertains to notice of meetings and requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

Lastly, I know of no case law that exempts boards of education from the requirement of the Open Meetings Law generally or §104 specifically.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Carl P. Mangee, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2154

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 20, 1992

Mr. Peter Bujanow
[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. Bujanow:

I have received your letter of September 30 in which you requested an advisory opinion under the Open Meetings Law in your capacity as a member of the Board of Education of the Ichabod Crane Central School District.

You wrote that it is your understanding that "a standing committee falls within the definition of 'public body'", and that, therefore, a meeting of a quorum of the members of a standing committee for the purpose of conducting public business is subject to the Open Meetings Law. The Board on which you serve consists of nine members and you seek to attend a meeting of a committee consisting of four of which you are not a member. A question has been raised as to whether the presence of additional Board members at meetings of standing committees would violate the Open Meetings Law, for in that situation, a majority of the entire Board would be present without providing notice of a Board meeting. As such, you asked whether there is "anyone who must be excluded from attending a School Board standing committee meeting."

In this regard, I offer the following comments.

First, it is noted that recent decisions indicate generally that ad hoc 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)]. Therefore, an advisory body such as a citizens' advisory committee would not in my opinion be subject to the Open Meetings Law.

Second, however, when a committee consists solely of members of a public body, such as a board of education, I believe that the Open Meetings Law is applicable. The phrase "public body" is defined in section 102(2) of the Open Meetings Law to include:

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

Although the original definition of "public body" enacted in 1976 made reference to entities that "transact" public business, the current definition as amended in 1979 makes reference to entities that "conduct" public business and added specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the definition of "public body", I believe that any entity consisting of two or more members of a public body would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Therefore, a standing committee of Board members in my view constitutes a public body subject to the Open Meetings Law that is separate and distinct from the Board of Education. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, section 41). As such, in the case of a committee consisting of four, for example, a quorum would be three.

Third, when a committee intends to gather to discuss public business, I believe that it is required to provide notice in accordance with §104 of the Open Meetings Law. Further, if a quorum of the committee is present for that purpose, such a gathering would in my view constitute a meeting of the committee that must be conducted in accordance with the Open Meetings Law.

If members of the Board other than members of a committee attend, their presence would not transform the gathering into a meeting of the Board, for those other members in my opinion would attend, and would have the right to attend, as members of the public. Stated differently, when members of the Board other than members of a committee attend a committee meeting, they would attend as members of the public. Presumably they would not participate as members of the committee. If that is so, and if there is no intent that all the Board of Education attend and participate as members of the Board, the presence of Board members

other than committee members would not convert the gathering into a meeting of the Board. Rather, I believe that a gathering of a committee to discuss the business within its area of oversight would be a meeting of a public body other than the Board that could be attended by any person, including members of the public who may also be members 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:pb
cc: Gunter Dully

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2155

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 27, 1992

Mr. Barry L. Gan
[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. Gan:

I have received your letters of October 5 and October 10, as well as the materials attached to them. You have sought an advisory opinion concerning the implementation of the Open Meetings Law by committees of the Cattaraugus County Legislature.

The issue relates to various considerations by the County concerning solid waste disposal, and you described three incidents and questioned the propriety of certain actions in terms of compliance with the Open Meetings Law. The first incident involved a meeting of the Public Works Committee, which met with representatives from Integrated Waste Systems (IWS), and entered into an executive session to discuss "potential contractual matters." You wrote, however, that "[t]o this day nobody in the public has any idea why the Committee was meeting with representatives from IWS." The second incident involved the Solid Waste Committee, which met in executive session with representatives of a Florida corporation "allegedly seeking to buy the county-owned incinerator." The motion to enter into executive session "did not state the reason", but the agenda for that meeting indicates that the closed session was held to discuss "contract and personnel matters." The third incident involved a meeting of the same committee. Before the meeting began, the acting chair informed the public that the part of the meeting dealing with the incinerator would be held in executive session. You urged the Committee to "obey the law." After the meeting was called to order, an explanation of the business to be conducted in executive session was given, but no reference was made to any of the grounds for entry into executive session. Nevertheless, a motion was made to go into executive session, which was carried. Although you left the room, three others stayed. You later questioned the basis for holding the executive session, and the chairman said that it was

being held to engage in "contract discussions." The next day you were told that the Committee discussed the sale of land.

In this regard, I offer the following comments.

First, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify eight grounds for entry into an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, the subject matter that may properly be discussed during executive sessions is limited.

Second, none of the grounds for entry into executive session deal in general "contractual matters", "contract discussions" or negotiations. The only provision that touches directly on contract negotiations is §105(1)(e), which authorizes 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, commonly known as the "Taylor Law," pertains to the relationship between public employers and public employee unions. As such, §105(1)(e) deals with collective bargaining negotiations between a public employer and a public employee union. That provision is clearly unrelated to the subject matter of the executive sessions in question.

The only ground for executive session that might in some instances be pertinent to contract negotiations is §105(1)(f). Although that provision is often cited to discuss so-called personnel matters, the term "personnel" appears nowhere in the Open Meetings Law, and that exception does not necessarily deal with personnel.

By way of background, in its original form, §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 §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 §105(1)(f), I believe that a discussion validly held under the provision is restricted to those situations in which the subject involves a particular person or corporation and only when one or more of the topics listed in §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981).

As indicated previously, §105(1)(f) may be asserted in appropriate circumstances to discuss certain issues relating to a particular corporation. For instance, a public body might attempt

to ascertain whether a firm has the resources to make a purchase or to carry out the terms of an agreement. In that situation, a discussion might involve the financial or credit history of a particular corporation. Nevertheless, again, the language of §105(1)(f) is quite precise, and I do not believe that it could properly be asserted to discuss "contractual matters" in all instances in which that subject might arise.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" or "contractual matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person" or "corporation." Such a motion would not in my opinion have to identify the person who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members of a public body nor others may be able to determine whether the subject may properly be considered behind closed doors.

Lastly, although a discussion of the sale of land might in some cases be a proper subject for consideration in executive session, the provision dealing with that issue is limited in its application. Specifically, §105(1)(h) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

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

Based upon the foregoing, the sale of land could only be discussed during an executive session when publicity would "substantially affect" its value. If a government is seeking to buy a particular parcel, and the site of that parcel is unknown to the public, it is likely that an executive session could properly be held to discuss the issue, for publicity could result in speculation, thereby precluding the government from purchasing the parcel at a price optimal to taxpayers. On the other hand, if a government seeks to sell real property, particularly when the public is aware of its location, it is unlikely that public discussion would substantially affect the value of the property.

In an effort to enhance understanding of and compliance with the Open Meetings Law, copies of this opinion will be forwarded to 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:pb
cc: Cattaraugus County Legislature
Dennis V. Tobolski, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2156

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

October 29, 1992

Mr. Tony Adamis
Bureau Editor
Northern Dutchess Bureau
13 West Market Street
Rhinebeck, N.Y. 12572

The staff of the Committee on 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. Adamis:

I have received your letter of October 13 in which you requested an advisory opinion concerning access to minutes of a meeting.

Specifically, following a meeting held by the Commission of Correction on September 15, a member of your staff requested minutes of the meeting. In a response to the request dated October 7, the Commission's public information officer wrote that the minutes "had not yet been finalized." He added that when they are final, a copy would be forwarded to your reporter.

In this regard, as you are aware, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, section 106 of that statute provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and 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 must be prepared and made available within two weeks of the meetings to which they pertain.

It is noted 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Stephen DelGiacco, Public Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1398A
OML-AO 2157

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 6, 1992

Robert A. Barlette, President
Dunkirk School Board
[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. Barlette:

As you are aware, I have received your letter of October 16 in which you requested an advisory opinion.

In your capacity as a member of the City of Dunkirk Board of Education, you wrote that one member of the Board contended that the release of teachers' salaries by another member of the Board constituted a "serious breach of conduct". You have asked whether a Board member may "pass out information such as a list of teachers' salaries given to him or her, and whether so doing is a "violation of Education Laws or Freedom of Information Laws?"

In this regard, I offer the following comments.

First, it is noted that 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 §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 §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 the 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 NYS 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. While information might have been obtained during an executive session properly held or from records that might have been characterized as confidential, I believe that a claim of confidentiality can only 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 may be aware, the Family Educational Rights and Privacy Act (20 USC §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, §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 §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 matter 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).

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 ware 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 need 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.

In the situation that you described, however, it is clear in my opinion that the information disclosed would be accessible to any person.

By way of background, 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.

With certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the 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 in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision 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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying

employees and their salaries 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 [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 notion that records that are relevant to the performance of the official duties of public employees are generally 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)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

Based upon the foregoing, since records reflective of teachers' salaries would be available to any member of the public, I cannot envision how disclosure of teachers' salaries by a Board member could constitute a "breach of ethics."

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-7401
OML-AO-2158

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 23, 1992

Robert M. Shaw, Director
Higher Education Committee
New York State Senate
Room 806
Legislative Office Building
Albany, NY

Dear Mr. Shaw:

As you are aware, I have received your letter of November 5. You asked whether an entity designated by the Board of Regents, the "Commission on Higher Education", is subject to the Freedom of Information Law and the Open Meetings Law.

By way of background, according to a news release attached to your letter, the Board of Regents several months ago appointed "18 distinguished business, education and civic leaders" to serve on the Commission. The Commission will "make recommendations to the Regents next spring on organizing and funding New York State's unified system of public and private higher education to serve more effectively the educational needs of all" and will focus on students' needs in the 21st century, the "kind of structure...our education system [should] have, and how it should be funded." The release also states the Commission's chair is the president and chief executive officer of a financial services company and that "[f]inancial support for Commission is being sought from private foundations."

In this regard, I offer the following comments.

First, it is noted that recent decisions indicate generally that ad hoc 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)].

Therefore, an advisory body such as a citizens' advisory committee would not in my opinion be subject to the Open Meetings Law. Since the Commission is apparently not subject to the Open Meetings Law, it could choose to conduct open meetings, but it would not be obliged to do so.

Second, the Freedom of Information Law applies to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of 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 definition refers to state and municipal departments and the like, "or [any] other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities". In my opinion, in view of the decisions rendered under the Open Meetings Law cited earlier, the Commission is not a governmental entity for it does not perform a governmental function.

Third, also relevant is the definition of "record" appearing in §86(4) of the Freedom of Information Law. That term is defined 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."

In my opinion, any documentation generated by the Commission would constitute a "record", for such documentation would consist of information produced for an agency, the Board of Regents. As such, the work product of the Commission would in my opinion fall within the scope of rights conferred by the Freedom of Information Law.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is unlikely in my view that any of the grounds for denial could be asserted to withhold records generated by the Commission for the Board of Regents.

I point out that one of the grounds for denial, §87(2)(g), pertains to inter-agency and intra-agency materials, and that it has been held by the Court of Appeals that records prepared "by outside consultants retained by agencies" may be characterized as intra-agency materials [see Xerox Corporation v. Town of Webster, 65 NY 2d 131, 133 (1985)]. When records consist of intra-agency materials, those portions consisting of advice, opinions or recommendations, for example, may be withheld; other portions of such records, i.e., statistical or factual information, must be disclosed [see §87(2)(g)(i)]. Nevertheless, in my opinion, the Commission could not be characterized as a consultant. As the term "consultant" is ordinarily used and according to an ordinary dictionary definition of that term, a consultant is an expert or a person or firm providing professional advice or services. As I understand the composition of the Commission, while it consists of well-respected individuals who may enjoy expertise in a variety of areas, many of its members do not, for their business or livelihood, engage in the kind of work or inquiry in which the Commission is engaged. Further, in the context of the Xerox decision, I believe that a consultant would be a person or firm "retained" for compensation by an agency to provide a service. It is my understanding that the Commission serves voluntarily and without compensation.

In sum, although the Commission does not appear to be subject to the Freedom of Information Law or the Open Meetings Law, the documentation that it produces would fall within the scope of the Freedom of Information Law and, for reasons discussed above, would in my opinion be accessible under that statute.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Regents

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2159

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 25, 1992

Ms. Kathleen A. Newkirk, Town Clerk
Town of Bethlehem
445 Delaware Avenue
Delmar, N.Y. 12054

The staff of the Committee on 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. Newkirk:

I have received your letter of November 19 in which you raised issues pertaining to the contents of minutes of meetings and the time in which minutes must be prepared.

In this regard, the Open Meetings Law offers direction on the subject and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute 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, although minutes must be prepared and made available within two weeks, it is clear that minutes need not consist of a verbatim account of every comment that was made. It is also noted that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his or her 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. Compt. File #82-181).

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 they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

PPPL-AO-139
FOIL-AO-1404
OML-AO-2160

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

November 25, 1992

Professor Fukashi Utsunomiya, Ph.D.
Tokai University
School of Political Science
1117 Kitakaname, Hiratsuka-Shi Kanagawa-Ken
Japan, 259-12

Dear Professor Utsunomiya:

I have received your letter of November 16, and it was a pleasure to hear from you. Your kind words are much appreciated, and I found the Forum to be most interesting and informative.

As you requested, enclosed are a variety of materials, including the Freedom of Information Law, procedural regulations promulgated pursuant to that statute, the Personal Privacy Protection Law and model regulations prepared to assist agencies in implementing the law, and the Open Meetings Law. Because the Open Meetings Law is procedural in nature, no regulations are required under that statute. In addition, enclosed are copies of the Committee's latest annual report and brochures describing the three statutes. Those materials describe the work of the Committee on Open Government. I also wrote an article sometime ago dealing with access to police records under the Freedom of Information Law, and a copy is enclosed.

You also asked how we deal with "police agency and police information" in the three statutes.

First, the Freedom of Information Law is applicable to entities of state and local government in New York, including the State Police, and municipal police departments.

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.
Since the ability to withhold is dependent upon the specific contents of records an the effects of their disclosure, the extent to which records must be disclosed or may be withheld will vary from one request to the next. However, several of the grounds for denial may be relevant.

Of potential significance is section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or a victim of a crime, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is section 87(2)(e), which permits an agency to withhold records that:

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

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of section 87(2)(e).

Another possible ground for denial is section 87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is section 87(2)(g). The cited 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.

Records prepared by employees of a police department and communicated within the department or to another agency would in my view fall within the scope of section 87(2) (g). Those records might include opinions or recommendations, for example, that could be withheld.

I point out, too, that in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member o the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

Second, the Personal Privacy Protection Law applies only to state agencies; it does not apply to municipal agencies. That statute generally confers rights of access to a "data subject", a natural person about whom information has been collected by a state agency [see Personal Privacy Protection Law, §92(3)], to records pertaining to him or her. Section 95(1) of the Personal Privacy Protection Law states in part that, upon request for records by a data subject for records pertaining to him or her, a state agency must disclose such records, unless access is "not required to be provided pursuant to subdivision five, six or seven" of that section.

Subdivision (5) of §95 enables an agency to withhold information "compiled for law enforcement purposes" when disclosure would:

> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

> iii" identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Further, subdivision (7) of §95 states that rights of access granted by the Personal Privacy Protection Law do not apply to public safety agency records. Section 92(8) of the Personal Privacy Protection Law defines the phrase "public safety agency record" to mean:

> "a record of the commission of correction, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of parole, the crime victims board, the division of probation or the division of state police or of any agency or component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to sections eight hundred thirty-seven, eight hundred thirty-seven-a, eight hundred thirty-seven-b, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

As such, in terms of disclosure, the Personal Privacy Protection Law generally excludes law enforcement records from rights of access to individuals.

Lastly, the Open Meetings Law pertains of meetings of public bodies, such as city councils, boards of education, legislative bodies, etc. From my perspective, it is rare that issues involving the disclosure of police or law enforcement issues arise under the Open Meetings Law. However, like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted in public unless there is a basis for a closed or "executive session". Section 105(1) of the Open Meetings Law specifies the grounds for entry into executive session, and the first three pertain to :

> "a. matters which will imperil the public safety if disclosed;
>
> b. any matter which may disclose the identity of a law enforcement agent or informer;

c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed."

If you have additional questions, please feel free to contact me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 7408.
OML-AO 2160A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 1, 1992

Mr. Felix F. Welka
[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. Welka:

I have received your letters of October 16 and November 27. Please accept my apologies for the delay in response.

A news article attached to your initial letter includes an allegation that the release of salary information by a member of the Dunkirk Board of Education constituted a "serious breach of conduct". You have questioned the accuracy of that statement.

In this regard, I offer the following comments.

First, it is noted that 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 §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 §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 the 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 NYS 2d 562, 567 (1986)].

By way of background, 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.

With certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the 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 in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision 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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries 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 [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 notion that records that are relevant to the performance of the official duties of public employees are generally 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

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)].

Based upon the foregoing, to the extent that a public body seeks legal advice from its attorney, I believe that the communications between the body and the attorney would fall within the scope of the attorney client privilege and would, therefore, be exempt from the coverage of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1419
OML-AO-2161

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 3, 1992

Mr. Lawrence Hull, Jr.
[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. Hill:

I have received your letter of October 20 and the news articles attached to it.

You described several issues and events relating to the Deposit Central School District Board of Education and, in particular, its implementation of the Open Meetings Law. Based on a review of your remarks and the articles, I offer the following comments.

First, since there appears to have been some question concerning whether a joint session of the Board and the Booster Club fell within the scope of the Open Meetings Law, it is emphasized that the definition of "meeting" 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 District business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Second, since you wrote that the Board conducts "a one hour executive session before each regular meeting", I point out that the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. 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, §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.

In addition, it has been consistently advised that a public body, in a technical sense, 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 an open 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. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

Third, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice. For instance, in my opinion, the discussion involving whether a proposition should be considered by District residents could not have validly been discussed in private, for none of the grounds for entry into executive session would have applied.

Reference was made to discussions of "legal issues" and "possible litigation" in executive session, and one of the grounds for entry into executive session is §105(1)(d), which permits a public body to conduct 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 is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meeting' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply 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)].

Therefore, unless the Board was discussing litigation strategy, it does not appear that §105(1)(d) could justifiably have been cited to conduct an executive session. Further, as indicated in the passage quoted above, the possibility that litigation might ensue would not constitute a valid basis for entry into executive session.

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, 444 NYS 2d 44, 46 (1981), emphasis added by court].

Fourth, because you questioned the completeness and accuracy of information provided by the District, it is suggested that, in

addition to the Open Meetings Law, the Freedom of Information Law represents an alternative vehicle for seeking information. That statute pertains to all existing agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. For instance, one of the issues raised involved the salaries of certain employees. In this regard, §87(3)(b) of the Freedom of Information Law requires that each agency maintain " a record setting forth the name, public office address, title and salary of every officer or employee of the agency." Gaining access to records under the Freedom of Information Law might enable you and others to obtain accurate data regarding School District operations.

Lastly, you wrote that a "growing number" of residents "would like to remove the members of the board and the superintendent", and you asked how that can be accomplished. Other than selecting Board members at the polls, I am unfamiliar with the methods of replacing board members, for that is an issue beyond the scope of the expertise of this office. It is suggested that the issue might be raised with an attorney at the State Education Department.

Enclosed for your review are copies of the Freedom of Information Law and the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1427A
OML-AO 2162

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 7, 1992

Mr. James N. Seefried
[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. Seefried:

I have received your letter of October 28, as well as various materials attached to it.

In your capacity as chairman of the Town of Clarendon Zoning Board of Appeals, you wrote that it is often difficult to obtain records in order to carry out your duties, and that, in certain instances, records have been withheld.

One of the issues involves the propriety of the zoning enforcement officer keeping records in his home. You asked that the records be kept in the office of the town clerk in order that you and citizens generally may review or seek copies in a convenient and efficient manner.

In this regard, in a decision that may have some bearing on the situation, although it was held that there was no requirement that a town bookkeeper keep records at town offices, it was also found that provisions be made to ensure that the records are accessible to the public [Town of Northumberland v. Eastman , 493 NYS 2D 93, 95 (1985)]. Further, while the zoning enforcement officer may have possession of certain records, I believe that the town clerk has legal custody of all town records under §30 of the Town Law, irrespective of where they are kept or who may have physical custody of the records. Subdivision (1) of §30 states in relevant part that the town clerk "[s]hall have the custody of all the records, books and papers of the town". In my opinion, in view of §30 of the Town Law, while it may be reasonable for the zoning enforcement officer to temporarily maintain records that he currently needs to perform his duties, all other records should be kept in town offices in order that they may be reviewed or copied

by the public generally at the location where town records are routinely maintained.

Another issue involves the contents of minutes of meetings and the time within which they must be made available. The Open Meetings Law offers direction on the subject and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute 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, although it is clear that minutes must be prepared and made available within two weeks, it is also clear that minutes need not consist of a verbatim account of every comment that was made.

Further, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. 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 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.

Finally, your requests for tape recordings of Town Board meetings were denied. The basis for the denial, according to the

Town Clerk, is that a tape recording "is considered a working tool, not a public record". I disagree, for the Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" to include:

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

Since tape recordings of open meetings would be produced for and maintained by the Town, I believe that they constitute "records" subject to rights of access. I point out by means of analogy that, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

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 §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].

In sum, based upon the language of the Freedom of Information Law and its judicial interpretation, it is clear in my view that a tape recording of an open meeting must be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Town officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Town Board
Susan C. Klatt, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2163

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 9, 1992

Mr. Alvin M. Berk, Chairman
Brooklyn Community Board 14
Flatbush Midwood Community District
1306 Avenue H
Brooklyn, N.Y. 11230

The staff of the Committee on 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. Berk:

As you are aware, I have received your letters of November 2 and November 16 and various materials related to them.

By way of background, in your capacity as Chairman of Community Board 14 in Brooklyn, you wrote that meetings of the Board have since 1990 been the scene of demonstrations, disruptions and threats of danger and violence. Extraordinary measures have been taken by the Board, the Police Department and the District Attorney's office to ensure that the Board can conduct its business in an orderly manner. In view of news articles critical of the Board and allegations that the Board violated the Open Meetings Law, in your initial correspondence, you indicated that you are seeking assistance:

> "...to help us to understand how we, as board members under attack from those who seek to divide us, can gather in a group in order to discuss the pressures upon us---to strengthen our relationships as human beings facing those pressures together---consistent with the Open Meetings Law. We need those discussions to comfort and support each other, to share our feelings about the attacks on us, and to strengthen our resolve to resist those attacks.
>
> "We also need to be able, from time to time, to come together to talk about the security measures the police have established, and how

> they affect the procedure that I, as chair, must use in conducting safe and orderly meetings within the bounds of law, the City Charter, the board's by-laws, and existing board policies. At no time would such discussions result in, lead to, or contemplate any action by the board. If a participant were to shift discussion to board business, such discussion would be immediately terminated.
>
> "In either case, the respective goals of improving personal relationships among board members and communicating our procedural responsibilities (to insure safe and orderly meetings) would be entirely compromised if members of the public or the press were to be present. And logistically, such candid discussions are difficult, if not impossible, in auditoria.
>
> "Our question, then, is what steps we, as board members, might take in order to be able to hold such discussions without running afoul of the Open Meetings Law."

Similarly, in your letter of November 16, you wrote that:

> "...the pattern of attacks on Brooklyn Community Board 14 since 1990 has prompted us to seek occasional opportunities to gather informally to strengthen personal relationships and relate to each other as individuals. When we have done this, discussion has been explicitly limited to the external pressures upon us and our feelings about and reactions to those pressures. It has never been our intent to discuss board business at such get-togethers. Of course, because the discussion centers on the pressures we face as board members, from time to time a board member may touch on the business of the board; when that has happened, we have reminded ourselves that board business is appropriate only at open meetings and have redirected the discussion immediately.
>
> "Also, because it is not our intent at these gatherings to discuss board business, we have had no reason to impose an attendance requirement or keep records of attendance or the discussion itself. My recollection of the most recent of these gatherings, on October

> 22, 1992, is that about 20 of the board's 50 members showed up."

In this regard, I offer the following comments.

First, since the Board consists of fifty members, it is emphasized at that outset that a gathering of less than a majority of the members, a quorum, would not be subject to the Open Meetings Law. The applicability of that statute is triggered only after a majority of the total membership of a public body has convened.

Second, although the convening of a quorum of a public body often signifies that a meeting is being held, the presence of a quorum alone is not the only factor necessary to determine that a gathering is a "meeting". Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Inherent in the definition is the notion of intent. A chance gathering or a social function, for example, would not in my view constitute a meeting, for there would be no intent on the part of those present to conduct public business, collectively, as a body.

To be sure, the definition of "meeting" 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 conduct District business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

The question, therefore, is whether the gatherings that you described, assuming that a quorum of the Board is present, involve the conducting of public business and constitute "meetings" subject to the Open Meetings Law. In less serious but somewhat analogous situations in terms of the applicability of the Open Meetings Law, questions have been raised concerning so-called "self-assessment" sessions held by members of public bodies to discuss interpersonal relations and similar matters. If indeed the business of that body is not intended to arise and does not arise, I do not believe that those kinds of gatherings would be subject to the Open Meetings Law. In the case of the subject matter that you described, strengthening relationships among board members and expressions of feelings of pressures felt by those individuals, for example, it is my view that a gathering held for those purposes, and not to engage in the deliberative or decision-making process regarding issues that would or could fall within the scope of the Board's official duties, would not constitute a meeting.

A gathering to discuss security measures in conjunction with consideration of the Board's by-laws and policies presents a more difficult question in terms of the Open Meetings Law. I do not feel that a discussion of security, which is a matter separate from the performance of the Board's legal duties or authority, would involve the conducting of public business. However, a discussion of by-laws or policy in my view involves issues that would constitute a matter of public business, for it would pertain to the procedural aspects of or the means by which the Board conducts its

official business and carries out its duties. Where and how to draw a line of demarcation between discussions of security and those relating to the business of the Board may be difficult and conjectural. Again, however, it is emphasized that the judicial decision cited earlier referred to the "decision-making process" and the "business of a public body". Further, the legislative declaration appearing at the beginning of the Open Meetings Law, §100, specifies that the Law is intended to the enable the public to "attend and listen to the deliberations and decisions that go into the making of public policy". It would seem, particularly in view of the events that have occurred in the District and at the Board's meetings, that gatherings held solely to consider interpersonal relationships, pressures felt personally by Board members and security measures, would not involve the deliberative or decision-making process relative to issues that come before the Board in the performance of its legal duties. While there is no judicial decision of which I am aware that is pertinent to the issue, it would appear that gatherings held for those purposes are separate from those held "for the purpose of conducting public business", i.e., the business that would come before the board in carrying out its duties. If that is so, such gatherings would not constitute "meetings" subject to the Open Meetings Law.

Lastly, it was suggested earlier that issues involving security as they relate to by-laws or policy, when considered by a majority of the Board, would likely fall within the requirements of the Open Meetings Law. As you are aware, the Law generally requires that meetings of public bodies be conducted in public, unless there is a basis for entry into executive session. An executive session is a portion of an open meeting during which the public may be excluded. Although it arises infrequently, one of the grounds for entry into executive session may be applicable to discuss the subject matter described in this paragraph. Specifically, §105(1)(a) permits a public body to conduct an executive session to discuss "matters which will imperil the public safety if disclosed". The proper assertion of that provision would in my opinion be contingent upon the nature of the issue under discussion and the effects of public disclosure of such an issue.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Tracy Connor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2164

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 4, 1992

Ms. Kathryn A. Connolly
Town Clerk
Town of North Greenbush
2 Douglas Street
Wynantskill, N.Y. 12198-7561

The staff of the Committee on 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. Connolly:

I have received your recent letter in which you asked that I address two issues that have arisen concerning the Town Board of the Town of North Greenbush.

According to your letter, at a regular meeting of the Board on November 12, a motion was made to change the date of the ensuing "workshop meeting" from November 19th to the 17th. The motion was unanimously approved, and soon thereafter, "notice of the meeting was faxed to the newspapers and it was also posted on the signboard". Subsequently, however, a press release was issued stating that the meeting was "illegal" due to "inadequate notice that the budget would be voted on". The release also stated "that the public was not allowed to speak because it was a workshop meeting not a regular Town Board Meeting", and Councilman John Ramahlo alleged that the meeting was "illegal...because it was not in the legal notices". You pointed out that "the time and place and that the budget would be voted on at the November 17th meeting was printed in an article in the Record newspaper well before the meeting".

In this regard, I offer the following comments.

First, based upon judicial interpretation of the Open Meetings Law, there is no distinction between a "regular meeting" and a "workshop meeting". The definition of "meeting" [see Open Meetings Law, section 102(1)] has been broadly interpreted by the courts, and in a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a

"meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The decision cited above dealt specifically with so-called "work sessions" and similar gatherings.

In short, based upon the direction given by the courts, when a majority of the Board gathers to discuss Town business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, it is reiterated that there is no distinction between a regular meeting and a workshop; when a workshop is held, a public body has the same obligations in terms of notice, openness, the ability to conduct executive sessions and the ability to act as in the case regular meetings.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

In the case of the meeting in question, I believe that the notice requirements were satisfied, for notice was faxed to the

news media and posted. With respect to the Councilman's contention regarding the failure to publish a legal notice, as specified in §104(3) of the Open Meetings Law, there is no requirement that legal notice be given to prior to a meeting to comply with the Open Meetings Law.

Lastly, 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, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit 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 answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2165

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 4, 1992

Ms. Rosalie Peplow, Town Clerk
Town of Lloyd, Town Hall
12 Church Street
P.O. Box 897
Highland, N.Y. 12528

The staff of the Committee on 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. Peplow:

I have received your letter of October 27 in which you requested a confirmation of a discussion involving the Open Meetings Law.

According to your letter:

> "At the Town of Lloyd Town Board Organizational Meeting in January the Regular Town Board Meeting was scheduled for the second Wednesday of the month at 8:00 p.m. and Special Town Board Meetings were scheduled for Wednesday at 7:30 p.m. at the Town Hall. This information is posted on the Town Clerk's Signboard. The Supervisor will announce at a meeting the few times there is not a special meeting scheduled for the following week".

It is your understanding "that this is sufficient notice of a special meeting".

In this regard, in order to avoid confusion, I point out that the phrase "special meeting" is found in §62(2) of the Town Law. That provision, from my perspective, deals with unscheduled meetings, rather than meetings that are scheduled in advance. Specifically, that provision states in relevant part that:

> "The supervisor of any town may, and upon written request of two members of board shall within ten days, call a special meeting of the

> town board by giving at least two days notice in writing to the members of the board of the time when and place where the meeting is to be held".

The provision quoted above pertains to notice given to members of a town board, and the requirements of that provision are separate from those contained in the Open Meetings Law. Moreover, it is reiterated that §62 deals with unscheduled meetings; it is assumed that your inquiry deals with scheduled meetings that the Board refers to as "special meetings".

The ensuing comments are based on the assumption that your question involves notice of regular meetings and other meetings that are scheduled in advance.

The Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

In the context of your inquiry, if a series of meetings have been scheduled in advance to be held at particular times, the posting of a notice of a schedule of those meetings and transmittal

of that notice to the news media would in my view satisfy §104 of the Open Meetings Law regarding those meetings. The only instances in which additional notice would be required would involve unscheduled meetings that are not referenced in the notice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

FOIL-AO-7437
OML-AO-2166

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 10, 1992

Mr. Art Simmons
[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. Simmons:

I have received your letter of November 2. In your capacity as a member of the Board of Trustees of the Village of Northville, you raised a variety of questions relating to open government laws. An attempt will be made to deal with them, though not necessarily in the order in which you raised them.

First, in conjunction with your questions concerning the services rendered by this office, there is no objection to receiving telephone or written inquiries from members of village boards of trustees, and, in fact, during the past year, this office received nearly 2,500 telephone inquiries from local government officials and prepared more than 100 written advisory opinions in response to their written requests for opinions. As a general matter, the Committee on Open Government provides advice, orally and in writing, to any person, including members of the public and the news media, as well as government representatives.

Second, there is no distinction in the Open Meetings Law and its requirements among regular meetings, special meetings and "work sessions". It is noted that the definition of "meeting" 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 a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Further, the provisions of the Law concerning notice, executive sessions, and the preparation of minutes, for example, would apply to all meetings, irrespective of their characterization.

In order to constitute a valid meeting and the presence of a quorum, I believe that all of the members of a public body must be

given reasonable notice of a meeting. Relevant in my view is §41 of the General Construction Law, which provides guidance concerning quorum and voting requirements. The cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board 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."

Based upon the language quoted above, a public body, such as a village board of trustees, 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. Further, if a public body consists of five members, three would constitute a quorum. However, in order to carry a motion or otherwise take action, again, there must be an affirmative vote of a majority of the total membership. For instance, if a public body consists of five members, three of whom are present, a vote of two to one would not carry a motion, for three affirmative votes would be needed to do so.

Third, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

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

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

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

In the context of your inquiry, if a series of meetings have been scheduled in advance to be held at particular times, the posting of a notice of a schedule of those meetings and transmittal of that notice to the news media would in my view satisfy §104 of the Open Meetings Law regarding those meetings. The only instances in which additional notice would be required would involve unscheduled meetings that are not referenced in the notice. It is emphasized that although notice must be given to the news media, there is no requirement that the news media must publish notice. As such, there may be instances in which notice is given to a newspaper as required by the Open Meetings Law, and the newspaper chooses not to print it. In that instance, so long as notice is posted and given to the news media as required by law, a public body would be in compliance with law.

Fourth, with regard to minutes, the Open Meetings Law offers direction on the subject and provides what might be viewed as minimum requirements concerning the contents of minutes. Section 106 of that statute 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."

Although minutes may include reference to comments made at meetings or even consist of a verbatim account of what is said at a meeting, there is no requirement that minutes be so expansive. It is also noted that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his or her 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. Compt. File #82-181).

In a related vein, you suggested that minutes should not include "political" comments and asked what a "political" comment might be. I cannot answer that question, and I doubt that it is answerable. Many comments might be viewed as political or politically motivated; some would likely contend that every comment is political.

Next, you raised questions concerning the tape recording of open meetings and executive sessions, and rights of access to tape recordings. Neither the Open Meetings Law or any other statute deals directly with the use of tape recorders at meetings. However, several judicial 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 goal of a fully informed citizenry, we accordingly affirm the judgment annulling the resolution of the respondent board of education" (id. at 925).

In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In sum, I believe that any person may use a tape recorder in a non-disruptive manner at an open meeting of a public body, irrespective of whose comments might be recorded.

Unlike an open meeting, when comments are conveyed with the public present, an executive session is generally held in order that the public cannot be aware of the details of the deliberative process. For example, one of the grounds for entry into executive session, §105(1)(d), pertains to litigation, and it has been held that the purpose of that exception is 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 in attendance at the meeting [see e.g., Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)]. When representatives of public bodies have asked whether they should tape record executive sessions, I have suggested that doing so may result in unforeseen and potentially damaging consequences. A tape recording is a "record" as that term is defined in §86(4) of the Freedom of Information Law and, therefore, would be subject to rights conferred by that statute. Further, a tape recording of an executive session may be subject to subpoena or discovery in the context of litigation. Disclosure in that kind of situation may place a public body at a disadvantage should litigation arise relative to a topic that has been appropriately discussed behind closed doors. In short, I am suggesting that tape recording executive sessions could potentially

defeat the purpose of holding executive sessions. More appropriate in my view would be the preparation of minutes to the extent required by §106(2) of the Open Meetings Law. Again, that provision requires the preparation of minutes of an executive session only when action is taken during an executive session.

With regard to access to tape recordings of open meetings, I point out that the Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" to include:

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

Since tape recordings of open meetings would be produced for and maintained by the Town, I believe that they constitute "records" subject to rights of access. I point out by means of analogy that, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

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 §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].

In sum, based upon the language of the Freedom of Information Law and its judicial interpretation, it is clear in my view that a tape recording of an open meeting must be disclosed.

Under the Local Government Records Law (see Arts and Cultural Affairs Law, Article 57-A), records cannot be destroyed or discarded except in conjunction with retention and disposal schedules promulgated by the State Education Department and its

State Archives and Records Administration. I believe that those schedules require that tape recordings be kept for a minimum of four months. After that time, they may be destroyed or reused.

Lastly, you sought my views concerning the following statement: "if people don't come to meetings, they have no right to complain or ask questions later." In short, I disagree. In my opinion, absence from a meeting cannot be equated with a lack of interest. People may have a variety of commitments involving work, child related activities or other issues that preclude them from attending. In some cases, weather conditions or health problems might prevent people from attending meetings. There may be a variety of reasons for not attending meetings, none of which involve the level of a person's interest. Further, often the news media serves as the eyes and ears of the public, and their presence may enable people unable to attend to know what transpired.

I hope that I 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 2167

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 14, 1992

Mr. M. J. Dowden
Village Residents Party
P.O. Box 105
Brookville, L.I. N.Y. 11545

The staff of the Committee on 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. Dowden:

I have received your letter of November 15 and the materials attached to it. According to your letter and the materials, the Village of Brookville will release minutes of meetings of its Board of Trustees "only after they have been approved at the subsequent meetings..."

In this regard, 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. 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."

Further, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the Clerk/Treasurer.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Jean G. Pailet, Clerk/Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2168

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 14, 1992

Mr. Daniel Jenkins
[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. Jenkins:

I have received your letter of November 18 and the materials attached to it.

You have sought my comments concerning a policy expressed by William Fulkerson, Chairman of the Jefferson County Board of Supervisors, who concluded that "...it is the prerogative of each committee to decide who, beyond the members of each committee, may or may not attend an executive session".

In this regard, I offer the following comments.

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

Although the original definition of "public body" enacted in 1976 made reference to entities that "transact" public business, the current definition as amended in 1979 makes reference to entities that "conduct" public business and added specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the definition of "public body", I believe that any entity consisting of two or more members of a public body would fall within the requirements of the Open Meetings Law [see also

Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Therefore, a standing committee of Board members in my view constitutes a public body subject to the Open Meetings Law that is separate and distinct from the Board of Supervisors. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, section 41). As such, in the case of a committee consisting of five, for example, a quorum would be three.

Second, when a committee intends to gather to discuss public business, I believe that it is required to provide notice in accordance with §104 of the Open Meetings Law. Further, if a quorum of the committee is present for that purpose, such a gathering would in my view constitute a meeting of the committee that must be conducted in accordance with the Open Meetings Law. If members of the Board other than members of a committee attend a meeting of a committee, I believe that they would have the right to attend as members of the public. Presumably they would not participate as members of the committee.

Third, §105(2) of the Open Meetings Law states that:

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

Based upon the provision quoted above, I believe that only the members of a committee, which would be the public body conducting a meeting, have the right to attend executive sessions held by a committee. While §105(2) enables a committee to permit the attendance of members of the Board or others 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 Board do not, in my opinion, have the right to attend executive sessions of a committee of the Board if they are not members of that public body.

In short, it appears that Chairman Fulkerson's statement is consistent with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2168

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 14, 1992

Ms. Gerianne Wright
Press-Republican
170 Margaret Street
Plattsburgh, N.Y. 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. Wright:

I have received your letter in which you requested an advisory opinion concerning action taken on October 28 by the Chazy Central Rural School Board of Education.

According to your letter, the Board "convened the meeting and called an executive session to discuss their teachers' union contract". However, in addition to discussing the contract with the teachers' union, you wrote that the Board "also discussed increasing the salaries of their principal and their superintendent". Following the executive session, the Board voted to ratify the teachers' contract, and to give raises to both the superintendent and the principal.

In this regard, the Open Meetings Law includes a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §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..."

In my opinion, discussion of the teachers' contract represented a subject separate from consideration of raising the salaries of the suprintendent and the principal. It appears that the subject involving the teachers' contract might properly have been considered in executive session pursuant to §105(1)(e). That provision enables a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law", i.e., collective bargaining negotiations with a public employee union. A discussion of raising the salaries of the superintendent and the principal might appropriately have been considered behind closed doors under §105(1)(f), which authorizes 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."

Nevertheless, the motion for entry into executive session only pertained to discussion of the teachers' contract. If that was so, the consideration of salary increases for the administrators would not have fallen within the motion. It is reiterated that a motion to conduct an executive session must identify "the general area or areas of the subject or subjects to be considered". Since two subjects were discussed during the executive session, I believe that the motion should have referred to both. Alternatively, to comply with the Law, following its discussion in executive session of the teachers' contract, the Board could have returned to the open meeting for the purpose of introducing and acting upon a new motion to enter into executive session to discuss salary increases for the tow administrators.

In short, §105(1) requires a public body to inform the public, prior to entry into executive session, of the topics to be discussed in an ensuing executive session. If the Board referred to only one topic, but indeed discussed two, again, I believe that it would have failed to have complied with that aspect of the Open Meetings Law.

As you requested and in an effort to enhance compliance with and 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

Robert J. Freeman
Executive Director

RJF:pb
cc: Charles O'Connor, Superintendent
Paul Sanger, Board President
Bob Clark
Cathy Devins
Roger Giroux
Paul LaPierre
Rose Robinson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2169

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 17, 1992

Frank J. Mahar
Dean of Administrative Services
Fulton-Montgomery Community College
Johnstown, NY 12095-9609

The staff of the Committee on 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 letter of November 23 in which you requested an advisory opinion concerning the Open Meetings Law. Please accept my apologies for the delay in response.

You wrote that the Board of Trustees of the Fulton-Montgomery Community College will be commencing negotiations with its facility union and will discuss the "parameters for those negotiations", including "such issues as percentage increases, length of contract, hiring policies for adjunct faculty and specific language changes would we like to make." Your question is whether it would be appropriate to discuss "negotiation parameters in an executive session."

In this regard, I offer the following comments.

First, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except to the extent that issues under consideration fall within one or more among eight grounds for entry into executive session that appear in paragraphs (a) through (h) of §105(1) of the Open Meetings Law.

Second, relevant to your inquiry is §105(1)(e), which authorizes public bodies to conduct executive sessions regarding "collective negotiations pursuant to article fourteen of the civil service law." As you are aware, Article 14 of the Civil Service Law, commonly known as the "Taylor Law", deals with the relationship between public employers and public employee unions.

In my opinion, a discussion of the issue in question would fall within the scope of §105(1)(e). Further, it would appear that the intent of that provision is in part intended to enable public bodies to discuss their collective bargaining strategy and "negotiation parameters" in private to avoid placing public bodies at a disadvantage at the bargaining table. As such, a discussion of those matters could in my view be conducted 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2170

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 21, 1992

Mr. Joseph M. McManus
[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. McManus:

I have received your letter of October 31. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning the status of meetings of district service cabinets under the Open Meetings Law, and you asked that I revise an opinion rendered on the same subject in 1986 in which it was advised that a district service cabinet is not a "public body" subject to the Open Meetings Law.

In this regard, in an effort to learn more of the manner in which a district service cabinet functions, I contacted Mr. Michael Kharfen, Director of the Community Assistance Unit of the Office of the Mayor. According to Mr. Kharfen, although the City Charter requires that it include a "core membership", a district service cabinet takes various forms, and it has no specific membership. He explained that a meeting of a district service cabinet may be large or small, for different people may attend, depending upon the nature of the issue or issues to be considered. As I understand its activities, a district service cabinet seeks to deal with service delivery issues and attempts to resolve inter-agency problems. For example, if a problem arises concerning law enforcement, a representative of the Police Department may serve as a "member" at a given meeting. Nevertheless, that person might not attend and the Department might not be represented again at a district service cabinet meeting until an issue arises that merits the presence of a person from that agency.

In short, I do not believe that a district service cabinet has a specific membership or that it functions as a body. If my assumptions and the information provided to me are accurate, a

district service cabinet would not constitute a public body subject to the Open Meetings Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Michael Kharfen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2171

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 22, 1992

Mr. Jack Gulvin
[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. Gulvin:

I have received your letter of November 23 concerning the propriety of executive sessions held by the Westfield Town Board and the Village of Westfield Board of Public Utilities.

One incident involved a gathering that "would be conducted like a work session, not a regular business meeting." At that gathering, reporters were "warned" that they could not use a tape recorder or report on any of the issues discussed. During that meeting, one of the members "said that he would not reveal his concerns in open session. Soon thereafter, the Board entered into an executive session. According to the minutes, the executive session was held to discuss a draft environmental impact statement (DEIS).

The other involved an executive session to discuss "litigation". You wrote, however, that you know of no proposed, pending or current litigation relating to the issue under consideration.

It is your view that the executive sessions in question could not likely have been justified, and that there was an intent to exclude those who are known to oppose a particular project.

In this regard, I offer the following comments.

First, there is no distinction in the Open Meetings Law and its requirements between regular meetings and "work sessions". It is noted that the definition of "meeting" 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 a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Further, the provisions of the

Law concerning notice, executive sessions, and the preparation of minutes, for example, would apply to all meetings, irrespective of their characterization.

Second, I believe that any person may use a tape recorder at an open meeting and that a member of the news media may report with respect to what he or she hears or observes. 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 goal of a fully informed citizenry, we accordingly affirm the judgment annulling the resolution of the respondent board of education" (id. at 925).

In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest

> in their own comments, is therefore wholly specious" (id.).

In sum, I believe that any person may use a tape recorder in a non-disruptive manner at an open meeting of a public body, irrespective of whose comments might be recorded.

Third, the Open Meetings Law is based on a presumption of openness, and paragraphs (a) through (h) of §105(1) of the Law specify and limit the topics that may properly be considered during executive sessions. Therefore, a public body may not conduct an executive session to discuss the subject of its choice. It is also noted that the Law requires that a procedure be accomplished by a public body, during an open meeting, before an executive session may be held. Section 105(1) states in relevant part that:

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

Lastly, it does not appear that a discussion of a DEIS could properly have been held in executive session, for none of the grounds for entry into executive session would apparently have been applicable. With respect to "litigation", §105(1)(d) permits a public body to conduct 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 is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meeting' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply 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)].

Therefore, unless the Board was discussing litigation strategy, it does not appear that §105(1)(d) could justifiably have been cited to conduct an executive session. Further, as indicated in the passage quoted above, the possibility that litigation might ensue would not constitute a valid basis for entry into executive session.

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, 444 NYS 2d 44, 46 (1981), emphasis added by court].

As you requested, copies of this opinion will be forwarded to the governing bodies of the Town and Village of Westfield.

I hope that I 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
Village Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1465
OML-AO-2172

162 Washington Avenue, Albany, New York 12231
(518) 474-2518, 2791

December 23, 1992

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 December 1 in which you seek an advisory opinion in your capacity as a member of the Board of Education of the Valley Stream Union Free School District Thirteen concerning several issues.

The first involves a complaint by teachers that their salaries have been disclosed, an action which is characterized as a "senseless invasion of privacy", and their request to meet with the Board in executive session "to argue their case for not having their salaries listed in the board agenda or minutes."

In this regard, I point out initially that records reflective of the salaries of public employees are clearly available to the public under the Freedom of Information Law and that consent by teachers to disclose salary records is unnecessary prior to release of that information.

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

With certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the 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 in possession or maintained by such entity except

> the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision 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 officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed for the following reasons.

One of the grounds for denial, §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 [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)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, 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 notion that records that are relevant to the performance of the official duties of public employees are generally 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)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted in public, except to the extent that a topic may properly be considered during an executive session. Further, 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, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §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.

Perhaps the most frequently cited ground for entry into executive session is the basis that is the focus of your inquiry, the so-called "personnel" exception. That provision relates to each of your questions involving executive sessions, i.e., consideration of disclosure of teachers' salaries, a discussion of a selection of a new president of the Board, and the ability to discuss various subjects under heading of "personnel".

I point out that although it is used often, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session relates to personnel matters, the language of that provision is precise. In its original form, §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 §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 §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 §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 §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. 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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981).

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 that discussions relating to budgetary matters or matters of policy could appropriately be discussed during an executive session.

In addition, due to the presence of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, 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. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

With respect to your specific questions, consideration of teachers' salaries would not in my opinion qualify for discussion during an executive session. That issue appears to involve a matter of policy pertinent to teachers and employees generally, and it would not fall within the specific language of §105(1)(f).

It is unlikely in my view that a discussion of choosing a new Board president could be conducted in executive session. The president of the Board would neither be appointed nor employed but rather elected by its members. Similarly, a review of a member's experience on the Board would not involve one's "employment" history, for a member would not be an employee of the District.

On the other hand, two of the issues that you described, alleged sexual harassment of a teacher by a student and consideration of a failure to receive tenure or appointment would focus on "particular" individuals. Those issues would involve the employment history of a particular person or perhaps a matter leading to the discipline of a particular person. As such, I believe that they would fall within §105(1)(f).

Lastly, you asked whether receipt of a letter from a teacher or a resident addressed to the Board must be "acknowledged under correspondence in the minutes". In this regard, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. 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."

Although a public body may choose to prepare expansive minutes, I do not believe that minutes must include reference to the acknowledgement of the receipt of correspondence.

I hope that I 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: Jerome Ehrlich