STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2305

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

January 19, 1994

William B. Heebink, Ph.D.
Superintendent of Schools
Port Washington Union Free School District
100 Campus Drive
Port Washington, NY 11050

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

Dear Dr. Heebink:

I have received your letter of November 30 in which you indicated that you are familiar with an advisory opinion prepared concerning "the Compact for Learning Central Committees which were created by State regulation". You have asked that I "confirm that this same opinion would be equally applicable to the site-based decision-making committees also established consequent to the same State regulations".

The regulations to which you referred, 8 NYCRR §100.11, require that boards of education "in collaboration with" so-called "compact for learning" or "shared decisionmaking" committees must develop a plan "for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking". As I interpret your inquiry, the question is whether "school-based" committees created pursuant to the plan adopted by a board of education are subject to the Open Meetings Law.

In conjunction with the following commentary, the answer in my view is dependent upon the nature of the functions conferred upon school-based committees by a district plan.

First, as you may be aware, 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."

The definition quoted above includes reference to a quorum requirement. In this regard, even though the action creating school-based committees might not refer to a quorum requirement, I believe that it is imposed by statute. Specifically, §41 of the General Construction Law, which has been in effect since 1909, 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 dy. 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 one of the persons or officers disqualified from acting."

Based upon the foregoing, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, a public body cannot do what it is authorized or empowered to do except at a meeting during which a quorum is present.

Second, judicial decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, 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)].

While the "compact for learning" or "shared decisionmaking" committees do not have the ability to make determinations,

according to the Commissioner's regulations, they perform a necessary and integral function in the development of shared decisionmaking plans. Those committees must, by law, be involved in the development of district plans. The regulations also indicate that a plan may be adopted by a board of education or BOCES only "after consultation with and full participation by" such committee, and that the Commissioner may approve a plan only after having found that it "complies with the requirements of this section", i.e., when it is found that a committee was involved in the development of a plan. Further, an appeal may be made to the Commissioner if a board has failed to permit "full participation" of a committee.

In the decisions cited earlier, none of the entities were designated by law to carry out a particular duty and all had purely advisory functions. More analogous to the status of shared decisionmaking committees in my view is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511-512).

Since a plan cannot be adopted absent "collaboration" and participation by those committees, and since they carry out a necessary function in the development of shared decisionmaking plans, I believe that they perform a governmental function and, therefore, are public bodies subject to the Open Meetings Law.

With respect to the entities that are the subject of your inquiry, while the regulations make reference to "school-based" committees, there is no statement concerning their specific role, function or authority. It is my understanding, based upon a discussion with a representative of the State Education Department, that school-based committees carry out their duties in accordance with the plans adopted individually by boards of education in each school district, and that those plans are intended to provide the committees in question with a role in the decision making process. When, for example, a plan provides decision making authority to school-based committees within a district, those committees, in my opinion, would clearly constitute public bodies required to comply with the Open Meetings Law. Similarly, when a school-based committee performs a function analogous to that of the shared decision-making committee, i.e., where the school-based committee has the authority to recommend, and the decision maker or decision making body must consider its recommendations as a condition precedent to taking action, I believe that the committee would be

a public body subject to the Open Meetings Law, even when the recommendations need not be followed.

In sum, due to the necessary functions that school-based committees perform pursuant to the Commissioner's regulations and the plans adopted in accordance with those regulations, I believe that those committees constitute "public bodies" subject to the requirements of the Open Meetings Law.

As you may be aware, the provisions of the Open Meetings Law are relatively straightforward, and in my opinion compliance with that statute by school-based committees should not be difficult to accomplish. However, in an effort to facilitate compliance, I offer the following general remarks.

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". 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)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law. However, if there is no intent that a majority of public body will gather for the purpose of conducting public business, collectively, as a body, but rather for the purpose of gaining education and training, for example, I do not believe that the Open Meetings Law would be applicable.

Lastly, §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. Moreover, as indicated in subdivision (3) of §104, the notice given under the Open Meetings Law is not required to be a legal notice; therefore, there is no expense involved in providing notice 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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2306

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 21, 1994

Ms. Michele Brazie
[redacted]

The staff of the Committee 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 Brazie:

I have received your letter of December 10. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning the status of "the newly formed site based committees" that exist in school districts. You wrote that the Superintendent of the Newark Valley Central School District has contended that "open meetings are to be held at the discretion of each site based committee".

Based upon the following analysis, I disagree with the Superintendent's contention. Further, although an opinion rendered by this office is advisory in nature, it is emphasized that the Committee on Open Government is given specific statutory authority to prepare advisory opinions concerning the Open Meetings Law (see Public Officers Law, §109), and it is my hope that the opinions are educational, persuasive, and that they enhance compliance with law. Moreover, because the issue that you raised is pertinent to school districts through the state. I have shared my views with officials at the State Education Department, and I believe that they concur with the ensuing commentary.

By way of background, regulations promulgated by the Commissioner of Education, 8 NYCRR §100.11, require that boards of education "in collaboration with" so-called "compact for learning" or "shared decisionmaking" committees must develop a plan "for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking". Your inquiry pertains those "school based", or as you referred to them, site based committees.

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."

The definition quoted above includes reference to a quorum requirement. In this regard, even though the action creating school-based committees might not refer to a quorum requirement, I believe that it is imposed by statute. Specifically, §41 of the General Construction Law, which has been in effect since 1909, 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 dy. 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 one of the persons or officers disqualified from acting."

Based upon the foregoing, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, a public body cannot do what it is authorized or empowered to do except at a meeting during which a quorum is present.

Judicial decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, 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)].

While the "compact for learning" or "shared decisionmaking" committees do not have the ability to make determinations, according to the Commissioner's regulations, they perform a necessary and integral function in the development of shared decisionmaking plans. Those committees must, by law, be involved in the development of district plans. The regulations also indicate that a plan may be adopted by a board of education or BOCES only "after consultation with and full participation by" such committee, and that the Commissioner may approve a plan only after having found that it "complies with the requirements of this section", i.e., when it is found that a committee was involved in the development of a plan. Further, an appeal may be made to the Commissioner if a board has failed to permit "full participation" of a committee.

In the decisions cited earlier, none of the entities were designated by law to carry out a particular duty and all had purely advisory functions. More analogous to the status of shared decisionmaking committees in my view is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511-512).

Since a plan cannot be adopted absent "collaboration" and participation by those committees, and since they carry out a necessary function in the development of shared decisionmaking plans, I believe that they perform a governmental function and, therefore, are public bodies subject to the Open Meetings Law.

With respect to the entities that are the subject of your inquiry, while the regulations make reference to school based or site based committees, there is no statement concerning their specific role, function or authority. It is my understanding, based upon a discussion with a representative of the State Education Department, that site based committees carry out their duties in accordance with the plans adopted individually by boards of education in each school district, and that those plans are intended to provide the committees in question with a role in the decision making process. When, for example, a plan provides decision making authority to site based committees within a

district, those committees, in my opinion, would clearly constitute public bodies required to comply with the Open Meetings Law. Similarly, when a site based committee performs a function analogous to that of the shared decision-making committee, i.e., where the site based committee has the authority to recommend, and the decision maker or decision making body must consider its recommendations as a condition precedent to taking action, I believe that the committee would be a public body subject to the Open Meetings Law, even when the recommendations need not be followed.

In sum, due to the necessary functions that site based committees perform pursuant to the Commissioner's regulations and the plans adopted in accordance with those regulations, I believe that those committees constitute "public bodies" subject to the requirements of the Open Meetings Law.

The provisions of the Open Meetings Law are relatively straightforward, and in my opinion compliance with that statute by site based committees should not be difficult to accomplish. However, in an effort to facilitate compliance, I offer the following general remarks.

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". 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)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law. However, if there is no intent that a majority of public body will gather for the purpose of conducting public business, collectively, as a body, but rather for the purpose of gaining education and training, for example, I do not believe that the Open Meetings Law would be applicable.

Lastly, §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. Moreover, as indicated in subdivision (3) of §104, the notice given under the Open Meetings Law is not required to be a legal notice; therefore, there is no expense involved in providing notice under the Open Meetings Law.

As you requested, copies of this opinion will be forwarded to the Board of Education and the Superintendent.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education
Dr. William D. Starkweather, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2306A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

January 25, 1994

Ms. Shirley B. Weinstein, President
Mid-Queens Community 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 Ms. Weinstein:

I have received your letter of December 18 in which you sought advice.

You wrote that you are the president of an entity that represents a large community, the Mid-Queens Community Council, and that you have also been employed by Community Board #8 as its recording secretary for the past 20 years. Until recently, when an issue arose of relevance to your community, "chairpersons always permitted [you] to step down as secretary and testify on the behalf of [your] community". However, the Board's newly elected chair advised you that you can no longer testify "unless [you] leave the post of secretary entirely". You indicated that a representative of the Office of Corporation Counsel informed you by phone that "such a decision is one that the chair can make". "If members of the community board can make statements at public hearings that impact their immediate communities, and then vote on the issue when they come before the board for recommendation", you asked "why [you are] prevented from speaking out when [you] do not vote".

In this regard, although I believe that the Open Meetings Law has tangential relevance to the matter, I offer the following comments.

First, while the chairperson of a public body may have the right to preside at a meeting or hearing, that person generally presides in accordance with requirements imposed by law or rules adopted by a public body as a whole. If that is so in this instance, the chair, who is one among many members, would not have the authority to act unilaterally to remove your ability to testify or speak. That authority would be in the Board, which presumably would discuss issues of policy, as a body, during open meetings and

take action to adopt rules or procedures by means of a majority of its total membership. Stated differently, it would appear that the Board, rather than its chair, would have the ability to adopt rules and procedures that govern the Board's proceedings.

Second, if the analysis in the preceding paragraph is accurate, I believe that any such rule or procedure adopted by a public body must be reasonable. In the situation that you described, if voting members of the Board and other members of the public are given the right or opportunity to testify during a public hearing, I question how you, whether as secretary to the Board or as the representative of a community organization, could, by rule, have a lesser right to speak than any other person who attempts to do so.

In short, while your right to speak is unrelated to your right conferred by the Open Meetings Law to attend a meeting of a public body, the prohibition against testifying might not be validly imposed by the chair acting independently of the Board. Further, even if such a prohibition is imposed by means of a rule or policy adopted by the Board, I believe that it would be of questionable validity.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Community Board #8

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2308

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 4, 1994

Mr. Alfred Otto Kowalewsky Kuhnle
[redacted]

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

Dear Mr. Kuhnle:

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

You have complained that the Mayor's Committee on the Judiciary in New York City failed to properly advertise a public hearing and disclose an agenda prior to the hearing.

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

I am unaware of any law or rule involving notice requirements concerning hearings held by the Committee on the Judiciary. Further, for the reason noted in the preceding paragraph, the Open Meetings Law would not be the source of a notice requirement pertaining to a hearing. Similarly, the Open Meetings Law is silent with respect to agendas. While an entity by policy or rule may prepare and disclose an agenda in advance of a meeting or hearing, the Open Meetings Law contains no such requirement.

The other issue that you raised relates to your apparent exclusion from a meeting of the New York City Fire Department Pension Fund. In my opinion, the Board of Trustees of the Fund constitutes a "public body" required to comply with the Open Meetings Law. In brief, the Open Meetings Law requires that

meetings of public bodies be conducted open to the public, unless there is a basis for entry into a closed or "executive" session. Section 105(1) of that statute specifies and limits the subjects that may properly be discussed in executive session.

Enclosed is a copy of the Open Meetings Law for your review.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2308

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 8, 1994

Ms. Jill M. Mattison
Village Clerk
Village of Sandy Creek
P.O. Box 240
Sandy Creek, NY 13145

The staff of the Committee on 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. Mattison:

I have received your letter of January 4 in which you raised questions concerning the Open Meetings Law.

According to your letter:

> "The Chief of our village volunteer fire department has requested that the village Board of Trustees meet with the fire department's board on a monthly basis. The chief attends all monthly village board meetings but feels the need to have another meeting with the village to discuss 'things'."

You asked whether the meetings would be subject to the Open Meetings Law. In addition, "[s]ince the village volunteer fire department members are considered employees of the village", you asked whether "these meetings could be construed as staff meetings" and whether staff meetings are 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. Section 102(2) of the Law defines "public body" to mean:

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

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

It is clear that a village board of trustees is a "public body" required to comply with the Open Meetings Law. Further, by reviewing the components in the definition, I believe that each is present with respect to the board of a volunteer fire company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law.

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

In view of the decision rendered in Westchester Rockland Newspapers v. Kimball, I believe that the board of volunteer fire company falls within the definition of "public body" and would be required to comply with the Open Meetings Law.

Second, 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)].

In short, if a quorum of either the Village Board of Trustees or the board of a volunteer fire company convenes to conduct public business, the gathering would in my opinion be subject to the Open Meetings Law. If a quorum of both entities convene jointly, the conclusion would be the same.

Lastly, while I am not an expert on the subject, I doubt that members of a volunteer fire company could be considered village employees. Further, it is unclear what a "staff meeting" is intended to mean. Again, if a majority of the membership of a public body gathers for the purpose of conducting public business, the Open Meetings Law would apply. However, if the staff of an agency, i.e., the highway superintendent, the clerk, and the dog warden meet, there would be no public body present, and the Open Meetings Law would not be applicable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2309

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 9, 1994

Mr. Steven M. Berman
[redacted]

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

Dear Mr. Berman:

I have received your letter, which reached this office on January 7.

Attached is a copy of a by-law adopted by the Poughkeepsie City School Board concerning public participation at its meetings. You have focused on a portion of the by-law which states that:

> "No participant may speak on the issues of Taylor Law Negotiations involving bargaining units in the school district or on matters involving the employment history of particular individuals and/or firms employed in the district."

It is your view "that this policy...violates the open meetings laws of the state", and you have sought my opinion on the matter.

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" pursuant to Education Law, §1709(1), 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.

In this instance, by authorizing the public to speak at its meetings, the Board in my opinion has acted in a manner above and beyond the requirements of the Open Meetings Law. The question, from my perspective, is whether the restrictions in the by-law quoted above are reasonable. So long as a party to "Taylor Law Negotiations" is not required to disclose or discuss particular aspects of those negotiations or answer questions concerning such negotiations to the detriment of the collective bargaining process, it is difficult to understand why taxpayers' expressions of opinion or fact would impair that process. If participation of that nature would not impair the ability of the District and its bargaining units to engage in collective bargaining negotiations in a manner consistent with law, the restriction would in my view be of questionable validity.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2310

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

February 11, 1994

Mr. Isidore Gerber
[redacted]

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

Dear Mr. Gerber:

As you are aware, I have received your letter of January 12. You have asked that I furnish information concerning judicial interpretations and advice pertaining to the assertion of the attorney-client privilege and political caucuses under the Open Meetings Law.

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 §105 of the Open Meetings 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 relevance to the assertion of the attorney-client privilege 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. Further, after a public body has sought and obtained legal advice from its attorney and has started to discuss and deliberate a matter of public business, I believe that the attorney-client privilege would end and that the Open Meetings Law would apply.

With regard to political caucuses, since the Open Meetings Law became effective in 1977, it has contained an exemption concerning political committees, conferences and caucuses. Again, when a matter is exempted from the Open Meetings Law, the provisions of that statute do not apply. Questions concerning the scope of the so-called "political caucus" exemption have continually arisen, and until 1985, judicial decisions indicated that the exemption pertained only to discussions of political party business. Concurrently, in those decisions, it was held that when a majority of a legislative body met to discuss public business, such a gathering constituted a meeting subject to the Open Meetings Law, even if those in attendance represented a single political party [see e.g., Sciolino v. Ryan, 81 AD 2d 475 (1981)].

Those decisions, however, were essentially reversed by the enactment of an amendment to the Open Meetings Law in 1985. Section 108(2)(a) of the Law now states that exempted from its provisions are: "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or the legislative body of a county, city, town or village, who are members or adherents 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..."

Therefore, in general, either the majority or minority party members of a legislative body may conduct closed political caucuses, either during or separate from meetings of the public body.

Many local legislative bodies, recognizing the potential effects of the 1985 amendment, have taken action to reject their authority to hold closed caucuses and to continue to conduct their business open to the public as they had prior to the amendment.

There have been recent developments in case law regarding political caucuses that suggest that the exemption concerning political caucuses has in some instances been asserted as a means of excluding the public from gatherings that have little or no relationship to political party activities or partisan political issues.

One of the decisions, Humphrey v. Posluszny [175 AD 2d 587 (1991)], involved a private meeting held by members of a village board of trustees with representatives of the village police benevolent association. Although the board characterized the gathering as a political caucus outside the scope of the Open Meetings Law, the Appellate Division, Fourth Department, held to the contrary. In a brief discussion of the caucus exemption and its intent, the decision states that:

> "The Legislature found that the public interest was promoted by 'private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies' (Legislative Intent of L.1985,ch.136,§1). Nonetheless, what occurred at the meeting at issue went beyond a candid discussion, permissible at an exempt caucus, and amounted to the conduct of public business, in violation of Public Officers Law §103(a) (see, Public Officers Law §100. Accordingly, we declare that the aforesaid meeting was held in violation of the Open Meetings Law" (id., 588).

The Court did not expand upon when or how a line might be drawn between a "candid discussion" among political party members and "the conduct of public business." Although the decision was appealed, the appeal was withdrawn, because the membership on the board changed.

The second decision, Buffalo News v. City of Buffalo Common Council [585 NYS 2d 275 (1992)], involved a political caucus held by a public body consisting solely of members of one political party. As in Humphrey, the court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, and found that:

> "In a divided legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it would be fair to assume the meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire legislature is of one party and the

> stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless. Therefore, the meeting of February 8, 1992 was in violation of Article 7 of the Open Meetings Law...
>
> "When dealing with a Legislature comprised of only one political party, it must be left to the sound discretion of honorable legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of Public Officers Law Article 7" (id., 278).

I hope that the foregoing serves to clarify your understanding of the Open Meetings Law, and that I have been of assistance. As you requested, a copy of this response will be forwarded to the Chairman of the Sullivan County Board of Supervisors.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Andrew Boyar, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8112
OML-AO-2311

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

February 14, 1994

Ms. Gina Eklund
[redacted]

The staff of the Committee on 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. Eklund:

I have received your letter, which reached this office on January 20, as well as a variety of materials attached to it concerning the Phelps-Clifton Springs Central School District.

You asked initially whether the Freedom of Information Law and the Open Meetings Law apply to school boards.

In this regard, the Freedom of Information Law pertains to records of an agency, 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 or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based upon the foregoing, it is clear that a school district, which is a public corporation, or a board of education would clearly constitute an agency required to comply with the Freedom of Information Law.

The Open Meetings Law is applicable to meetings of public bodies and §102(2) of that statute 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."

Under the definition quoted above, a board of education is unquestionably a public body subject to the Open Meetings Law.

You wrote that notices of meetings of the Board of Education indicate that the meetings begin at 7:30 even though they "truly start at 7:00 P.M. for Executive Session behind closed doors." One of the attachments to your letter is a newspaper column that includes the times and places of meetings. The reference to the meeting of the Phelps-Clifton Springs School Board indicates that the meeting would begin at 7:30. Nevertheless, you enclosed minutes indicating the meeting began at 7 p.m. with an executive session.

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. In addition, the Law 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.

Further, 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].

In sum, every meeting must convene as an open meeting. Moreover, if the Board intends to meet at 7 p.m., notice to that effect must be given to comply with the Open Meetings Law.

Lastly, despite the Board's lengthy executive sessions, you expressed the belief that the ability to conduct executive sessions is limited. In addition, a portion of minutes attached to your letter refers to an executive session to discuss "personnel".

As suggested earlier, the Open Meetings Law restricts the subjects that may be considered during an executive session. Paragraphs (a) through (h) of §105(1) specify the topics that may properly be discussed in executive session, and I have enclosed a copy of the Open Meetings Law for your review.

Perhaps the most frequently cited ground for entry into executive session is 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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981).

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.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 8117
OML-AO - 2312

162 Washington Avenue, Albany, New York 12231
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February 16, 1994

Mr. James L. Schmidt
Hurleyville Concerned Citizens
[redacted]

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

Dear Mr. Schmidt:

I have received your letter of January 18 in which you described a series of difficulties in obtaining records from the Board of Fire Commissioners of the Hurleyville Fire District. You have sought advice on the matter.

In this regard, I offer the following comments.

First, 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)].

Second, you referred to minutes of both open meetings and executive sessions and indicated that some are missing and others were "whited out". Here I point out that 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. Further, 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.

Third, with respect to rights of access to records, in general, 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, there would be no basis for withholding or "whiting out" any aspect of minutes of open meetings. Moreover, contracts, bills, vouchers, ledgers, books of account and similar records reflective of the receipt or expenditure of public monies must generally be made available. In brief, except in rare instances, none of the grounds for denial could be asserted to withhold those kinds of records.

Since you referred to contracts and bids, of relevance is §87(2)(c) of the Freedom of Information Law, which enables an agency to withhold records insofar a disclosure would "impair present or imminent contract awards or collective bargaining negotiations. As that provision relates to the impairment of "contract awards" it is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids has received a number of bids, but the deadline for their submission has not been reached, premature disclosure of the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals has been reached, often the passage of that event results in the elimination of harm. Further, it has been held that bids are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2D 951, 430 NYS 2D 196, 198 (1980)]. The cited decision involved bids and related documents. I believe, however, that it is implicit that the agreement itself had been made public or would be an accessible record.

The other situation where §87(2)(c) has successfully been asserted to withhold records pertains to real estate transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Again, premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving an optimal price [see Murray v. Troy Urban Renewal Agency, Sup. Ct., Rensselaer County, April 24, 1980, rev'd 84 2D 612, NY 2D 888 (1982)].

The only punitive sanction arising under the Freedom of Information Law involves §89(8) of that statute, which 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."

A companion provision, §240.65 of the Penal Law, includes virtually the same language.

Lastly, it is emphasized that citizens can express their views concerning their elected officials at the polls. If you and others feel that your elected representatives are not representing you or carrying out their duties as they should, efforts may be made to replace them through the electoral process.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8120
OML-AO-2313

162 Washington Avenue, Albany, New York 12231
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February 18, 1994

Ms. Jody Adams
[redacted]

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

Dear Ms. Adams:

I have received your letter of January 19 in which you requested an advisory opinion concerning the status of a particular entity under the Open Meetings and Freedom of Information Laws.

Your question involves a committee that was designated to deal with "the estate/trust field", and you provided some description regarding its membership.

In order to acquire additional information on the subject, I have contacted Professor Kenneth F. Joyce, Executive Director of the Law Revision Commission, as well as a representative of Assemblywoman Helene Weinstein. In brief, I was informed that in conjunction with recommendations offered by the judiciary committees of the Senate and the Assembly, a joint resolution was approved in May of 1993 to designate a group to study provisions of the Estates, Powers and Trusts Law regarding spousal rights. Three members each are designated by the Senate, the Assembly, the Bar Association and the Surrogate's Court Association. I have been informed that the committee is purely advisory in nature.

In view of the committee's functions and the judicial interpretation of the Open Meetings Law, it appears that it would not constitute a public body required to comply with that statute. 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."

Recent decisions indicate generally that advisory bodies, 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)]. Most analogous to the issue that you have raised is the New York Public Interest Research Group case, in which it was held that an advisory commission designated by the Governor by means of an executive order was not subject to the Open Meetings Law.

The records of or prepared by the Committee are, in my view, subject to the Freedom of Information Law, particularly those provisions pertaining to the State Legislature. Section 86(2) of the statute defines "state legislature" to mean:

> "...the legislature of the state of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof."

Based on the foregoing, I believe that the entity in question would be subject to §88 of the Freedom of Information Law, which deals specifically with the State Legislature. I point out that subdivision (2) of §88 specifies the kind of records that must be disclosed by the State Legislature.

Enclosed is a copy of the Freedom of Information Law for your review.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Kenneth F. Joyce
Hon. Helene B. Weinstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8127
OML-AO-2313A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 1, 1994

Mr. Charles J. Tiano
[redacted]

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

Dear Mr. Tiano:

I have received your letter of January 25. Please accept my apologies for the delay in response.

You have asked whether a town board or other governmental entity "has the authority to withhold from the public the names of persons who have filed an application to fill a vacancy on the Town Board." You added that there is a vacancy on the Woodstock Town Board and that it "is known through reliable sources that the board has interviewed, in executive session, eight (8) aspirants to fill the vacancy."

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.

In my view, a record or records identifying persons seeking to fill a vacancy in an elective office must be disclosed. Section 87(2)(b) of the Freedom of Information Law enables an agency to withhold "an unwarranted invasion of personal privacy". However, in more typical circumstances, a person seeking to fill an elective position attempts to make his or her name known in order to attract the interest of voters. To suggest that names of those attempting to fill the same position that has become vacant and which may be filled by means of an appointment made by an elective body would in my view be an anomaly. I am not suggesting that personal details of individuals' lives must be disclosed. Nevertheless, in my opinion, disclosure of the names of candidates for a vacant

elective position could not be characterized as an unwarranted invasion of personal privacy.

Further, although §89(7) of the Freedom of Information Law states in part that nothing in that statute requires the disclosure of the name "of an applicant for appointment to public employment", an applicant for a position on a town board would not be a prospective employee seeking employment.

Second, a recent judicial decision dealt in part with a discussion in executive session concerning those under consideration to fill a vacant elective position on a public body. In holding that an executive session could not properly have been held, the court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994).

Based on the foregoing, it is clear in my view the names of candidates who seek to fill vacant elective positions must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Woodstock Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 2314

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

March 14, 1994

Ms. Frances Knapp
County Legislator
County of Dutchess
Poughkeepsie, NY 12601

The staff of the Committee on 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. Knapp:

I have received your letter of January 31 and the news article attached to it. Please accept my apologies for the delay in response.

As a minority party member of the Dutchess County Legislature, it is your view that "closed door caucuses" held by majority party members "violates the Open Meetings Law and restricts your 'right to know' important information as a county legislator". You have sought guidance in an effort "to ensure that Dutchess County government is conducted in the 'open'".

In this regard, §108(2)(a) of the Open Meetings Law exempts from the coverage of that statute "deliberations of political committees, conferences, and caucuses". Further, paragraph (b) of that provision states that:

> "for purpose 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 of adherents of the same political party, without regard to (i) the subject matter under discussions; including discussions of pubic 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."

Based upon the foregoing, as a general matter, the majority members of the County Legislature may generally meet in private, even to discuss matters of public business, for such gatherings are outside the coverage of or "exempt" from the Open Meetings Law.

While it may be legal to engage in closed political caucuses, it is questionable in my opinion whether closed caucuses held routinely to discuss public business would be consistent with the spirit and overall intent of the Open Meetings Law as expressed in §100 of that statute. It is suggested that you persist in your efforts to alter the rules of the County Legislature to prohibit closed caucuses held by at least a majority of Legislature to discuss public business. It is noted that many local legislative bodies have adopted rules or policies analogous to the amendment to which you referred.

It is also noted that the Governor has recommended amendments to the Open Meetings Law based on proposals offered by the Committee on Open Government to terminate the practice of holding closed caucuses to discuss public business when one political party holds a lopsided majority of membership or a local legislative body.

Lastly, despite the apparent legal of the practice of holding closed caucuses, that practice may in my opinion be criticized in an effort to gain public support for openness and a change in the practice.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Hon. John Kennedy, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2315

162 Washington Avenue, Albany, New York 12231
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March 14, 1994

Ms. Mili Bonilla
Ms. Natalie Dixon
Ms. Barbara Gross
Ms. Wanda Roberts
Ms. Margarita Torres
Dr. Davidson Daway
Bronx Educational Services
965 Longwood Avenue - Room 309
Bronx, NY 10459

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

Dear Mesdames Bonilla, Dixon, Gross, Roberts, Torres and Dr. Daway:

I have received your letter of January 4, which reached this office on January 26. You have questioned the propriety of the exclusion of the public from a meeting held by Community School #8 in the Bronx. The issues raised involve the ability of the Board to conduct executive sessions, especially to discuss so-called "personnel" matters. You have asked that I "investigate the matter and take appropriate disciplinary steps."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law. The Committee does not have the jurisdiction or the resources to investigate or impose disciplinary action upon public bodies. Nevertheless, 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 open to the public, except to the extent that the subject matter under consideration may properly be discussed during an executive session.

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.

Second, 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 particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion under that provision 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.

The language of that provision is precise and pertains only to certain enumerated subjects that relate to an individual. The possibility that a person's name might be mentioned would not alone justify the holding of an executive session.

Lastly, 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.

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.

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-2316

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 14, 1994

Ms. Phyllis Walker
[redacted]

The staff of the Committee 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. Walker:

I have received your letter of January 31 and the materials attached to it. Please accept my apologies for the delay in response.

Your concern relates to the implementation of the "shared decision making plan" in the Springville-Griffith Institute Central School District. As you are aware, in opinions rendered by this office that have been sent to you and with which officials of the State Education Department concur, it has been advised that shared decision making committees and school based committees created pursuant to regulations promulgated by the Commissioner of Education constitute "public bodies" required to comply with the Open Meetings Law.

As I understand your inquiry, the question is whether workshops, training sessions and the like conducted for or with those bodies, with the assistance of the New York State United Teachers as "consultant/trainers", are subject to the Open Meetings Law.

In this regard, I offer the following comments.

First, 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 a public body gathers to conduct the business of that body, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

The question, therefore, is whether the gatherings in question, assuming that a quorum of a public body is present, involve the conducting of public business and constitute "meetings" subject to the Open Meetings Law. In 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 a public 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.

However, if a public body gathers to carry out its duties and conduct public business as a body, with the assistance of a consultant, for example, that kind of gathering would appear to constitute a "meeting" subject to the requirements of the Open Meetings Law. Often public bodies seek the advice of consultants. The fact that the consultants in this instance may be representatives of a public employee union would not in my opinion alter the status of a gathering or the applicability of the Open Meetings Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

FOIL-AO- 8146
OML-AO 2317

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 15, 1994

Mr. William G. Farrar
[redacted]

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

Dear Mr. Farrar:

I have received your letter of January 28 and accompanying materials. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning a denial by the Village of Mineola of your request for a settlement agreement between the Village and a former Village employee. The Village Clerk rejected the request stating that:

> "...disclosure of said document would result in unwarranted invasion of personal privacy, and also since such document is part of the employment history of the subject former employee and may deal with the employment, demotion, discipline, suspension, dismissal or removal of said person."

However, having been informed by the Village Attorney that "payment of taxpayers dollars will be made pursuant to the agreement", you contended that:

> "As an interested taxpayer, [you] want to know how much taxpayer money will be used to, in effect, keep the Village out of court. Without access to the settlement agreement, the elected Village officials who approve the agreement cannot be held directly accountable for their action as taxpayers are prevented from knowing the full extent of the actions of their elected officials in this matter."

You also indicated that it is your understanding that "the settlement contains a 'gag order' preventing the Village from disclosing the terms of the agreement.

In this regard, I offer the following comments.

First, in his denial of your request, the Village Clerk appears to have relied in part on the language of one of the grounds for entry into executive sessions, §105(1)(f), that appears in the Open Meetings Law. In brief, that statute pertains to meetings of public bodies; it is separate and distinct from the Freedom of Information Law, which pertains to access to agency records. Further, while an issue might properly be discussed during an executive session held pursuant to §105(1) of the Open Meetings Law, it does not necessarily or legally follow that a record relating to or prepared as a result of an executive session may be withheld under the Freedom of Information Law.

Second, based upon the following analysis of the Freedom of Information Law and its judicial interpretation, I believe that the settlement agreement must be disclosed, notwithstanding the "gag order."

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.

Perhaps the most relevant ground for denial is §87(2) (b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In addition, §89(2)(b) lists five examples of unwarranted invasions of personal privacy.

Although subjective judgments must often of necessity be made when questions concerning privacy arise, 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); 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].

In Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement apparently analogous to the "gag order" to which you referred was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education' s right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure.

> Without one, the agreement is invalid insofar as restricting the right of the public to access."

Another more recent decision also required the disclosure of a settlement agreement between a teacher and a school district following the initiation of disciplinary proceedings under section 3020-a of the Education Law (Buffalo Evening News v. Board of Education of the Hamburg School District and Marilyn Will, Supreme Court, Erie County, June 12, 1987). Further, that decision relied heavily upon an opinion rendered by this office.

It has been held in other circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

Under the circumstances, particularly since the identity of the person involved is known, it is my view that the terms of the settlement would result in a permissible rather than an unwarranted invasion of personal privacy, except to the extent that disclosure involves intimate personal details in the nature, for example, of unsubstantiated allegations.

Also of significance is §87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. A settlement agreement could likely be characterized as "intra-agency" material. Nevertheless, I believe that the record is reflective of a "final agency determination" and would be accessible on that basis [see Farrell, Geneva Printing, Sinicropi, supra], except to the extent that a different ground for denial applies.

Further, in its discussion of the intent of the Freedom of Information Law, the Court of Appeals in Capital Newspapers, supra, found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (67 NY 2d at 566).

In sum, I believe that the Freedom of Information Law as judicially interpreted requires, at the very least, that the settlement agreement in question be disclosed insofar as it indicates terms involving the payment of public monies.

Enclosed are copies of Geneva Printing and Buffalo Evening News, supra.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Village officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Richard M. Devoe, Village Clerk
Mr. Spellman, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

DMC-AO 2318

162 Washington Avenue, Albany, New York 12231
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March 15, 1994

Hon. Larry G. Mack
Cattaraugus County Legislature
[redacted]

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

Dear Legislator Mack:

I have received your letter of February 2 in which you sought a "ruling" from the Committee on Open Government concerning a matter relating to the Open Meetings Law.

In brief, as a member of the Cattaraugus County Legislature, you attended a meeting of the Legislature's Public Works Committee. Although you attempted to speak during the meeting, the Chairman of the Committee precluded you from so doing. You added that although you had previously served as a member of the Public Works Committee, you are no longer a member of that body. It is your view that as an elected representative of your district, you should not be denied permission to speak at a meeting.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law. This office is not empowered to issue a "ruling" that is binding. Nevertheless, I offer the following comments.

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

Based on the foregoing, the County Legislature and the Public Works Committee are both public bodies subject to the Open Meetings Law. However, while you are a member of the County Legislature, you are not a member of the Public Works Committee.

Second, although the Open Meetings Law provides you and the public generally to attend meetings of the Public Works Committee, that statute is silent with respect to the right to speak or otherwise participate at its meetings. Therefore, while you and others have the right to attend meetings of the Committee, the Open Meetings Law does not confer the right to speak at those meetings.

That is not to suggest that a public body could not authorize you or others to speak at meetings; rather, I am suggesting that a public body need not permit persons other than its members from speaking. On the other hand, a public body may choose to permit public participation, and many do so. In those instances, it has been recommended that a public body permit the public to speak 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.

Lastly, I point out that §153(8) of the County Law provides that the County Legislature "shall determine the rules of own proceedings". In conjunction with that provision, as a County Legislator, you could recommend the adoption of rules concerning public participation at meetings or perhaps participation by members at meetings of committees upon which they do not serve.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Gerald J. Fitzpatrick, Chairman, Public Works Committee
Hon. Don B. Winship, Chair, County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 2319

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

March 23, 1994

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:

As you are aware, I have received your letter of February 10 and the materials attached to it.

By way of background, in a request made under the Freedom of Information Law, you wrote that you were informed that the Rotterdam Town Board held a meeting on Sunday evening, January 16, and that there was "speculation" that the Board held a lengthy executive session. You asked for confirmation that the Board met in executive session on that evening. In response to your request, the Supervisor wrote that:

> "On Sunday evening, January 16, 1994, I set up a meeting between myself and a member of the Rotterdam Police Department to discuss personnel matters. Town Board members were also in the building that evening and did stop in to say hello during my meeting. No official 'Executive Session' was called or held on Sunday evening, January 16, 1994."

You have sought my opinion "on whether it is logical that his board members met with him by what seems to be happenstance, when he was meeting with a department member regarding personnel matters on a Sunday night when the Town Hall would ordinarily be closed". You wrote that you "cannot believe that board members would leave their homes and families on a Sunday night, to just casually 'drop into' a locked and dark town hall, just in case there was a meeting, without having been summoned by their Supervisor".

In this regard, despite your feelings, there appears to be no basis for concluding that the Town Board held a meeting or an executive session on the night in question. Most members of town

boards serve on a part time basis and, in my experience, it is not unusual for board members to spend time in town offices at unusual times to review materials or talk to staff in order that they can be better prepared and equipped to perform their duties. Many situations have been described to me in which members of municipal boards "casually drop into" municipal offices to review records, engage in the study of an issue, etc.

If indeed a majority of the Town Board gathers, by design, to discuss public business, I would agree that such gathering would constitute a "meeting" subject to the requirements of the Open Meetings Law. Nevertheless, in view of the Supervisor's response, I do not believe that it could be concluded that a meeting, as that term is defined by the Open Meetings Law, was held.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James a Constantino, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2320

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 24, 1994

Hon. Larry G. Mack
Cattaraugus County Legislature
[redacted]

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

Dear Legislator Mack:

As you are aware, I have received your letter of February 11. Please accept my apologies for the delay in response.

As a member of the Cattaraugus County Legislature, you complained that the Chairman of the Legislature precluded you from addressing that body about your concerns. You also expressed the view that the "standard" concerning your right to speak at meetings of the Legislature and its committees "should not be set by the Legislature."

In this regard, although it pertains to meetings, the issue that you raised does not involve the provisions of the Open Meetings Law. That statute provides the public with the right to attend meetings of public bodies. As indicated in previous correspondence, the Open Meetings Law is silent with respect to public participation at meetings, and it is similarly silent concerning speech by members of public bodies. Further, although I enclosed a copy of §153 of the County Law with an earlier response to an inquiry, I point out that subdivision (8) of that statute provides in part that "the board of supervisors [i.e., the County Legislature] of each county shall determine the rules of its proceedings". Therefore, despite your contention that the Legislature should not set the standards regarding members' activities during meetings, the Legislature has the statutory authority to do so.

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Don Winship, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 2321

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 29, 1994

Hon. Frank Coccho, Sr.
Alderman
City of Corning
[redacted]

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

Dear Alderman Coccho:

I have received your recent letter in which you sought my views concerning "the legality of a public body meeting in executive session for the purpose of discussing a mutual 'Environmental Agreement' executed between a municipality and two corporations."

By way of background, you wrote that the New York State Department of Environmental Conservation (DEC) has identified certain property near Corning as an "inactive hazardous waste disposal site" and that the site is included in the State's registry of inactive hazardous waste disposal sites. You also indicated that, following a period of public comment, the DEC selected "a final remedial alternative of the site in a Record of Decision" in March, 1992. Finally, you added that a "prior administration declared an executive session on this matter citing possible litigation by NYSDEC."

In this regard, I offer the following comments.

First, as you are aware, 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 an executive session may appropriately be convened. The grounds for entry into executive session are specified and limited in paragraphs (a) through (h) of §105(1) of the Open Meetings Law.

Second, as I understand the factual background, while three of the grounds for entry into executive session may relate to the matter, it does not appear that any of them could justifiably be asserted.

As you suggested in a comment within your letter, the mere possibility or threat that litigation might occur would not serve as an adequate basis for conducting an executive session. The provision in the Open Meetings Law that deals with litigation is §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable 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 or fear of litigation.

Of conceivable relevance is §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..."

While the issue might involve two corporations, on the basis of your letter, it does not appear to pertain to the "financial or credit history" of a corporation, for example, or any other of the topics described in §105(1)(f).

The remaining provision of potential significance is §105(1)(h), which permits a public body to enter into an executive session to discuss:

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

It is unclear whether the matter involves the "proposed acquisition, sale or lease of real property." However, since the DEC appears to have selected and publicly disclosed the location of the site, it would appear that "publicity" would, at this time, have no impact upon the value of property.

In sum, based upon the facts that you presented, there appears to be no basis for discussing the matter 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

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March 29, 1994

Mrs. Kathleen Suau
[redacted]

The staff of the Committee on 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. Suau:

As you are aware, I have received your letter of February 17 and the correspondence attached to it. Please accept my apologies for the delay in response.

You described a series of difficulties in obtaining records from the Floral Park-Bellerose Union Free School District, particularly minutes of meetings of the Board of Education and administrators' contracts. Based upon your commentary and the correspondence, I offer the following remarks.

First, although it was suggested that you seek minutes from the public library, the District is, in my view, obliged to disclose records in its possession that are accessible under the Freedom of Information Law. I point out that the Freedom of Information Law pertains to agency records, and that §86(4) of the Law 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."

Therefore, if minutes of meetings are maintained by the District, its officials are required to respond to a request for those "records" in a manner consistent with the Freedom of Information Law.

With specific regard to minutes, 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, minutes must be prepared and made available within two weeks. Moreover, 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.

Second, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations

> as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Board of Education, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Board has the responsibility to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests.

It is also noted that the Freedom of Information Law provides direction concerning the time and manner in which an agency 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)].

Further, although you were directed to do so, I do not believe that an agency can require that a request be made on a prescribed form. To reiterate, the Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (21 NYCRR 1401.5), which have the force of law and govern the procedural aspects of the Law, require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [21 NYCRR 1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual, such as yourself in the situation that you described, requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency possesses and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more

than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

Lastly, 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.

Contracts, bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff must generally be disclosed, for none of the grounds for denial could appropriately be asserted to withhold those kinds of records. Likewise, in my opinion, a contract between an administrator, such as a superintendent, and a school district or board of education clearly must be disclosed under the Freedom of Information Law. It is noted that there is nothing in the statute Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

The provision in the Freedom of Information Law of most significance regarding contracts with administrators is, in my view, §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided

substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their 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].

In a discussion of the intent of the Freedom of Information Law by the state's highest court in a case cited earlier, the Court of Appeals in Capital Newspapers, supra, found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (67 NY 2d at 566).

In sum, I believe that an administrator's contract, like a collective bargaining agreement between a public employer and a public employee union, must be disclosed, for it is clearly relevant to the duties, terms and conditions regarding the employment of a public employee.

In an effort to enhance understanding of an compliance with the Freedom of Information and Open Meetings Laws, copies of this opinion will be forwarded to District officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William F. Emmel, President
Dr. William J. McDonald, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2323

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March 30, 1994

Hon. Margaret G. Santillo
Councilperson
Town of Amherst
[redacted]

Dear Councilperson Santillo:

I have received your letter of March 8, as well as a copy of your communication with Secretary of State Shaffer of March 28 concerning my failure to respond to your letter.

As indicated in a letter to you dated March 11, I was out of the office for quite some time. Consequently, I had no opportunity to respond to correspondence from you and many others. In addition, since the staff of the Committee consists only of myself and two secretarial assistants, no other individual had been authorized to respond to requests for opinions. In view of the foregoing, I hope that you will understand the reason for the delay in response.

With respect to the issue that you raised in your capacity as a member of the Town Board of the Town of Amherst, you wrote that the Board has considered holding weekly "work sessions" at times when you are unable to attend. Despite expressing your feelings on the matter, you were informed by the Town Attorney that the Board "is free to set the date, time and place of its meetings by majority vote, although this may inconvenience individual members of the Board whose schedules are restricted by other employment." You have sought my opinion on the matter.

In this regard, while I am sympathetic to your situation, the Open Meetings Law, the statute within the scope of the Committee's advisory jurisdiction, is not directly relevant to the issue. That statute provides direction regarding the public's right to attend meetings, the ability of a public body to exclude the public from those meetings, notice of meetings, the taking of minutes and the like. The Open Meetings Law, however, does not deal with the ability of members of public bodies to attend meetings, nor does it deal specifically with the times when meetings may be held.

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. Questions have been raised in the past concerning the times at which meetings have been scheduled. Some have complained that a meeting scheduled during the day is inconvenient due to employment. Others have suggested that meetings scheduled at night are inconvenient due to any number of obligations. If a meeting is scheduled for 2:30 a.m., my opinion would be that such a time would be unreasonable, for the great majority of the public could not reasonably attend a meeting scheduled at that time. Nevertheless, if a meeting is scheduled for 2:30 p.m., it is questionable whether holding a meeting at that time of the day could be characterized as unreasonable.

More relevant than the Open Meetings Law in my view is §63 of the Town Law. That provision states in part that "the board may determine the rules of its procedure..." Unless a rule adopted by a public body is unreasonable, I believe that it is valid.

In some, while I recognize that your desire to attend is based upon an intent to carry out your official duties as effectively as possible, there is nothing in the Open Meetings Law that pertains specifically to the matter.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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April 1, 1994

Shirley A. Taber
Oswego County Legislator
Town of West Monroe
[redacted]

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

Dear Legislator Taber:

As you are aware, I have received your recent letter and a number of news articles attached to it.

In your capacity as a member of the Oswego County Legislature, you have sought advice and clarification concerning the propriety of a resolution "establishing guidelines for the use of audio/visual equipment of Legislature meetings". The resolution states in part that "the private use of hand held audio/visual equipment be permitted in the spectator area located in the rear of the legislative chambers". The problem according a newspaper account is that "[v]ideo cameras in the back of the chambers - where spectators sit - can't pick up the voices or faces of legislators, whose backs are to the audience".

In this regard, 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.

In the context of the facts presented, the issue in my view is whether the portion of the resolution restricting the use of the audio and video equipment to the rear of the legislative chambers is reasonable. I point out that §153(8) of the County Law states

in part that a "board of supervisors shall determine the rules of its own proceedings". As indicated in Mitchell, implicit in that grant of authority is a requirement that such rules be reasonable. From my perspective, in authorizing the use of audio or video equipment, it is implicit that those using the equipment should be able to do so in a manner and at a location or locations in consideration of the purpose for which the equipment is used. The purpose, obviously, is to be able to capture, on tape, the words and images of the members of the Legislature. If indeed the only location permitted to the public for recording the meetings precludes those using their equipment form recording visual images and the verbal commentary of the members of the Legislature, I believe that the portion of the resolution imposing such a restriction would be unreasonable. In short, unless the equipment can be situated at a location in which its operation can accomplish the intended and implicit goal, the rule in my opinion would be unreasonable and voidable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: County Legislature

STATE OF NEW YORK
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April 1, 1994

Mr. Alexei A. Waters
Program Director
Public Education Association
[redacted]

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

Dear Mr. Waters:

As you are aware, I have received your letter of February 27. Please accept my apologies for the delay in response.

You have presented a series of allegations relating to the implementation of the Open Meeting Law by Community School Board 27 in New York City. Specifically, you wrote that:

> "On January 25, 1994, the school board called a 'special meeting' to be held on January 27, 1994 at 10:00 p.m. for the expressed purpose of 'enforcing rules relative to supervisory selection'. The meeting, however, was not called by the President of the school board, but rather, the Secretary, even though the by-laws expressly indicate that the President has the authority to call meetings. Furthermore, the Superintendent of Community School District 27 was not notified in advance, nor were the local education reporters, nor was the meeting date and time posted in the main lobby of the district office. Indeed, the school board members mailed announcements on either January 25, 1994 or January 26, 1994. This meant that most people, including the Superintendent, received the announcement for the January 27, 1994 meeting on the very day of the meeting. Consequently, the

> Superintendent could not attend, nor could the public."

In addition, although the secretary tape records meetings "and did so on January 27", you indicated that the tape of that meeting "was said to be missing". You also wrote that "the secretary for the board has not been keeping minutes of executive meetings where votes were taken, nor has he indicated how each member voted". Similarly, having attended an ensuing meeting, you wrote that "the votes were tallied but the record did not indicate how each member voted". You also contended that the board has on occasion voted telephonically and has in your view "failed to follow its own by-laws" concerning the duty of the public to speak at meetings.

You have sought an advisory opinion concerning your allegations. 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 also noted that 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)].

Second, the Open Meeting Law includes reference to minutes of meetings and provides what might be characterized as minimum requirements concerning the contents of minutes. 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.

Third, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although the Freedom of Information Law generally pertains to existing records and ordinarily does not require that a record be created or prepared [see Freedom of Information Law, §89(3)], an exception to that rule involves voting by agency members. Specifically, §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..."

Therefore, when a final vote is taken by members of an "agency", which is defined to include a state or municipal board [see §86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "[t]he use of a secret ballot for voting purposes was improper", and that the Freedom of Information and Open Meetings Laws requires "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987), aff'd 72 NY 2d 1034 (1988)].

Fourth, 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.

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.

Next, 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. Further, when a reasonable rule has been adopted, I believe that it must be implemented reasonably and in a manner that gives affect to its intent.

Lastly, statutes other than Freedom of Information Law provide direction concerning the custody, security, retention and disposal of records. Specifically, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

As such, local officers, must in my view "adequately protect" records. Further, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. Having conferred with representatives of the State Education Department on prior occasions, I believe that tape recordings of meetings must be retained for a minimum of four months.

In an effort to enhance compliance with and understanding of the provisions referenced in the preceding commentary, copies of this opinion will be forwarded to District officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: School Board
Secretary to the Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8173
OML-AO 2326

102 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

April 1, 1994

Ms. Edna M. Johnson
ACORN Education Organizer
National Office
[redacted]

The staff of the Committee on 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. Johnson:

As you are aware, I have received your letter of February 22. Please accept my apologies for the delay in response.

Attached to your letter are items of correspondence in which you requested minutes of meetings of the School Board in Community School District 19 in Brooklyn. As of the date of your letter to this office, you had not received a response to either request.

You have sought assistance in the matter. In this regard, I offer the following comments.

First, 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, for the language of §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.

Second, with respect to requests for records generally, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond. 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)].

In an effort to enhance understanding of and compliance with the Open Meeting and Freedom of Information Laws, copies of this opinion will be forwarded to District officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: School Board
Mr. Blake, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2327

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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April 4, 1994

Mr. Anthony Biscotti
[redacted]

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

Dear Mr. Biscotti:

As you are aware, I have received your letter of February 26. Please accept my apologies for the delay in response. In conjunction with your initial inquiry, enclosed is a copy of §66 of the General Construction Law.

You have raised a series of questions concerning the Open Meetings Law, and I will attempt to respond to each.

Reference was made to §105(1) of the Law, which states in part that a public body may not take action in an executive session to appropriate public monies. You asked: "What is there to prevent elected officials, during an executive session, to first verbally agree among themselves to vote to appropriate public moneys, then later physically cast the majority vote, via the predetermined way, in open public forum." In this regard, ordinarily, when a public body has properly entered into an executive session, it may vote in executive session, unless the vote is to appropriate public monies, in which case it must return to an open meeting for the purpose of voting. In that latter situation, through discussion and deliberation, the members of a public body likely reach a meeting of the minds, an understanding or consensus during an executive session that is confirmed or made final through a vote taken in public. When that occurs, there may and in my view should be nothing in the law that precludes the members of a public body from seeking such an understanding in a proper executive session and confirming that understanding thereafter by means of a vote. From my perspective, the provision in question is based upon a recognition by the State Legislature that certain issues may justifiably be discussed in private, but that an action to appropriate public money is so significant to taxpayers that such action should always be taken in full view of the public.

Next, you referred to elected members of a "citizens review board" who are "excluded from sitting in on executive sessions." As you suggested, §105(2) of the Open Meetings Law authorizes the members of a public body to attend executive sessions of such body. If the members of the board in question are precluded from attending executive sessions of that board, such prohibition would in my opinion be contrary to §105(2).

You also asked whether the public has the right to "have a 'question and answer' segment during common council 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.

You asked whether school boards and "state-funded not for profit agencies" are subject to the Open Meetings Law. A board of education is a governmental entity that performs a governmental function and is clearly required to comply with the Open Meetings Law. Most not for profit entities are not governmental in nature and, therefore, fall beyond the coverage of the Open Meetings Law.

Lastly, you wrote that the mayor of your city "has a penchant for holding meetings at 10:00 A.M. during work days", and you asked whether that is legal. In this regard, the Open Meetings Laws does not deal specifically with the times when meetings may be held.

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. Questions have been raised in the past concerning the times at which meetings have been scheduled.

Some have complained that a meeting scheduled during the day is inconvenient due to employment. Others have suggested that meetings scheduled at night are inconvenient due to any number of obligations. If a meeting is scheduled for 2:30 a.m., my opinion would be that such a time would be unreasonable, for the great majority of the public could not reasonably attend a meeting scheduled at that time. Nevertheless, if a meeting is scheduled for 2:30 p.m. or 10:00 a.m., it is questionable whether holding a meeting at those times of the day could be characterized as unreasonable.

In sum, there is nothing in the Open Meetings Law that pertains specifically to the matter.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2328

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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April 4, 1994

Hon. William M. Hamel
Supervisor
Town of Mentz
P.O. Box 798
Port Byron, NY 13140

The staff of the Committee on 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 Hamel:

As you are aware, I have received your letter of February 27 and the correspondence attached to it.

Based upon the materials, a reporter for the Citizen was initially denied access to the "unapproved minutes" of a meeting of the Mentz Town Board held on January 11 and was told by the Town Clerk that minutes would be available after being corrected and approved by the Board. In a letter to the reporter, you confirmed that the minutes would not be disclosed until their approval at a meeting on March 1.

In this regard, §106 of the Open Meetings Law pertains to minutes of meetings and provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and 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.

Moreover, 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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frances Butler, Town Clerk
Lynn McNicol

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2329

162 Washington Avenue, Albany, New York 12231
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April 5, 1994

Mr. Lewis Evans
[redacted]

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

Dear Mr. Evans:

As you are aware, I have received your letter of March 1. Please accept my apologies for the delay in response.

You have questioned whether motions to enter into executive session made during meetings of the Clymer Central School District Board of Education should be "more specific" than indicated on an agenda and at the meetings.

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 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. Based upon the language of the Open Meetings Law and its judicial interpretation, motions to conduct executive sessions citing the subjects to be considered as "personnel", "litigation" or "negotiations", for example, without additional detail are inadequate. The use of those kinds of terms alone do not provide members of public bodies or members of the public who attend

meetings with enough information to know whether a proposed executive session will indeed be properly held.

For instance, although it is used frequently, the term "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. 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 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 §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, or when the issue bears upon a group of employees, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel".

Moreover, 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 [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. 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 frequently cited relates to "litigation". Again, that kind of minimal description of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is §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].

Similarly, with respect to "negotiations", the only ground for entry into executive session that mentions that term is §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, §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 §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into 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].

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

FOML-AO-2330

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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April 12, 1994

Mr. Kevin F. Hilbert
[redacted]

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

Dear Mr. Hilbert:

As you are aware, I have received your letter of March 1, which reached this office on March 9. Please accept my apologies for the delay in response.

You have sought information concerning "public notice" requirements relating to meetings held by town boards, zoning boards of appeal, planning boards and school boards. 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 include:

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

Based on the foregoing, each of the entities to which you referred would clearly constitute public bodies subject to the Open Meetings Law.

In addition, 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)]. Based upon the direction given by the courts, when a quorum 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 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.

You referred to notice of meetings that may be postponed due to inclement weather and questioned what the notice requirements might be concerning rescheduled meetings. In short, the provisions of §104 of the Open Meetings Law would apply, and it is likely that §104(2) would be particularly relevant.

Lastly, you also referred to notice requirements concerning public hearings. There is no statute that pertains to hearings generally. Statutory requirements may differ, depending upon the nature of the body and the subject of the hearing. For instance,

one section of the Town Law may provide specific direction concerning a hearing held by a zoning board of appeals; a different section, however, would apply with respect to a hearing held by a town board regarding a proposed budget.

I hope that I 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-2331

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

April 12, 1994

Mr. Richard P. Krebs
[redacted]

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

Dear Mr. Krebs:

As you are aware, I have received your letter of March 3, which reached this office on March 10. Please accept my apologies for the delay in response.

You referred to a series of events relating to the implementation of the Open Meetings Law by the Massapequa Board of Education. I point out that I will speak on April 18 at the request of Massapequans United for Education at 7 p.m. in the Marjorie Post Park Community Center. It is my intent to discuss the Open Meetings Law and the Freedom of Information Law and to enhance the understanding of those statutes on the part of the public, District administrators and members of the Board of Education. I encourage you and all interested persons to attend.

In conjunction with the events as you described them, I offer the following comments.

First, 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, 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. Further, paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may appropriately be considered in executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

Third, even though issues might have related to or involved "negotiations", the only provision that includes that term is §105(1)(e), which permits entry into executive session to discuss or engage in collective bargaining negotiations under the Taylor Law. Under the circumstances that you described, no collective

bargaining negotiations were in process. If that is so, I do not believe that §105(1)(e) could properly have been asserted.

In some instances, issues relating to negotiations other than collective bargaining negotiations may be considered in executive session. 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."

If, for example, in the course of negotiations involving the engagement of a contractor, a public body considers the financial or credit history of the contractor, to that extent, an executive session could properly be held.

With respect to notice of meetings, 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.

I point out that 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)].

I do not believe that posting notice in a single location prior to a meeting would comply with the Open Meetings Law, for §104 of the Law contains a dual requirement in that notice must be posted and given to the news media as well. Therefore, posting alone, without notice given to the news media, would in my view be inadequate. Moreover, notice must be posted in one or more designated, conspicuous, public locations. In my view, the Board should, presumably by resolution, designate one or more appropriate locations where notice of meetings will always be posted.

Lastly, you asked what action can be taken if executive sessions are improperly held. In this regard, under §107 of the Open Meetings Law, a judicial proceeding can be initiated in an effort to compel compliance with the Law. Preferable in my view would be an effort to increase knowledge of the requirements of the Open Meetings Law in order that public bodies can better comply with its provisions. In an attempt to do so, a copy of this opinion will be forwarded to the Board.

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 2332

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

April 12, 1994

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 correspondence of March 7. You have raised several issues concerning the Open Meetings Law and its implementation by the Board of Trustees of the Village of Lindenhurst.

Highlighted on minutes of a meeting is a reference to a motion to enter into executive session made by the Village Attorney. Since no reason for the executive session was indicated, you asked whether a basis for conducting an executive session must be stated.

In this regard, first, the Village Attorney is not a member of the Board of Trustees, and it is questionable in my view whether any person other than a member may introduce a motion. While a municipality's attorney may unquestionably recommend that an executive session be held, offering a recommendation is distinguishable from introducing a motion.

Second, 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 Open Meetings Law. The other arises under §108 of the Open Meetings Law, which contains three exemptions from the Law.

Specifically, §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, and the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

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

As such, 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.

Again, the other vehicle for excluding the public involves the assertion of exemption. When an exemption applies, the Open Meetings Law does not. Consequently, if an exemption from the Open Meetings Law is asserted, the reasons for its assertion may but need not be stated.

Of possible relevance to the matter is the assertion of an attorney-client relationship in conjunction with §108(3) of the Open Meetings Law. That provision 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. Further, after a public body has sought and obtained legal advice from its attorney and has started to discuss and deliberate a matter of public business, I believe that the attorney-client privilege would end and that the Open Meetings Law would apply.

You also raised an issue concerning the contents of minutes, which in this instance include "no record of people's input". Here I point out that the Open Meetings Law provides what might be

characterized 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."

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. While minutes may include reference to those who spoke and the nature of their comments, I know of no requirement that those references must be included in minutes.

Lastly, you alluded to notice of a special meeting conducted to hold a hearing. In this regard, there may be distinctions between a meeting and a hearing. A meeting generally involves a situation in which a quorum of a public body convenes for the purpose of deliberating as a body and/or to take action. A public hearing, on the other hand, generally pertains to a situation in which the public is given an opportunity to express its views concerning a particular issue, such as a zoning matter or a local law, for example. Every meeting must be preceded by notice given in accordance with §104 of the Open Meetings Law, which requires that notice of the time and place of a meeting be given to the news media and by means of posting. Notice requirements concerning hearings may differ, depending on the entity that conducts the hearing (i.e., whether it is a village board of trustees, a zoning board of appeals, a board of education, etc.) and the subject matter. For instance, statutory notice requirements imposed upon a zoning board of appeals are separate from those pertaining a hearing held by a board of education concerning a proposed budget.

I hope that I have been of some assistance.

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Trustees
Gerard Glass, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8200
OML-AO-2333

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

April 18, 1994

Mr. John F. Rogers
Box 305
Division Street
Northville, NY 12134

The staff of the Committee on Open 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 March 11 in which you sought assistance concerning a hearing pertaining to a variance conducted by the Town of Arietta Zoning Board of Appeals.

You wrote that the only notice of the hearing, which apparently involved your property, appeared in the Hamilton County News, and that you were not directly informed. In addition, although you obtained portions of a "variance manual", you indicated that you have been unsuccessful in your efforts to obtain the entire manual.

In this regard, the Committee on Open is authorized to provide advice concerning the Open Meetings Law and the Freedom of Information Law. This office has neither the jurisdiction nor the expertise to offer guidance concerning land use or zoning matters. However, in an attempt to provide advice, I offer the following comments and information.

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

As I understand your comments, the variance manual in which you are interested would be accessible under the Law. While one of the grounds for denial is relevant to a consideration of rights of access, that provision, due to its structure, often requires disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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 basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that a manual would consist of instructions to staff that affect the public or the Town's policy. Therefore, I believe that it would be available, unless a different basis for denial could be asserted.

Second, §104 of the Open Meetings Law requires that notice of the time and place of meetings be given prior to every meeting to the news media and by means of posting in one or more designated, conspicuous public locations. That statute does not pertain to hearings, nor does it require that notice be given to particular individuals. Nevertheless, in an effort to acquire information that may be useful to you, I have enclosed provisions of the Town Law concerning zoning boards of appeals. One provision, §267-a, pertains in part to hearings on appeal and states in subdivision (1) that "At least five days before such hearing, the board of appeals shall mail notices thereof to the parties..." It appears that you are a party and that you should have received notice in accordance with the provision cited above.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2334

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

April 18, 1994

Mrs. Christel Steenrod
[redacted]

The staff of the Committee on 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. Steenrod:

I have received your letter of March 8, which reached this office on March 14.

Your letter relates to an apparent refusal on the part of a site based committee of the Newark Valley Central School District to provide notice of meetings. You suggested that I visit the District and "read the riot act to them".

In this regard, for reasons with which you are familiar, I believe that site based committees are public bodies subject to the requirements of the Open Meetings Law. However, the primary function of the Committee on Open Government involves providing advice. Neither myself nor the Committee has the authority to compel an entity to comply with the Open Meetings Law. Nevertheless, I offer the following comments.

First, §104 of the Open Meetings Law pertains to notice of meetings and requires that every meeting of a public body 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.

Second, it has apparently been contended that the presence of members of the public at meetings would be disruptive. 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, §100), 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., Education Law, §1709), 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Dr. William D. Starkweather, Superintendent
Board of Election

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2335

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

April 26, 1994

Mr. Mark Schreiner
Wellsville Daily Reporter
159 N. Main Street
Wellsville, NY 14895

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

Dear Mr. Schreiner:

I have received your letter of March 18 and a variety of related materials.

As you described the situation, on March 8, "the elected boards of the Town and Village of Andover met in executive session with the mayor and public works director of the Village of Wellsville and the Supervisor of the Town of Wellsville." The stated basis for conducting the executive session involved a contention that it pertained to "the discussion of a legal matter", and the Mayor of Wellsville explained that she gave a presentation during the executive session concerning "the environmental remediation" of a particular landfill. Neither she nor others would provide additional detail. You added that the Village of Wellsville initiated a lawsuit against the Town and Village of Andover relating to the dumpsite in 1992.

You have questioned the validity of the executive session and asked how information concerning the gathering, if it was "invalid", might be made public. There are no minutes of the executive session, and you were informed that no action was taken.

In this regard, as you may be aware, §105 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)].

Based upon the foregoing, although a public body may discuss its litigation strategy in private, when it seeks to discuss litigation with its adversary in the litigation, it loses its capacity to conduct an executive session. It is noted that the cased cited in the passage quoted above, Concerned Citizens, supra, dealt with a situation in which a town board and its adversary in litigation met in executive session to discuss the litigation. In that decision, it was held that a public body cannot meet with its adversary in litigation in private to discuss the litigation.

In sum, if my understanding of the facts is accurate, there would have been no basis for conducting an executive session.

I note in passing with respect to the sufficiency of a motion to discuss "legal matters" or "litigation" that 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].

Section 106 of the Open Meetings Law pertains to minutes of meetings. When no action is taken during an executive session, minutes of the executive session need not be prepared. Since there is no record of the executive session, it is suggested that you might contact those who attended in order to attempt to acquire additional information. It is emphasized that in a case in which the issue was whether discussions occurring during an executive

session held by a public body 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). As such, I do not believe that those present during the executive session would be prohibited from discussing or disclosing what transpired at the executive session.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Andover
Town Board, Town of Wellsville
Board of Trustees, Village of Andover
Board of Trustees, Village of Wellsville

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8211
OML-AO-2336

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

April 27, 1994

Ms. Patricia Meisenburg
[redacted]

The staff of the Committee on 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. Meisenburg:

I have received your letter of March 16, which reached this office on March 22. Please accept my apologies for the delay in response.

You wrote that in September of last year, you submitted a list of questions involving budget concerns and expenditures to a member of the Starpoint Central School Board of Education. You were informed, in brief, that responding to your questions would involve substantial time and effort, and the Board chose not to do so. However, the Board indicated that records containing information which could be used to respond to your questions would be available through the Freedom of Information Law. Although you requested and reviewed "volumes of information to sort through - none...provided...the answers [you] were seeking." Moreover, you wrote that your questions were discussed in an executive session and action was taken concerning the Board's response. It is your view that by discussing the matter and taking action during a closed meeting represented a "violation of the Open Meetings Law."

You asked what action might be taken. In this regard, I offer the following comments.

First, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to

existing records. Section 89(3) of that statute states in partthat an agency need not create a record in response to a request. In short, in a technical sense, the District in my view is not obliged to provide information sought by answering questions.

In the context of your request and by means of example, there may be no record indicating why a travel allotment is paid to the Superintendent even though he is provided with a car. It is possible that the issue was discussed at a meeting but that no record was prepared that would include an answer to your question. Similarly, there may be no record that indicates a "total cost of carpeting installed in the classrooms"; rather, there may be a variety of records indicating portions of total cost, but no total itself. Again, in that kind of situation, the District would not be obliged to review records, cull information from them and prepare a "total" in response to your inquiry.

Another issue that may be relevant involves the requirement in §89(3) of the Freedom of Information Law that an applicant must "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. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of your request, I must admit to being unfamiliar with the District's record-keeping systems; whether it has the ability to locate and identify records that would include information responsive to your questions in the manner in which you requested the information is unknown to me.

In the future, rather than seeking information by asking questions, it is suggested that you request existing records. Prior to making such a request, it is also suggested that you confer with the District's records access officer in an effort to ascertain how the District maintains its records, thereby enabling you to request records reasonably described. The records access officer has the duty of coordinating the District's response to requests for records.

With regard to consideration of your request by the Board, I point out that §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". 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)]. Therefore, if indeed the Board gathered, discussed and acted upon your request, I believe that such a gathering would have constituted a meeting subject to the requirements of the Open Meetings Law.

As a general matter, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that 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 be made in public and 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 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 view, if your request was considered at a Board meeting, none of the grounds for entry into executive session would have applied.

Lastly, I point out that, as a general rule, a public body may take action during an executive session properly held [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. If the Board acted upon your request, I believe that its action should be memorialized in minutes indicating the nature of the action taken, the date and the vote of the members.

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 2337

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 4, 1994

Mr. Edward Gebera
[redacted]

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

Dear Mr. Gebera:

I have received your letter of March 27 and the materials attached to it.

According to your letter and a news article, a committee of the Tonawanda Common Council conducted an executive session to discuss issues that "centered around a contract between the Carousel Society and Amusements of Rochester." The City Attorney, Joseph Cassata, said that the closed session concerned "legal matters, involving certain contracts for Canal Fest affecting Tonawanda and North Tonawanda", and that it was justifiably held because the City is subject to liability during Canal Fest."

You have sought my opinion concerning the propriety of the executive session.

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 §105 of the Open Meetings 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.

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

> "The purpose of paragraph d is "to enable 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. As I understand the matter, unless the committee was discussing litigation strategy, §105(1)(d) of the Open Meetings Law would not have been applicable.

I point out, too, that the provision in the Open Meetings Law concerning contract negotiations, §105(1)(e), pertains to collective bargaining negotiations involving a public employee union and a public employer. As such, that provision would not have served on a basis for conducting an executive session.

Of possible relevance, however, would have been §108(3), which exempts from the Open Meetings Law "...any matter made confidential by federal or state law", and the assertion that the discussion fell within the attorney-client privilege. 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 (i.e., by means of the presence of persons other than a

client). Further, after a public body has sought and obtained legal advice from its attorney and has started to discuss and deliberate with respect to a matter of public business, I believe that the attorney-client privilege would end and that the Open Meetings Law would apply.

In sum, I believe that the closed session could properly have been held only to the extent that litigation strategy was considered or that an attorney-client privilege could properly have been asserted.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Cassata, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8232
OML-AO-2338

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 9, 1994

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 letters of March 28 and April 6, as well as related documentation. Both pertain to a report prepared for the Town of Newburgh by a consulting engineer.

By way of background, you wrote that the Town Board on January 20, at an all day work session, "purportedly authorized a study to be prepared" by a particular consultant. Although an executive session was held and a vote was apparently taken, you indicated that no minutes had been prepared as of the date of your letter to this office. On March 7, you requested the consultant's report, which was deemed to be "Draft-Confidential" by the Supervisor. A written denial dated March 9 referred to the record as a "draft document...considered to be an intra-agency document until such a time as its review is complete." You appealed the denial on March 11, but received no specific response to the appeal.

In your second letter, you wrote that the report "was deemed completed" at a Board meeting held on March 30 and was made available on the following day. You included attachments to the report and indicated that the "major portion of this report...contains a copy of the DEIS volume adopted by the Town Board in 1988", as well as a portion of another DEIS.

You asked whether the document should have been made available when originally requested. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the

> state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions. folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Due to the breadth of the language quoted above, I believe that a report produced by or for an agency would constitute a "record" subject to rights conferred by the Law, even if it is characterized as "draft".

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.

Third, in my view, an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality, without more, would not in my view serve to preclude an agency from disclosing a record. In this instance, I am unaware of any statute that would render the report exempted from disclosure by statute.

Similarly, as advised in my letter to you of April 22, 1992, the fact that a record may properly be characterized as intra-agency material is not a determinative of rights of access, for the content of the material serves as the basis for such a determination. To reiterate a point made in that opinion, I refer once again to a decision rendered by the Court of Appeals in which the Court specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, holding that:

> "While the reports in principle may be exempt from disclosure, on this records - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the

> reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i]), or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents. Moreover, the regulations promulgated by the Department of Environmental Conservation have long required that draft enforcement impact statements be disclosed [6 NYCRR 617.10(e)].

Based on the foregoing, insofar as the report consisted of statistical or factual data or portions of draft environmental impact statements at the time you requested it, I believe that it would have been accessible under the Freedom of Information Law.

In addition, as you are aware, §89(4)(a) of the Freedom of Information Law requires that agencies respond to appeals within ten business days of its receipt. Specifically, that provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Lastly, I point out 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)]. 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.

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, §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. However, if motions were made, i.e., a motion to enter into an executive session, or if action was taken, I believe that minutes reflective of those activities must be prepared and made available.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Jane A. Sager, Supervisor
Doris M. Greene, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2339

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 11, 1994

Ms. Tinker Twine
[redacted]

The staff of the Committee on 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 March 26. Please be advised that your correspondence did not reach this office until April 12.

According to your letter:

> "...the Saugerties town board has held several unannounced, private meetings in Albany during the month of March with representatives of the promoters who propose to hold a weekend rock concert in Saugerties in August.
>
> "While the purpose of the meetings was, apparently, to negotiate a contract with the festival promoters prior to issuing a mass gathering permit, the board did not convene publicly, state the reasons for the executive sessions, nor vote to conduct this business privately."

You have sought an advisory opinion concerning the matter described above, as well as the propriety of a meeting held at the Ulster County Office Building in Kingston last winter. You wrote that:

> "...[t]he meeting was attended by the Saugerties town board and 8 officials from various county departments and the county legislature. The purpose was to coordinate SEQR review of the then proposed Woodstock Festival to be held in Saugerties this August. The meeting was called by the chairman of the Ulster County legislature."

In this regard, I offer the following comments.

First, 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 public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

It is noted, too, that in a relatively 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 held last winter might have been held at the request of a person not associated with the Town, I believe that it was a meeting, assuming that a quorum of the Board was present for the purpose of conducting public business.

In each of the instances that you presented, if a quorum of the Board gathered to conduct public business, I believe that the gatherings would have been meetings that should have been held in accordance with the requirements of the Open Meetings Law.

Second, the intent of the Open Meetings Law is clear. Section 100 of the Law, the legislative declaration, states that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

In my view, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. I believe that a meeting should be held a location where members of the public who might want to attend could reasonably do so. The proposed rock festival is the subject of a great deal of interest, and it is assumed that the festival will have a significant impact on Town residents. Holding a meeting some 45 miles from the Town would in my opinion be unreasonable, for many of those interested in attending might not be or have been able to do so.

Lastly, aside from the provisions of the Open Meetings Law, §62 of the Town Law states in part that "[a]ll meetings of the town board shall be held within the town..."

I hope that I 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-2340

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 12, 1994

Mr. Andrew W. Barone
Civil Engineer
[redacted]

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

Dear Mr. Barone:

I have received your letter of April 12 in which you raised a question concerning the Open Meetings Law.

You wrote that at a recent meeting of the Board of Trustees of the Village of Monroe held primarily to discuss the budget, the Board entered into an executive session "to discuss and develop salaries...for all offices and positions not covered under bargaining agreements of union personnel."

Your inquiry concerns the propriety of the 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".

In the context of your inquiry, insofar as discussions of raises or related matters pertained to non-union staff as a group and did not focus upon any "particular person", I do not believe

that any ground for entry into executive session would have been applicable. 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). On the other hand, insofar as the discussion focused 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 have been appropriately held.

I hope that I have been of some assistance.

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 2341

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

May 16, 1994

Mr. Larry L. Helwig, Councilman
Town of Wheatfield
Niagara County
[redacted]

The staff of the Committee on 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 Helwig:

I have received your letter of April 12, which reached this office on April 18.

You have questioned the status under the Open Meetings Law of a committee created pursuant to a resolution adopted by the Town Board of the Town of Wheatfield. The Committee consists of three members of the Town Board and is authorized to negotiate contracts with the Chiefs of five fire departments that serve the Town and to negotiate a new retirement program for volunteer firemen. The members of the Committee are from the same political party, and you wrote that neither you nor the other member of the Board from the minority party received notice of a committee meeting. You added that neither the public nor the news media were given notice.

In this regard, although most of the ensuing remarks are similar to those contained in a copy of an advisory opinion sent to you in March, I offer the following comments.

First, when a committee consists solely of members of a public body, such as a town board, I believe that the Open Meetings Law is clearly 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 town board consisting of two or three of its members, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see 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, §41). As such, in the case of a committee consisting of either two or three, for example, a quorum would be two.

Further, 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 [see Glens Falls

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 town board consisting of two or three of its members, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see 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, §41). As such, in the case of a committee consisting of either two or three, for example, a quorum would be two.

Further, 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 [see Glens Falls

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

Further, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered in executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

Lastly, as you may be aware, §108(2) of the Open Meetings Law exempts "deliberations of political committees, conferences and caucuses" from its coverage. If a matter is exempt from the Law, none of the requirements for entry i.e., regarding notice or the procedural requirements for entry into an executive session, would apply. Section 108(2)(b) states in relevant part that:

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York or the legislative body of a county, city, town or village, who are members or adherents to the same political party..."

In my view, the exemption concerning political caucuses applies to "the legislative body" of a Town, i.e., the Town Board. The language of §108 does not refer to a committee of a legislative body, such as the committee that is the subject of your inquiry. Since §108 is inapplicable, I do not believe that the committee in question may conduct a closed political caucus, irrespective of the political party affiliation of those who are present at its meetings. Rather, as a committee, its meetings are, in my view, subject to the Open Meetings Law in all respects.

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 8247
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May 16, 1994

Mr. Gerard E. McKenna
Vice President
G & P Management Corp.
[redacted]

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

Dear Mr. McKenna:

I have received your letters of April 14 and May 1, as well as the correspondence related to them.

You have sought advice and assistance concerning your efforts to obtain records from the Town of Providence. In conjunction with the issues raised in the correspondence, I offer the following comments.

First, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing board of a public corporation, the Town of Providence, is the Town Board, and I believe that the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
>
> (4) Upon request for copies of records:
>
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records.
>
> (5) Upon request, certify that a record is a true copy.
> (6) Upon failure to locate the records, certify that:

> (i) the agency is not the custodian for such records; or
> (ii) the records of which the agency is a custodian cannot be found after diligent search."

In most towns, because the town clerk is the legal custodian of all town records, that person is most often designated as records access officer. When that is so, a request should be directed to the clerk, and he or she has the responsibility of coordinating the Town's response to requests.

In conjunction with one of the responses to a request, while you may view records during a meeting as offered, I do not believe that the opportunity for inspecting or copying the records can be restricted to that time. Section 1401.4 of the regulations referenced earlier state that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies may 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..."

Based upon the foregoing, I believe that the records access officer should have acknowledged receipt of your request within five business days of its receipt and that she should have included an estimate of the date when the records would be made available or denied. Further, 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)].

Third, one of the issues appears to relate to the scope of your requests. While an agency cannot require that an applicant specify or identify the records of interest with particularity, I point out that §89(3) of the Freedom of Information Law states that an applicant must "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. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of your request, I must admit to being unfamiliar with the Town's record-keeping systems; whether it has the ability to locate and identify all of the records sought in the manner in which you requested them is unknown to me. However, as indicated earlier, if there is difficulty in making an appropriate request, the records access officer has the duty of ensuring that Town personnel "assist the requester in identifying requested records, if necessary" [see §1401.2(b)(2)].

Fourth, the Freedom of Information Law generally pertains to existing records, and §89(3) states in part that an agency need not create a record in response to a request. Therefore, the Town in my view would not be required to prepare a record that includes names, addresses and phone numbers of "entities requesting subdivision action". However, if you request records that contain that information, I believe that the Town would be obliged to disclose them or portions of existing records containing that information.

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

Correspondence between Town officials and subdivision applicants would, in my opinion, be available, for none of the grounds for denial would apply. However, communications among or between Town officials would be accessible or deniable, in whole or in part, based upon their contents. Relevant is §87(2)(g), which states that an agency may withhold records that:

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

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

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

Lastly, since your requests refer to minutes of minutes, I direct your attention to the Open Meetings Law, which provides guidance concerning minutes, their contents and the time within which they must 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. It is also clear that minutes need not consist of a verbatim account of all that was said at a meeting, for §106 provides what might be viewed as minimum

requirements concerning the contents of minutes. While a clerk or public body may choose to prepare expansive minutes, they must consist only of the kinds of information described in §106.

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 are 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Records Access Officer
Richard Hunter, Supervisor
Glen W. Brownell, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2343

162 Washington Avenue, Albany, New York 12231
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May 18, 1994

Mr. Joseph A. Fiore
[redacted]

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

Dear Mr. Fiore:

I have received your letter of April 10, which reached this office on April 18.

Your letter and the correspondence attached to it refer to a meeting held at the request of a resident of the Town of Ashford. In attendance were the resident, two members of the Low-Level Radioactive Waste Siting Commission, certain Commission personnel and two members of the Ashford Town Board. You asked how such a meeting can be held "and not be in violation of the Open Meetings Law".

In this regard, the Open Meetings Law applies 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."

While it is clear that both the Commission and the Town Board are public bodies, a "meeting" subject to the Open Meetings Law does not occur unless a quorum of a public body has convened for the purpose of conducting public business. A quorum is a majority of the total membership of a public body.

In the situation to which you referred, less than a quorum of either the Commission or the Town Board was in attendance. In short, since less than a quorum was present, the Open Meetings Law and the requirements imposed by that statute would not have applied.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Angelo F. Orazio, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8255
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May 20, 1994

Mr. Alfred Gillen
[redacted]

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

Dear Mr. Gillen:

I have received your letter of April 17 and the materials attached to it. You have sought my views concerning certain issues arising under the Open Meetings and Freedom of Information Laws.

The first involves a situation in which schools were closed in the Brentwood School District due to a snowstorm, but the Board of Education held a meeting on that same day. In response to an inquiry on the matter addressed to Commissioner Sobol of State Education Department, you were informed that the meeting was not "illegal". From my perspective, the fact that classes might have been cancelled would not have precluded the Board from conducting a meeting. I point out that in response to a somewhat similar matter, the State Comptroller advised that a municipality is not legally obligated to close its offices on the holidays designated in §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, weekends, or on a day when classes are cancelled, 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.

You also referred to minutes of a special meeting which did not explain why it was called. In this regard, while the Open Meetings Law requires that a meeting be preceded by notice of the time and place, I am unaware of any requirement that the reason for holding a special meeting must be included in the notice or in minutes. However, having reviewed the minutes, I believe that they

are incomplete. Item 4 refers to a motion to enter into an executive session, but the minutes do not include the reasons for entry into executive session. I direct your attention to §105(1) of the Open Meetings Law, which states in part that:

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

Based on the foregoing, a motion to conduct an executive session must identify "the general area or areas of the subject or subjects to be considered". Further, §106 of the Open Meetings Law requires that minutes include a record or summary of all motions, as well as other matters.

The remaining issues relate to your requests made under the Freedom of Information Law and your complaint that District officials have written that "District records do not exist in the format requested". Some of your requests include a variety of items, and although the District may maintain various records containing those items, there is likely no single record that would include all of them. Additionally, in one of your requests, you raised the following question: "What do the teachers & Administrators Union Reps do in a day? (Teach? Hrs. days and salaries... How many per union)".

In conjunction with the foregoing, it is noted that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information 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, in a technical sense, the District in my opinion is not obliged to provide the information sought by answering the questions raised in the request or creating records on your behalf. Nevertheless, in view of the general thrust, intent and spirit of the Freedom of Information Law, it is likely that the District maintains records reflective of some of the information sought, and that it can readily disclose "information" derived from existing records.

More specifically, 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, as well as attendance records, must be disclosed.

Of relevance is §87(2)(b), which 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.

In a decision dealing with attendance records that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates and times of attendance or absence, would not in my view represent a personal detail of an individual's life and would be relevant to the performance of one's official duties. Therefore, I do not believe that §87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

In affirming the Appellate Division decision in Capital Newspapers, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Lastly, rather than seeking information by asking questions or requesting records containing specific information when such records may not exist, it is suggested that you attempt to learn of the format and content of the District's records. With that information, it is likely that appropriate requests could be made.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Frank A. Mauro, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2345

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May 23, 1994

Mr. Ronald McLain
[redacted]

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

Dear Mr. McLain:

I have received your letter of April 23 in which you raised several issues relating to the Open Meetings Law.

You wrote at the outset that it is your understanding that "when two or more members of the same elected board come together to discuss public business, that meeting was supposed to be open to the public." In my opinion, that is not usually so. For a meeting to fall within the requirements of the Open Meetings Law, a quorum, a majority of the total membership of a public body, must be present for the purpose of conducting public business. If a public body consists of seven members, for example, a quorum would be four, and the Open Meetings Law would not apply until at least four convene for the purpose of conducting public business. A gathering of two in that situation need not be public, for the Open Meetings Law would not apply. However, if a public body consists of three members, two would constitute a quorum, and a meeting of two of the members to conduct the business of the body would, in my view, be subject to the requirements of the Open Meetings Law.

You referred next to a "site selection committee" consisting of four members of the Gloversville Enlarged School District Board of Education. You wrote that:

> "This committee never held any public meetings to discuss possible sites. The public was only involved when at a regular board of education meeting the site selection committee gave an explanation of the criteria that was used to either delete a site or keep a site on the list of possibilities. Then the site selection committee came to another regular meeting of the board of education and

> recommended what they considered to be the best site. Then the full board of education voted to accept the recommendation and send it to the State for approval."

You asked whether the Committee operated properly.

In this regard, 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 clearly 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 county board of supervisors, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see 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.

Further, 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 [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 601 NYS 2d 29, ___ AD 2d ___ (1993)].

I point out, too, that 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 entry into a closed or executive session. Of possible relevance concerning the site selection committee's duties is §105(1)(h), which permits a public body to conduct an executive session to discuss:

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

Consequently, the proposed acquisition or lease of real property may be discussed in executive session only when publicity would substantially affect the value or the property. Further, for reasons to be discussed in conjunction with the remaining issue that you raised, even if the committee had a basis for conducting an executive session, I believe that it should first have convened its meetings open to the public.

With respect to the last issue, you wrote that:

> "another thing that bothers several of the members of the public that attend the regular meetings of the board of education is the fact that the board of education always has an hour long executive session before the public session is held and the public is never informed why the executive session was needed. Then right after the public session the entire board always goes into another executive session and this session is always for the

> purpose of discussing personnel matters or at least that it what the board says."

Here 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].

Therefore, even when a subject to be discussed could properly be considered during an executive session, I believe that a public body must first convene an open meeting, preceded by notice of the time and place given in accordance with §104 of the Open Meetings Law. Following the initiation of the meeting in public, when a subject arises that may be discussed in executive session, the procedure described earlier in §105(1) should be carried out.

As suggested earlier, the 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 to which you referred, 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, supra).

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.

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
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2346

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May 23, 1994

Mr. Robert F. Reninger
[redacted]

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

Dear Mr. Reninger:

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

According to your letter, prior to a public hearing held in the Town of Greenburgh relating to proposed amendments to its zoning ordinance, the Broadview Civic Association requested minutes of the meeting during which the hearing was authorized. In response to the request, the Town Clerk indicated that no minutes were taken because the authorization occurred at a "work session". You have asked whether the absence of minutes would render the hearing "subject to invalidation."

In this regard, although the issue relates to commentary offered in a letter of December 28, 1993 addressed to you, I offer the following remarks.

Fist, as you are aware, 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 short, there is no legal distinction between a "meeting" and a "work session".

Second, with respect to minutes of "work sessions", as well as other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §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. However, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. Since action was taken to schedule the hearing in question, I believe that minutes must be prepared and made available memorializing the action, the date, and the vote of each member.

Lastly, the provisions concerning the enforcement of the Open Meetings Law state in relevant part that:

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

or part thereof taken in violation of this article void in whole or in part."

Based on the foregoing, a proceeding could be initiate to compel the public body that took action to prepare appropriate minutes as required by §106 of the Open Meetings Law. If, however, the action was taken during an open meeting, and if legal notice of the hearing was published as required by law, it is questionable in my view whether "good cause" could be demonstrated for the purpose of convincing a court to employ its discretionary authority to nullify an action. Further, I believe that action taken remains valid unless and until a court renders a determination to the contrary.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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May 26, 1994

Mr. Gary Hayes
[redacted]

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

Dear Mr. Hayes:

I have received your letters of April 29 and May 20, as well as a variety of related materials.

You have sought an advisory opinion concerning a denial of your request for the "datebook" of the Superintendent of the Middleburgh Central School District concerning a particular date. The Superintendent has contended that it is not subject to the Freedom of Information Law, and you wrote that he stated at a meeting that it is his "personal datebook". It is your view that the datebook relates to school business and "will help to clarify his sworn testimony". In addition, you have questioned the propriety of executive sessions held by the Board of Education and forwarded minutes of a number of meetings. An example of minutes as they relate to the issue is the following statement appearing in minutes: "Executive Session to discuss negotiations, personal matters, recommendations of CSE and other appropriate areas".

In this regard, I offer the following comments.

First, §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

> maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

Additionally, in another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Similarly, 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)].

In short, based upon the language of the Law and its judicial interpretation, I believe that the datebook would constitute a record subject to rights conferred by the Freedom of Information Law.

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

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.

In my view, the record in question would constitute "intra-agency" material. However, it would likely consist of purely factual information accessible under §87(2)(g)(i), unless a different ground for denial may be asserted.

Also relevant is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records to the extent that 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. 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, 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].

In my opinion, schedules indicating appointments, meetings and the like in which the a public employee has engaged are relevant to the performance of that person's official duties. Therefore, to the extent that the record in question pertains to the performance of the Superintendent's official duties, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy with respect to the public employee who maintains or is the subject of the datebook.

I direct your attention to a decision that described the intent and utility of the Freedom of Information Law. Specifically, in Capital Newspapers v. Burns, the Court of Appeals, in considering the routine functioning of government held that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus

> providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (supra, 565-566).

Perhaps the most direct precedent is Kerr v. Koch (Supreme Court, New York County, NYLJ, February 1, 1988). A newspaper reporter was granted access to the "public schedules" of New York City's former Mayor, Edward Koch. However, other more detailed "private" schedules were withheld. In that decision, the court posed the following question: "Will granting access to the Mayor's appointment calendars without redaction urged by respondents as proper, result in an unwarranted invasion of personal privacy?" In response to the question, it was stated that:

> "Avoidance of disclosure under FOIL cannot be had by simply placing in documents the unilateral description, 'private' as this would '*** thwart the entire objective of FOIL by creating an easy means of avoiding compliance.'"

Further, in granting access to the records, the Court found that:

> "It appears that some private appointment calendar material has been produced for petitioner, with redactions that reduce the worthiness of those documents.
>
> "There is no suggestion of scandal attached to those who are associates of the Mayor, whether they be servants of the public or private individuals. Accordingly there is nothing unwarranted, excessive or unjustifiable in revealing the names of those with whom the Mayor had appointments from time to time. As a public person invested with a public trust, he should be accountable for his associations."
>
> "The passion for secrecy found in the redaction of names from private schedules of the respondents, where luncheon meetings have been billed to the Mayor's expense account, is not justified under the circumstances described here. Mixed, as they appear to be with public documents and records, all kept by the agency of the Mayor's Office, the private schedules are vulnerable under the Freedom of Information Law. Otherwise, liberal construction of FOIL is forfeited and the

> exemptions in the law are at the mercy of a narrow interpretation."

If an entry in an appointment book is unrelated to the performance of one's official duties, for example, as in the cases of a reference to an appointment with a doctor or spouse, I believe that those portions of the record could be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Further, if reference is made to a student or the parent of a student, I believe that privacy considerations arise not with respect to the public employee acting in the performance of his or her duties, but rather with respect to the parent or the student. To the extent that the record includes reference to students or their parents, I believe that those references could be deleted prior to public disclosure.

With respect to executive sessions, 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 and limit the subjects that may appropriately be considered during an executive session. Based upon the language of the Open Meetings Law and its judicial interpretation, motions to conduct executive sessions citing the subjects to be considered as "personnel", "litigation" or "negotiations", for example, without additional detail are inadequate. The use of those kinds of terms alone do not provide members of public bodies or members of the public who attend meetings with enough information to know whether a proposed executive session will indeed be properly held.

For instance, although it is used frequently, the term "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. 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 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 §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, or when the issue bears upon a group of employees, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel".

Moreover, 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 [see <u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, July 21, 1981; also <u>Becker v. Town of Roxbury</u>, Supreme Court, Chemung County, April 1, 1983]. 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 frequently cited relates to "litigation". Again, that kind of minimal description of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is §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].

Similarly, with respect to "negotiations", the only ground for entry into executive session that mentions that term is §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, §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 §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into executive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle, supra].

In sum, I believe that a motion to enter into an executive session must be sufficiently detailed to enable Board members and the public to know that the Board is acting in compliance with the Law.

Lastly, when the Board focuses on specific students, of likely relevance is a provision of federal law, the Family Educational Rights and Privacy Act (20 U.S.C. §1232g). In brief, that Act is applicable to educational agencies or institutions that participate in funding programs administered by the U.S. Department of Education. As such, it applies to virtually all public educational institutions, as well as many private colleges and universities. With regard to records, as a general matter, "education records" identifiable to a particular student or students are considered confidential, unless the parents of the students consent to disclosure. Concurrently, the parents enjoy rights of access to education records pertaining to their children.

As the Family Educational Rights and Privacy Act relates to the Open Meetings Law, §108(3) of the Open Meetings Law exempts from its provisions "any matter made confidential by federal or state law". Consequently, information discussed by a board of education derived from education records of a student would be confidential and could be considered outside the scope of the Open Meetings Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education
Walter J. Doherty, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 31, 1994

Mr. Lewis R. Dabi
[redacted]

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

Dear Mr. Dabi:

I have received your letter of April 29 and the materials attached to it.

You have raised several issues concerning meetings and other actions in the Harborfields Central School District. It is emphasized that the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law. As such, certain issues that you described, i.e., encouraging students to vote during class time, are beyond the scope of the Committee's jurisdiction and expertise. For purposes of clarification, based upon your commentary, I offer the following remarks.

First, while I agree with your statement that "issues should be addressed, not concealed", I know of no requirement that a public body refer at an open meeting to communications received from residents and other interested persons.

Second, in a related vein, 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.

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-8288
OML-AO-2349

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 3, 1994

Mr. Patrick Morris
[redacted]

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

Dear Mr. Morris:

I have received your letter of May 6 and the materials attached to it.

In brief, having requested minutes of meetings of the Salamanca Industrial Development Agency, as well as a "listing of all records maintained by the IDA and whether or not those records are available to the public", you wrote that your request was denied, and you raised a series of questions relating to the matter.

In an effort to answer to those questions and in conjunction with the correspondence, I offer the following comments.

First, the response to your request indicates that minutes of meetings would be made available, but that the Agency did "not have available staff or time to go through all of the Agency minutes for the past three years to filter out the information you want". I am unaware of the particular information in which you are interested. However, it appears that the response was appropriate.

It is clear that minutes of meetings of an industrial development agency must be prepared and made available to the public. As you are aware, §106(3) 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 meeting except that minutes taken pursuant to subdivision two hereof shall be

> available to the public within one week from the date of the executive session."

Further, pursuant to §87(2) of the Freedom of Information Law, accessible records must be made available for inspection and copying. Therefore, I believe that you may inspect minutes at no charge; alternatively, you could request copies of minutes, in which case, the Agency could charge up to twenty-five cents per photocopy [see Freedom of Information Law, §87(1)(b)(iii)].

Second, with respect to the adequacy of a request, often the issue is whether the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. 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 or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of your inquiry, I would conjecture that minutes of meetings may be readily retrieved and that a request for minutes covering a period of three years would reasonably describe

the records. If, however, a request involves minutes insofar as they deal with a particular subject, and if the minutes are not topically indexed, I do not believe that agency staff would be required to review all of the minutes in an effort to locate particular items within them.

Third, with regard to rules and regulations, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of the Agency is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

Next, as a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to a list maintained by an agency. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list.

Lastly, when records are available under the Freedom of Information Law, it has been held that they must be made equally available to any person, without regard to one's status, interest or possible public benefit that may accrue to the public [see M. Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976)]. The Law does not generally distinguish among applicants, and the intended use of records is largely irrelevant to rights of access or the fees that agencies may charge. In addition, 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Nancy Milligan, General Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2350

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 6, 1994

Mr. Thomas Broderick
Grievance Officer
Elizabethtown/Lewis Central School
Teachers' Association
Elizabethtown, NY 12932

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

Dear Mr. Broderick:

I have received your letter of May 4 in which you sought my views concerning an executive session held prior to a meeting of the Elizabethtown/Lewis Central School District Board of Education.

In this regard, I offer the following comments.

First, by way of background, I point out 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, 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, §104 of the Open Meetings Law requires that every meeting be preceded by notice of the time and place. In my view, even when there is an intent to conduct an executive session immediately after convening, a public body must provide notice of the time it intends to convene initially. However, a public body could, in my opinion, include in or with the notice an indication that a motion would be made to enter into executive session to discuss a particular topic immediately after the convening of an open meeting.

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

FOML-AO-2351

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 8, 1994

Mr. Richard E. Scudellari
Co-leader
Tax Pac, 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. Scudellari:

I have received your letter of May 8 and the materials attached to it.

Among the materials are notices of meetings of the Harborfields Board of Education indicating that meetings would begin at 8:15 p.m., as well as minutes indicating that the meetings were called to order earlier than that time to conduct executive sessions.

You have questioned the propriety of the practice and inquired as to which agency can assist "in requiring the Board to operate legally." In this regard, I offer the following comments.

First, by way of background, I point out 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, 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, §104 of the Open Meetings Law requires that every meeting be preceded by notice of the time and place. In my view, even when there is an intent to conduct an executive session immediately after convening, a public body must provide notice of

the time it intends to convene initially. However, a public body could, in my opinion, include in or with the notice an indication that a motion would be made to enter into executive session to discuss a particular topic immediately after the convening of an open meeting.

Lastly, this office offers advice concerning the Open Meetings Law. While the Committee on Open Government cannot enforce the Open Meetings Law, it is my hope that advisory opinions, including this opinion, can serve to educate, persuade and encourage compliance with the Law. When an opinion rendered by the Committee is ineffective, an aggrieved person may commence a judicial proceeding against a public body pursuant to §107 of the Open Meetings Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Barbara Muller, District Clerk

OML-AO 2352
FOIL-AO 8293

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 9, 1994

Mr. Joseph Kopylec
[redacted]

Dear Mr. Kopylec:

As you are aware, your letter of May 7 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Open Meetings and Freedom of Information Laws. Some of the issues raised in your correspondence with the Supervisor of the Town of Carlisle relate to those statutes.

In conjunction with those issues, I offer the following comments.

First, a town supervisor is a member of a town board, and the supervisor has the same right and responsibility to vote at meetings as any other member of the town board. Further, pursuant to §63 of the Town Law, the town supervisor, when present, presides at town board meetings, and the board is empowered to "determine the rules of its procedure."

Second, there is no legal requirement that minutes or similar records be read aloud at meetings. However, most records maintained by state and local government agencies are available to the public 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 §87(2)(a) through (i) of the Law. Moreover, §106(3) of the Open Meetings Law requires that minutes of meetings be prepared and made available within two weeks of the meetings to which they pertain.

Third, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). Nevertheless, 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 (i.e., 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.

Lastly, with respect to the capacity to hear what is said at meetings, I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process. Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. For instance, I believe that the Board must situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basis requirement of the Open Meetings Law. However, if a meeting room is large, I believe that members of the public body should situate

themselves in locations close enough to the proceedings to hear what is said.

Enclosed for your review are copies of the Open Meetings Law, the Freedom of Information Law, and an explanatory brochure that deals with both of those laws.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Donald E. Mackey, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8300
OML-AO-2353

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 10, 1994

Ms. Lillian Abbott Pfohl
The Post Standard
Clinton Square
P.O. Box 4818
Syracuse, NY 13221-4818

The staff of the Committee on 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. Pfohl:

I have received your letter of May 16 in which you sought an advisory opinion concerning the Freedom of Information Law.

According to the materials that you forwarded, you requested records of the Syracuse Financial Plan Commission (the Commission) concerning certain time periods. You were informed, however, that the Commission is not an "agency" subject to the Freedom of Information Law and that the records would be withheld. In his response to your appeal, Mayor Bernardi wrote that the functions of the Commission are solely advisory and offered the following remarks concerning the matter:

> "...I have asked private citizens from a variety of backgrounds and with a diversity of experience and expertise to become part of the Commission. These individuals have agreed to volunteer their time and effort, and to lend their considerable knowledge, to offer recommendations to me on the operation of the City's government. I want Commission members to be able to engage in free, candid, and frank discussions and deliberation on a whole host of topics. So that this discussion may take place, I believe that Commission meetings should not be open to members of the general public. Certainly, it is my expectation that any final recommendations issued by the Commission will be made public for consideration and comment."

While I agree that the Commission's meetings are not subject to the Open Meetings Law and that it is not an agency, it clearly carries out its duties for the City of Syracuse. Consequently, based on the following analysis, I believe that the records that it prepares are subject to the Freedom of Information Law.

First, as indicated by the Mayor, several judicial 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, it appears that the Commission does not constitute a public body subject to the Open Meetings Law.

Section §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, if the Commission is not a public body because, based on judicial decisions, it does not perform a governmental function, it would not be an agency, for it would not perform that function. However, a public corporation, such as the City of Syracuse, is an agency required to comply with the Freedom of Information Law.

Second, the fact that the Commission may not be a public body subject to the Open Meetings Law or an agency as defined by the Freedom of Information Law is not determinative. In my view, the issue is whether the documentation prepared by the Commission consists of agency records.

Section 86(4) of the Freedom of Information Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to,

> reports, statements, examinations, memoranda, opinions. folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

Additionally, in another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Based upon the decisions cited above, all of which were rendered by the State's highest court, the documents in question in my view constitute "records" subject to rights conferred by the Freedom of Information Law, because they were "produced...by, with or for an agency", the City of Syracuse.

In short, due to the breadth of the definition of "record", when an entity or person prepares documents for an agency, and the City of Syracuse is clearly an agency, I believe that those documents are agency records subject to rights conferred by the Freedom of Information Law, irrespective of their origin or authorship.

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

Often records reflective of predecisional commentary or advice may be withheld, for §87(2)(g) permits an agency to withhold "inter-agency or intra-agency materials", depending upon their contents. However, if the Commission is not an agency, the records prepared for or transmitted to the Mayor would not consist of either inter-agency or intra-agency material and §87(2)(g) could not be asserted as a basis for denial.

I note that Xerox Corporation v. Town of Webster [65 NY 2d 131 (1985)] dealt with reports prepared "by outside consultants retained by agencies" (id. 133). In such cases, it was found that the records prepared by consultants should be treated as if they were prepared by agency staff and should, therefore, be considered intra-agency materials. However, based on the Mayor's remarks, the Commission could not, in my view, 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 members of the community who may

enjoy expertise in a variety of areas, its members are not in the business of preparing recommendations on the operation of municipal government for gain or livelihood. Further, in the context of the Xerox decision, I believe that a consultant would be 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. For the foregoing reasons, I do not believe that the work produced prepared by the Commission could be viewed as a consultant's report or that it would fall within the scope of §87(2)(g) of the Freedom of Information Law.

In sum, I believe that records prepared for the City of Syracuse constitute agency records subject to the Freedom of Information Law, even though they were prepared by an entity other than an agency. Further, it does not appear that any of the grounds for denial would be applicable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Roy A. Bernardi, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2354

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 13, 1994

Hon. Frances B. Pierce
Councilwoman
[redacted]

The staff of the Committee on 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. Pierce:

I have received your letter of June 1. As a member of the Urbana Town Board, you wrote that the Supervisor "likes to discuss the coming month's town Board Agenda with the Councilmen & one woman, one on one" in order "to avoid controversial topics in public." You asked that I "shed some sunshine on this subject."

In this regard, it is noted at the outset 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.

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 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 that are preceded by reasonable notice given to all members.

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 syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

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

I also direct your attention to the legislative declaration of the Open Meetings Law, §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 short, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they may validly take action or make collective determinations by means of a series of "one on one" meetings or telephonic communications. I point out, too, that in a case in which members of a public body engaged in a "series of less-than-quorum meetings", it was held that the Open Meetings Law did not apply, for there was no evidence of an intent to circumvent the Open

Meetings Law; however, if there is evidence of such an intent, the purposes of the Open Meetings Law could be thwarted, and the Court inferred that such a practice would violate the Open Meetings Law [see Tri-Village Publishers, Inc. v. St. Johnsville Board of Education, 110 Ad 2d 932 (1985)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2355

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June 13, 1994

Mr. Robert C. Black
[redacted]

The staff of the Committee 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. Black:

I have received your letter of May 12 in which you claimed that the Open Meetings Law is being violated by the Department of History at the State University at Albany.

You referred to discussions of the matter some weeks ago in which I advised that if the entities in question are, in your words, "governing institutions, not merely advisory bodies", they would be subject to the requirements of the Open Meetings Law. You enclosed a copy of a portion of the Department of History's bylaws as they pertain to certain committees and asserted that they "confirm [the] accuracy" of your contention that the committees are indeed government institutions.

In this regard, although the language of the Department's bylaws suggest that the committees are in some respects governing bodies, Article X, §5 of the policies adopted by the Board of Trustees of the State University indicate otherwise. While the applicable policy authorizes the faculty to adopt bylaws, those bylaws are subject to and must be consistent with the policies of the Board of Trustees, and actions taken by the faculty pursuant to the bylaws are considered to be advisory. Specifically, the cited provision states that:

> "(a) The faculty of each college shall prepare and adopt bylaws which shall contain: (1) Provisions for committees and their responsibilities; (2) Procedures for the calling and conduct of faculty meetings and elections; and (3) Provisions for such other matters of organization and procedure as may

> be necessary for the performance of their responsibilities.
>
> (b) Bylaws shall be consistent with and subject to the Policies of the Board of Trustees of State University of New York, the laws of the State of New York, and the provisions of agreements between the State of New York, and the certified employee organization established pursuant to Article 14 of the Civil Service Law. Provisions of bylaws concerning consultation with the faculty shall be subject to the approval of the chief administrative officer of the college. All actions under bylaws shall be advisory upon the Chancellor and the chief administrative officer of the college."

In short, despite the language of the bylaws and what appears to be the authority to take final action, the committees in question have no such authority. If that is so, they would not constitute public bodies required to comply with the Open Meetings Law.

As we likely discussed, judicial decisions indicate generally that advisory bodies, 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, again, it appears that the entities in question are not subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2356

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June 14, 1994

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:

As you are aware, I have received your most recent letter, which reached this office on May 23.

Attached to your correspondence is a copy of a letter presented by your environmental group, the C.C.I.E., to the Ilion Village Board of Trustees at its meeting on April 25 in order that the letter could be included in the minutes. The letter referred to the functions of the Ilion Light Commission, and the Chairman of the Commission spoke later at the same meeting. On May 8, when the minutes of the April 25 were submitted for approval by the Board, you wrote that the Mayor would not include either your group's letter nor reference to the comments made by the Chairman of the Light Commission in the minutes.

You expressed the assumption "that the minutes of a meeting should reflect what actually occurs" and that they should not be prepared "only in a manner that protects the Mayor, and Village Board's political positions, and either eliminates, or, rewords all opposing views and positions".

In this regard, although it is implicit that minutes must be accurate, the Open Meetings Law 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 or include reference to 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). As such, even when a statement is offered by a member of a public body for inclusion in the minutes, that person has no absolute right to require that the statement become part of or referenced in the minutes.

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 they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Lastly, to ensure that a complete record of a meeting is prepared and that minutes of a meeting are accurate, it has become common to tape record meetings. Often a clerk or secretary of a public body records meetings as an aid in the preparation of minutes. In addition, judicial decisions indicate that any person who attends an open meeting may use a portable cassette tape recorder [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 15, 1994

David A. Payton, Ph.D.
Regional Education Coordinator
The State Education Department
Long Island Regional Field Services Team
Room 971 EBA
Albany, NY 12234

The staff of the Committee on 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. Payton:

I have received your letter of May 20, as well as a variety of material sent to you concerning the New Hyde Park-Garden City Park Board of Education. You asked that I review the material for the purpose of providing advice relative to the Board's compliance with the Open Meetings Law.

From my perspective, there are three issues present concerning the Open Meetings Law.

First, based on the minutes of a meeting held on April 15, the "public session of the meeting" was called to order at 7:30 p.m. However, the minutes also indicate that an executive session began a half hour earlier.

In this regard, by way of background, I point out 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)].

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].

Further, §104 of the Open Meetings Law requires that every meeting be preceded by notice of the time and place. In my view, even when there is an intent to conduct an executive session immediately after convening, a public body must provide notice of the time it intends to convene initially. However, a public body

could, in my opinion, include in or with the notice an indication that a motion would be made to enter into executive session to discuss a particular topic immediately after the convening of an open meeting.

The second issue involves the adequacy of the reasons given for entry into executive session. The minutes describe the reasons only as "personnel/negotiations".

Based upon the language of the Open Meetings Law and its judicial interpretation, motions to conduct executive sessions citing the subjects to be considered as "personnel", "litigation" or "negotiations", for example, without additional detail are inadequate. The use of those kinds of terms alone do not provide members of public bodies or members of the public who attend meetings with enough information to know whether a proposed executive session will indeed be properly held.

For instance, although it is used frequently, the term "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. 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 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 §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, or when the issue bears upon a group of employees, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel".

Moreover, 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 [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. 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 frequently cited relates to "litigation". Again, that kind of minimal description of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is §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].

Similarly, with respect to "negotiations", the only ground for entry into executive session that mentions that term is §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, §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 §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into 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 third issue relates to the ability of the District's attorney to offer a legal opinion to the Board in an executive session. Here I point out 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 may be closed to the public in accordance with §105 of the Open Meetings Law, which was discussed earlier in detail. 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.

In my opinion, although there would likely have been no basis under §105 of the Law to conduct an executive session, it appears that the matter could have been considered in private based on the attorney-client privilege.

Of relevance to the assertion of the attorney-client privilege 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 precedent, 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. Further, after a public body has sought and obtained legal advice from its attorney and has started to discuss and deliberate a matter of public business, I believe that the attorney-client privilege would end and that the Open Meetings Law would apply.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Anne Hess
Board of Education
Richard J. Nicolello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2358

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June 15, 1994

Ms. Lynn Lunde
[redacted]

The staff of the Committee on 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. Lunde:

I have received your memorandum of May 24 and various related materials. As a member of the Greater Johnstown School District Board of Education, you have raised questions relating to the Open Meetings Law.

Your first area of inquiry involves the ability of a majority of the members of the Board to take action without informing other members of their activities. You indicated that you and the other Board members were never informed of a meeting during which action was purportedly taken.

In this regard, by way of background, 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).

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 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 reasonable notice to all of the

members. Therefore, if, for example, four of seven members of a public body meet without informing the other three, even though the four 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.

The second issue pertains to the legality of disclosing information acquired during an executive session. You enclosed a portion of the District's Code of Ethics, which in the context of your question states that a person "shall not disclose info regarding any matters discussed in an executive session of the board of education whether such information is considered 'confidential' or not." In my view, it is questionable whether the entirety of the provision quoted above is enforceable.

I point out that the Open Meetings Law is permissive. Although that statute 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. 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. No statute of which I

am aware would confer or require confidentiality with respect to the matters described in your correspondence.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

Although 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 short, the situations in which information acquired during an executive session would be "confidential" in the legal sense would be rare. Further, the validity of or capacity to enforce a prohibition against disclosure "whether such information is 'confidential' or not" is, in my opinion, questionable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 2359

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 17, 1994

Mr. Wayne R. Robbins, President
Letchworth Central Teachers Association
Letchworth Central School
Gainesville, NY 14066

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

Dear Mr. Robbins:

I have received your letter of June 6 in which you sought guidance concerning "the legal responsibility of a body to accommodate visitors attending a public meeting".

Specifically, you wrote that the Board of Education of the Letchworth Central School District:

> "...conducts their regularly-scheduled meetings in the Superintendent's office which is a room approximately 15' x 20'. Much of the room is taken up by a large table seating 10 to 12 people and the Superintendent's desk. There is room for chairs along the wall for other administrators and some visitors, but it cannot comfortably seat more than 10 additional people. On the occasion in question, approximately 32 visitors attended the meeting and about half were able to crowd into the room but only by standing along the wall. Some 15 people were left to stand in an outer office. They could barely hear the conversation inside, let alone participate."

You raised the issue before the Board and the Superintendent, who wrote that:

> "The location of Board meetings is based on the number of people who have asked to address the Board or who will be on the agenda. The

> only 'visitors' we expected on May 23rd were Joe Marcin and Jeff Thomas. Willard and I had not prior knowledge that the LCTA planned to attend the meeting. Prior to the May 9th Board meeting, we had been made aware by Aggie Tamrowski that several people would be attending the meeting, therefore, we used Room 188. No one told us that the LCTA would be present on May 23rd. You are always welcome at our Board meetings but we need to be able to plan in advice for the use of Room 188."

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 can be anticipated 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education
Charles R. Pegan, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2360

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 20, 1994

Mr. Joseph F. Maher
The Gazette Newspapers
2345 Maxon Road
Schenectady, NY 12031-1090

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 Mr. Maher:

I have received your letter of June 1, which reached this office on June 6.

You have sought an advisory concerning practices of the Fulton County Board of Supervisors and its committees relative to notice of their meetings. According to your letter, "there have been numerous occasions where special committee meetings or special meetings of the entire board have been scheduled hastily, and no effort has been made by the board or its clerk or staff to notify the media...at all." You referred to a recent situation in which a notice was allegedly but posted, but in which you were told "there was no time to notify the media."

In this regard, I offer the following comments.

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

Since the definition makes specific reference to committees of a public body, I believe that the Board of Supervisors, as well as

committees consisting of its members, constitute public bodies required to comply with 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, §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. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Since notice must be "conspicuously posted in one or more designated public locations," I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings.

Lastly, the judicial interpretation of the Open Meetings Law suggests 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 §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 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 may be unreasonable to conduct meetings on short notice.

In an effort to provide guidance and enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Board and its clerk.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Supervisors
Jon R. Stead, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 2361

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 23, 1994

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, unless otherwise indicated.

Dear Mr. Blum:

I have received your letter of in which you requested a "ruling on roll call minutes" concerning the Education Subcommittee of the Citizens Advisory Committee of the New York/New Jersey Harbor Estuary Program (HEP).

In this regard, the Committee on Open Government is authorized to provide advice pertaining to the New York Freedom of Information and Open Meetings Laws. The Committee is not empowered to issue a "ruling" or otherwise enforce those statutes. Nevertheless, based on a review of the materials attached to your letter, and a discussion with a representative of the Hudson River Foundation, I offer the following comments.

It is my understanding that HEP is funded through the federal Environmental Protection Agency and that participants in HEP and its committees and subcommittees may be representatives of federal agencies, New York and New Jersey state and municipal agencies, and interested persons who are not government employees. HEP, as described to me, is a public/private partnership that operates through cooperative agreements designed to enhance and encourage public participation.

Notwithstanding the goals of the Program, neither New York nor New Jersey has the ability to impose its laws beyond its borders. As you may be aware, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee,

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

In a case involving the application of the New York Freedom of Information Law to the Waterfront Commission of New York Harbor, which is a bi-state agency, it was held in Metro-ILA Pension Fund v. Waterfront Commission of New York Harbor (Supreme Court, New York County, NYLJ, December 16, 1986) that "[a]n interstate agency is created by interstate compact, and New York may not impose its preferences with respect to freedom of information on the other party to the compact." Therefore, it was held that "the Waterfront Commission is not an 'agency' subject to New York's Freedom of Information Law."

While §87(3)(a) of the Freedom of Information Law requires that an agency maintain voting records indicating how each member cast his or her vote, because the committees created by the HEP are not agencies, the New York Freedom of Information Law and its requirement concerning the record of votes would not, in my opinion, be applicable.

Similarly, the Open Meetings Law, which includes requirements concerning minutes of meetings, pertains to meetings of public bodies. In my view, there are three reasons for advising that the Open Meetings Law is inapplicable.

First, as in the case of the Freedom of Information Law, the state's Open Meetings Law is valid only in New York; it does not apply beyond the borders of this state.

Second, in a case involving the status of a committee operating within the State University that was designated pursuant to federal law, the Court of Appeals found that the powers of the committee "derive solely from Federal Law...and for that reason alone", it was concluded that the entity in question did not constitute a public body subject to the Open Meetings Law [American Society for the Prevention of Cruelty to Animals v. Board of Trustees of the State University of New York, 79 NY 2d 927, 929 (1992)].

Lastly, judicial decisions indicate generally that advisory bodies, 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)].

In sum, for the reasons discussed earlier, it appears that the requirements of the Freedom of Information Law and the Open Meetings Law to which you alluded do not apply to committees or subcommittees formed under HEP.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2362

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 24, 1994

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

I have received your letter of June 7. You alleged that the New York City Health and Hospitals Corporation has violated the Freedom of Information and Open Meetings Laws and asked that the Committee on Open Government and the Attorney General take action to ensure compliance.

Although the nature of the alleged violations is not described, you referred to "the assertion by a staff member of the corporation's public affairs office that only corporate board of directors meetings are open to the public and that all other meetings of board committees and subsidiaries are closed."

In this regard, when a committee consists solely of members of a public body, is authorized to take action, or performs a required function in the decision making process, I believe that it would constitute a public body subject to the Open Meetings Law.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

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

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "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 or that has the ability to take action, or that performs a function that must be carried out prior to decision making, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see 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.

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 [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, Appellate Division, Third Dept., ___ AD 2d ___ (1993)].

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.

It is also noted that every meeting of a public body must be convened open to the public, 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. In addition, a procedure must be accomplished, during an open meeting, before an executive session may be held. Specifically, §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 may conduct an executive session for the below enumerated purposes only..."

Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered in executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to the Health and Hospitals Corporation.

I hope that I have been of some assistance. If you have particular grievances or questions concerning the Open Meetings or Freedom of Information Laws and choose to seek an opinion, please communicate them to me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Director, Office of Public Affairs
Karen Boxer, Counsel

FOIL-AO- 8330
OML-AO- 2363

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 29, 1994

Ms. Lynne A. Eckardt
Maple Road
Brewster, NY 10509

<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. Eckardt:

I have received your letter of June 9 in which you raised a series of issues relating to the Brewster Public Library.

You wrote that until recently, the director of the Library was its records access officer. However, at a meeting held on June 6, on the advice of the town attorney, the "Library Board itself" became the records access officer. You added that "[n]o information, including the minutes, could be looked at without first filing a Freedom of Information form which a member of the Board would then approve or disapprove." No particular member of the Board was designated as records access officer, and no vote was taken on the matter. In addition, you enclosed a copy of memorandum sent to the library director by the Board of Trustees on June 8 which includes the following statements of policy:

> "1. Request for copies of the minutes for the meetings of the Board of Trustees.
>
> Written request to be prepared which will be approved in writing by a member of the library staff.
>
> 2. Request for copies of all other library documents.
>
> Written request to be prepared which will be reviewed and approved by a member of the Board of Trustees."

When and where the policy was adopted is, from your perspective, "unclear."

You have sought my opinion on the matter. In this regard, I offer the following comments.

First, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

Based on information provided by Library staff, it appears that the Library is, in essence, a department of the Town government. The members of the Library Board of Trustees are appointed by the Town Board, and it is my understanding that the Library functions as a unit within the Town government. If that is so, the governing body of a public corporation, the Town of Brewster, is the Town Board, and I believe that the Board would be required to promulgate appropriate rules and regulations applicable to Town government, including the Library, consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In addition, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

"The records access Officer is responsible for assuring that agency personnel:

(1) Maintain an up-to-date subject matter list.
(2) Assist the requester in identifying requested records, if necessary.
(3) Upon locating the records, take one of the following actions:
(i) make records promptly available for inspection; or
(ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
(4) Upon request for copies of records:
(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the requester to copy those records.
(5) Upon request, certify that a record is a true copy.
(6) Upon failure to locate the records, certify that:
(i) the agency is not the custodian for such records; or
(ii) the records of which the agency is a custodian cannot be found after diligent search."

Whether the Town Board or perhaps the Library Board of Trustees has the authority to designate the records access officer, based upon the provisions cited above, it is inappropriate in my view for the Board of Trustees to serve as records access officer, particularly since the duties to be performed in that role may be carried out by an unspecified Board member. Again, the regulations state that a records access officer shall be designated "by name or by specific job title."

Second, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (21 NYCRR §1401.5), which have the force of law and govern the procedural aspects of the Law, require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [21 NYCRR §1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual, such as yourself in the situation that you described, requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency possesses and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

Third, the Open Meetings Law provides guidance concerning minutes, their contents and the time within which they must 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.

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 are 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.

Based on the preceding remarks, there would appear to be no valid basis for requiring that request for minutes be approved.

Lastly, with regard to the time or event at which a policy was changed, 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).

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.

In order to take action, I believe that a meeting must be held by a quorum of a public body. 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."

In view of the language quoted above, a public body, such as a town board or a public library 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Library Board of Trustees
Town Board
Town Attorney
Paulette Sullivan, Assistant Director, Brewster Public Library

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2364

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 29, 1994

Supervisor Jim Switzer
Town of Ontario
[redacted]

The staff of the Committee on 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 Switzer:

I have received your memorandum of June 13. You indicated that the State Board of Equalization and Assessment appears to conduct some of its business by means of "phone meetings". You have questioned the propriety of such a practice.

In this regard, it is noted at the outset 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.

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 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 that are preceded by reasonable notice given to all members. Therefore, if reasonable notice of a meeting is not given to a member or members, I do not believe that a public body has the authority to perform its duties, even though a majority of its members may be present.

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 syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

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

I also direct your attention to the legislative declaration of the Open Meetings Law, §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 short, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they may validly conduct meetings by means of telephone conferences, vote or make collective determinations by means of telephonic communications.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Gaskell
Stephen Harrison

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2365

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

June 30, 1994

Mr. David J. Clements
[redacted]

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

Dear Mr. Clements:

I have received your letter, which reached this office on June 15. You have questioned the propriety of an executive session held by the Mechanicville City Council on March 15.

According to the minutes of the meeting, the Commissioner of Civil Service asked to address the City Council, and the Council approved a motion to conduct the discussion in executive session. Although the minutes refer to the motion, no reference was made in the motion to the basis for entry into executive session. The minutes indicate later that the Mayor stated that the discussion involved "pending litigation", and the Civil Service Commissioner added that "[i]t was to avoid pending litigation."

In this regard, I offer the following comments.

First, 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.

Second, based upon the minutes, of relevance to the matter 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 Council 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 or fear 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].

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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2366

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 5, 1994

Mr. Thomas Carson
[redacted]

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

Dear Mr. Carson:

I have received your letter of June 17. In brief, although you supplied the Naples Town Board with information concerning compliance with the Open Meetings Law relative to executive sessions, you wrote that the Board's motions to enter into executive session either fail to include a reason or offer a reason that is too general. You have asked that this office "initiate action" against the Town.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law. The Committee cannot enforce the Law or compel a public body to comply with its provisions. However, as indicated above, advisory opinions are prepared, and the intent of an opinion is to educate and persuade. In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this response will be sent to the Town Board.

It is noted at the outset that the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §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 and limit the subjects that may appropriately be considered during an executive session.

Based upon the language of the Open Meetings Law and its judicial interpretation, motions to conduct executive sessions citing the subjects to be considered as "personnel", "litigation" or "negotiations", for example, without additional detail are inadequate. The use of those kinds of terms alone do not provide members of public bodies or members of the public who attend meetings with enough information to know whether a proposed executive session will indeed be properly held.

For instance, although it is used frequently, the term "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. 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 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 §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, or when the issue bears upon a group of employees, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel".

Moreover, 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 [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. 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 frequently cited relates to "litigation". Again, that kind of minimal description of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is §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].

Similarly, with respect to "negotiations", the only ground for entry into executive session that mentions that term is §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, §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 §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into 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].

You also referred to §105(1)(b), which permits a public body to enter into an executive session to discuss:

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

Based on the foregoing, a public body may discuss the proposed acquisition of real property, for example, behind closed doors, "but only when publicity would substantially affect the value" of the property. Conversely, when publicity would not have any substantial effect upon the value of real property, §105(1)(h) could not in my opinion be properly asserted to enter into an executive session.

Lastly, with respect to 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."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2267

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 6, 1994

Mr. Lewis Evans
[redacted]

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

Dear Mr. Evans:

I have received your letter of June 17, which reached this office on June 23.

You have requested "a formal response/ruling on a matter involving the annual meeting of the Clymer Central School District." It was announced at the meeting that there were two candidates for a seat on the Board of Education, and at that point, "a Bona Fide voter rose, was recognized but before he could complete his request the chair ruled him out of order." Since the voter sought to have each candidate answer questions, you asked whether "by State Law...questioning of the candidates for a School Board [is] permitted prior to a vote." You added that one of the candidates, the incumbent, refused to debate or meet with his opponent or a reporter, and you expressed the belief that you and others were denied the opportunity to know the incumbent's position on the issues before voting.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law. The Committee is not empowered to issue a "ruling" or enforce the Open Meetings Law.

Second, 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, raise questions, 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., Education Law, §1709), 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.

In short, I know of no law that would require that the School Board permit residents to question candidates at a meeting. Certainly it is common to elicit candidates' views at a variety of other events, such as those that you mentioned. If a candidate refuses to debate, answer questions or be interviewed, certainly voters are free and may be encouraged to cast their votes for an opponent.

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-2360

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 13, 1994

Mr. Michael A. Kless
[redacted]

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

Dear Mr. Kless:

I have received your letter of July 5. As you requested, enclosed is "Your Right to Know", an explanatory brochure dealing with both the Open Meetings Law and the Freedom of Information Law.

You raised the following question:

> "Under open meetings can [you] attend a regularly scheduled meeting of a government agency, without notifying them just walk in? No matter how much they complain?"

In this regard, I offer the following comments.

First, the Open Meetings Law pertains 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."

As such, the Open Meetings Law generally applies to meetings of entities that carry out a government function collectively, such as legislative bodies, boards, councils, commissions, etc. It does

not apply to staff meetings held by agencies or to gatherings involving less than a quorum of a public body.

Second, §103(a) of the Open Meetings Law states in part that "Every meeting of a public body shall be open to the general public", except that executive sessions may be conducted in appropriate circumstances. An executive session is a portion of an open meeting during which the public may be excluded [see §102(3)]. Further, §105(1) of the Open Meetings Law specifies and limits the subjects that may properly be discussed in an executive session.

Lastly, the Open Meetings Law provides the public with the right to attend and listen to a public body's deliberations and actions at meetings. However, the Law is silent with respect to public participation and it confers no general right upon the public to speak or otherwise participate at meetings of public bodies.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2369

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 13, 1994

Hon. Barbara Johnson
Councilwoman
[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 Councilwoman Johnson:

I have received your letter of July 6, as well as the correspondence relating to it.

In your capacity as a member of the North Hempstead Town Board, you indicated that the Board consists of members of a single political party, and in a memorandum of June 30, you criticized the Board concerning its practice of holding closed meetings to discuss "calendar items". You also disagreed with the Town Attorney's contention that the meetings could legally be closed on the ground that they constitute political caucuses exempted from the Open Meetings Law. In the memorandum, you wrote that:

> "...the meetings in question are intended not to discuss political matters, but rather to address those calendar items that are expected to arise at subsequent Town Board meetings and where Public Hearings have been scheduled to gather evidentiary facts upon which decisions are to be subsequently made by members of the Board. As you are all well aware, in addition to the discussion of calendar items, straw votes are taken at these meetings on such issues as placement of group homes, the abolition of garbage Commissioners and other matters of public policy. The fact that these votes are not binding is of no importance...
>
> "...the assertion that these meetings are 'informal', as mentioned in Supervisor Newburger's recent memorandum to me, is simply

> incorrect. These meetings are scheduled every week at 5:00 p.m. on Mondays and an agenda is provided, whether orally or in writing. Simply calling a meeting 'informal' doesn't make it so. Scheduling such meetings with the purpose in mind of discussing and, ultimately, deciding public policy matters and determining the Board's voting pattern prior to the public meeting clearly make these 'informal' meetings formal indeed!"

You also referred to the decision rendered in Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992)], in which the court considered the propriety of closed political caucuses held by an entity whose members represented a single political party.

The Town Attorney responded to your commentary on July 7 and continued to express the view that the closed political caucuses could be validly held. He wrote that the Court in Buffalo News "merely held that it was not appropriate for members of the legislative body to use a private meeting to 'adopt' a plan to address the municipality's deficit" (emphasis by the Town Attorney). He also wrote that "[a] meeting at which [he] give[s] [his] view of legal issues before the Town Board is exempt from the requirements of the Open Meetings Law" on the basis of the attorney-client privilege.

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

First, 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 found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have 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 rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," 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, when a majority of the Board is present to discuss the Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law.

Second, as you are likely aware, the Open Meetings Law provides two vehicles under which a public body may meet in private. One is the executive session, a portion of an open meeting that may be closed to the public in accordance with §105 of the Open Meetings 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 relevance to the assertion of the attorney-client privilege 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. Further, after a public body has sought and obtained legal advice from its attorney and has started to discuss and deliberate a matter of public business, I believe that the attorney-client privilege would end and that the Open Meetings Law would apply.

With regard to political caucuses, since the Open Meetings Law became effective in 1977, it has contained an exemption concerning political committees, conferences and caucuses. Again, when a matter is exempted from the Open Meetings Law, the provisions of that statute do not apply. Questions concerning the scope of the so-called "political caucus" exemption have continually arisen, and until 1985, judicial decisions indicated that the exemption pertained only to discussions of political party business. Concurrently, in those decisions, it was held that when a majority of a legislative body met to discuss public business, such a gathering constituted a meeting subject to the Open Meetings Law, even if those in attendance represented a single political party [see e.g., Sciolino v. Ryan, 81 AD 2d 475 (1981)].

Those decisions, however, were essentially reversed by the enactment of an amendment to the Open Meetings Law in 1985. Section 108(2)(a) of the Law now states that exempted from its provisions are: "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or the legislative body of a county, city, town or village, who are members or adherents 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..."

Therefore, in general, either the majority or minority party members of a legislative body may conduct closed political caucuses, either during or separate from meetings of the public body.

Many local legislative bodies, recognizing the potential effects of the 1985 amendment, have taken action to reject their authority to hold closed caucuses and to continue to conduct their business open to the public as they had prior to the amendment.

Moreover, as indicated by Buffalo News, there have been recent developments in case law regarding political caucuses that indicate that the exemption concerning political caucuses has in some instances been asserted improperly as a means of excluding the public from gatherings that have little or no relationship to political party activities or partisan political issues.

One of the decisions, Humphrey v. Posluszny [175 AD 2d 587 (1991)], involved a private meeting held by members of a village board of trustees with representatives of the village police benevolent association. Although the board characterized the gathering as a political caucus outside the scope of the Open Meetings Law, the Appellate Division, Fourth Department, held to the contrary. In a brief discussion of the caucus exemption and its intent, the decision states that:

> "The Legislature found that the public interest was promoted by 'private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies' (Legislative Intent of L.1985,ch.136,§1). Nonetheless, what occurred at the meeting at issue went beyond a candid discussion, permissible at an exempt caucus, and amounted to the conduct of public business, in violation of Public Officers Law §103(a) (see, Public Officers Law §100. Accordingly, we declare that the aforesaid meeting was held in violation of the Open Meetings Law" (id., 588).

The Court did not expand upon when or how a line might be drawn between a "candid discussion" among political party members and "the conduct of public business." Although the decision was appealed, the appeal was withdrawn, because the membership on the board changed.

As you know, Buffalo News involved a political caucus held by a public body consisting solely of members of one political party. As in Humphrey, the court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, stating that:

> "In a divided legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it would be fair to assume the

> meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless. Therefore, the meeting of February 8, 1992 was in violation of Article 7 of the Open Meetings Law...
>
> "When dealing with a Legislature comprised of only one political party, it must be left to the sound discretion of honorable legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of Public Officers Law Article 7" (id., 278).

In my opinion, the Town Attorney's interpretation of Buffalo News is unduly narrow. He apparently chose to focus on the term "adopt" by suggesting that the gatherings in question are held to discuss, not to adopt, and that, therefore, they may be closed on the ground that they constitute political caucuses.

The court, however, continually referred to the term "meeting" and the deliberative process, not merely the act of "adopting" or taking action. In fact, the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.
>
> > "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain

> informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.
>
> "A literal reading of Section 108, as urged by Respondent, could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a 'political caucus' which would have no public input, and the public meetings decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. The Legislature could not have contemplated such a result by amending Section 108 and at the same time preserving Section 100" (id., 277).

Based on the foregoing, I believe that the Town Attorney's interpretation of Buffalo News is inconsistent with its language and the overall thrust of the decision. To reiterate a statement in the decision: "any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Ivan Kline, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8365
OML-AO-2370

162 Washington Avenue, Albany, New York 12231
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July 15, 1994

Ms. Lynne A. Eckardt
Maple Road
Brewster, NY 10509

The staff of the Committee 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. Eckardt:

I have received your letter of July 11.

You referred to an advisory opinion prepared on June 29 in response to your inquiry involving issues relating to the Brewster Public Library. In that opinion, I wrote that Library staff informed me that the Library is essentially a unit of the government of the Town of Southeast. In your recent letter, you wrote that the Town Attorney "has established that the Library is a totally separate entity from the town." You have asked: "In what ways, if any, would this decision alter or invalidate [my] opinion?"

In this regard, I offer the following comments.

First, if the Library is not a town entity, it is unclear, from my perspective, exactly what it may be. According to the Assistant Director, the Library's employees are public employees subject to the Civil Service Law, they participate in the Town's medical insurance plan, the Library's budget is approved by the Town Board, it uses the Town's tax identification number, and the Supervisor signs every Library check.

Whether the Library is part of the Town government or otherwise, based upon the information described in the preceding paragraph, I believe that it is clearly a governmental entity. Consequently, it is an "agency" subject to the Freedom of Information Law [see Freedom of Information Law, §86(3)]. Similarly, the Library Board of Trustees would constitute a public body, required to comply with the Open Meetings Law. It is noted, too, that §260-a of the Education Law requires that meetings "of a

board of trustees of a public library, cooperative library system, public library or free association library" must be held in accordance with the Open Meetings Law.

Second, with regard to your specific question, having reviewed the opinion of June 29, there is only one aspect of it that would differ if indeed the Library is not a unit of Town government. If the Library is not part of the Town, the governing body, the Board of Trustees, would be required to promulgate the appropriate rules and regulations pursuant to §87(1) of the Freedom of Information Law, rather than the Town Board. No other portion of that opinion would in my view merit or require alteration.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Paulette Sullivan, Assistant Director
Town Board
Willis Stephens, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2371

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July 18, 1994

Hon. Stephen M. Saland
Member of the Senate
Room 946
Legislative Office Building
Albany, NY 12247

Hon. Eileen M. Hickey
Member of the Assembly
Room 628
Legislative Office Building
Albany, NY 12247

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

Dear Senator Saland and Assemblywoman Hickey:

I have received your letter of July 15 concerning a matter involving the Clermont Town Board and appreciate your interest in compliance with the Open Meetings Law.

You wrote that "residents of the Town of Clermont are questioning the validity of a Home Rule Request form which was authorized at an emergency meeting of Town Board members on June 29th" and that legislation was approved by the Senate and Assembly pursuant to the request. You have asked that I confirm your understanding of provisions of the Open Meetings Law that were discussed with a member of the Senator's staff. According to my records, I received an inquiry from Ed Spaight on July 13, and we discussed the provisions of §§104 and 107 of the Open Meetings Law, which deal respectively with notice of meetings and the enforcement of that statute.

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, §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. Although, the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Second, the judicial interpretation of the Open Meetings Law suggests 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 §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 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, the Open Meetings Law requires that notice be given to the news media and posted "conspicuously" in one or more "designated public locations" prior to meetings. Further, absent an emergency or urgency, the court in Previdi suggested that it may be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

Third, 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 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.

Lastly, as you may be aware, there are relatively few lawsuits initiated under the Open Meetings Law (on average, less than ten per year, statewide). That may be due to a variety of factors, including the expense and time involved, as well as the broad discretion that may be asserted judicially. As you may be aware, the Committee on Open Government has recommended amendments to the Open Meetings Law in an effort to make the enforcement or compliance mechanisms more meaningful to the public (see excerpts from the Committee's latest annual report, pp. 4,5 and 20-22).

I hope that I 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

COM-AO 2372

162 Washington Avenue, Albany, New York 12231
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July 19, 1994

Mr. Robert A. Barlette
[redacted]

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

Dear Mr. Barlette:

I have received your letter of July 13 in which you sought an advisory opinion in your capacity as a member of the Board of Education of the Dunkirk City School District.

You referred to action taken during executive sessions and asked whether a board education can "take a consensus vote" during an executive session "without going back out in public and notifying the public what action the district has taken or intends to take by majority vote". You added that Cheryl Randall of the NYS School Boards Association informed you that "1) a vote should be taken in public not in Executive Session, and 2) the minutes should reflect what action was taken as a result of the Board's discussion in Executive Session without disclosing the substance of the confidential matter". You asked whether I concur with her opinion.

I am in general agreement with Ms. Randall's advice, and I offer the following comments.

First, when action is taken by a public body, I believe that it must be memorialized in minutes, and §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal

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

Based on of the foregoing, it is clear in my opinion that minutes of open meetings must include reference to action taken by a public body.

Second, 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 such, minutes of executive sessions need not generally be prepared by a board of education.

Third, if a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. 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).

Therefore, if a board of education 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, the minutes, in my view, should reflect the actual votes of the members.

Lastly, I do not believe that action taken in public or minutes must of necessity include information which ordinarily would not be accessible to the public. For example, if the Board determines to direct the superintendent to offer a position to an applicant for the position, I believe that any such action must be taken in public and memorialized in minutes. However, the name of the person to whom the position is offered need not, in my opinion, be stated during an open meeting or included in the minutes of the 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: Cheryl Randall

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 19, 1994

Mr. Ned R. Ross
[redacted]

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

Dear Mr. Ross:

I have received your letter of July 12 and the correspondence attached to it. You have raised questions concerning the Freedom of Information and the Open Meetings Laws with respect to certain actions or failures to act of the Oneida-Herkimer Solid Waste Authority, which you refer to as the "SWA".

The first issue involves a request made under the Freedom of Information Law that was denied. Following an appeal, a determination was made on May 20 to grant access to the records sought and the SWA's Appeal Committee "directed the Executive Director" to make the records available. Nevertheless, as of the date of your letter to this office, you had not yet received the records. You have asked what you can do "to not only compel them to provide the public information but also to have them censured or otherwise penalized for non compliance with the law".

In this regard, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and states in relevant part that:

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

Based on the foregoing, within ten business days of the receipt of an appeal, an agency must either make the records available or fully explain in writing the reasons for further denial. Since the appeals committee's determination has not been carried out and you have not received the records, I believe that you would have the right, should you choose to assert it, to initiate a lawsuit under Article 78 of the Civil Practice Law and Rules on the ground that the request has been constructively denied. It is noted when such a proceeding is brought under the Freedom of Information Law, the agency has the burden of proof. Further, although there is nothing in the Freedom of Information Law pertaining to the imposition of a penalty or censure, a court may award attorney's fees, payable by an agency, in certain circumstances. Specifically, §89(4)(c) of the Freedom of Information Law states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public: and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

The second issue involves compliance with the Open Meetings Law. You wrote that at a recent meeting, the chairman of the SWA's board "declared that they would be going into executive session and that real property matters would be discussed". However, you added that "[n]o motion was made to go into executive session, nor was any vote called for or recorded."

Here I point out that every meeting of a public body 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.

Although one of the grounds for entry into executive session refers to real property, that provision limits the ability to enter into executive session. Section 105(1)(h) permits a public body to enter into an executive session to discuss:

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

Based on the foregoing, a public body may discuss the proposed acquisition of real property, for example, behind closed doors, "but only when publicity would substantially affect the value" of the property. Conversely, when publicity would not have any substantial effect upon the value of real property, §105(1)(h) could not in my opinion be properly asserted to enter into an executive session. While I do not believe that motion to enter into executive session must necessarily identify the parcel or parcels of land under consideration, in view of the language of §105(1)(h), there must be some indication in the motion that publicity would substantially affect the value of the property.

Lastly, as in the case of the Freedom of Information Law, an aggrieved person may seek to enforce the Open Meetings Law by initiating a proceeding based on §107 of that statute. Nevertheless, in an effort to enhance compliance with and understanding of both the Open Meetings and the Freedom of Information Laws, and to obviate the need to engage in litigation, copies of this opinion will be forwarded to the SWA.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Barbara Freeman
David Link
Hans G. Arnold

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2374

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July 19, 1994

Mr. Robert L. Henrickson
Vice President
Nassau Union of Concerned
Citizens Inc.
Rd 1 Box 6C
East Nassau, NY 12062-9801

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

Dear Mr. Henrickson:

I have received your letter of July 14 and the materials attached to it.

In brief, the organization that you represent is opposed a proposal which, if approved, would authorize the operation of a rock quarry in the Town of Nassau. According to your letter and a news article, Art Henningson, an employee of the Department of Environmental Conservation (DEC) who is overseeing the project, plans to schedule a meeting with representatives of the company that would operate the quarry, DEC and the Town. The article indicates that Mr. Henningson said that such a meeting would not be open to the public.

You asked "how an assembly of this sort would be viewed from the perspective of Article 7 - The Open Meetings Law."

In this regard, 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)].

It is emphasized 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 Town 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.

I point out that it has been held that a gathering of a quorum of a public body 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 public body was asked to attend by an official who was not a member of the body [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the gathering in question might be held at the request of an official

of the DEC, I believe that it would be a meeting, assuming that a quorum of the Board is present for the purpose of conducting public business.

It is also noted that, 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Town Board, Town of Nassau
Arthur Henningson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2375

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 20, 1994

Mr. Ralph C. DeMarco
Guercio & Guercio
[redacted]

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

Dear Mr. DeMarco:

I have received your recent letter in which you requested an advisory opinion concerning the following question:

> "May the Board of Education of the West Islip Union Free School District properly permit a former member of the Board, who was defeated in an election held on May 18, 1994, to attend the Board of Education's Executive Sessions, wherein said former member will receive the Board's materials packet and otherwise participate without voting, pending the determination of said former member's appeal of the election results?"

You added that the former member has petitioned the Commissioner of Education to set aside the results of the election, and that the Board has resolved to permit former member to attend executive sessions pending the determination of his petition by the Commissioner in order to "maintain continuity of its Executive Session deliberations regardless of the outcome of said former member's appeal."

In my opinion, with one exception, Board may permit the former member to be present during executive sessions and receive the "materials packet".

Relevant to the matter is §105(2) of the Open Meetings Law, which 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." Therefore, the only people who

have a right to attend executive sessions are the members of the public body conducting the executive session; however, the public body may authorize others to attend. From my perspective, as in the case of any other law, the Open Meetings Law should be implemented in a manner that gives reasonable effect to its intent. I do not believe that a public body may, without a rational basis, permit some to attend executive sessions while excluding others. In this instance, I believe that the Board has offered an appropriate rationale for permitting the former member to attend until his appeal is determined by the Commissioner.

The situation in which the former member could not likely attend executive sessions or receive materials pertinent to a meeting would involve a matter relating to a particular student or students. I direct your attention to a provision of federal law, the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g. As you may be aware, FERPA is applicable to all educational agencies or institutions that participate in federal education funding programs. As such, it applies to virtually all public educational institutions, such as public school districts, as well as many private colleges and universities. In brief, FERPA confers rights of access to "education records" pertaining to a student or students under the age of eighteen to the parents of the students. Students acquire the rights of their parents when they reach the age of eighteen. Concurrently, it generally requires that education records be kept confidential, unless the parents or students, as the case may be, waive the right to confidentiality. Therefore, federal law generally prohibits an educational agency from disclosing records identifiable to students absent consent to disclose from parents or from students who have reached the age of majority.

The regulations promulgated by the U.S. Department of Education pursuant to the FERPA define "disclosure" to mean "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means" (34 C.F.R. §99.3). An exception to the requirement of confidentiality involves "disclosure...to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests" [34 C.F.R. §99.31(a)(1)]. As such, education records or information identifiable to students contained in them may be disclosed to Board members; the same records or information, however, could not be disclosed to others without the consent of the parents. Therefore, insofar as an executive session or materials distributed to Board members include records or information identifiable to students, I believe that FERPA would preclude disclosure to the former Board member, absent the consent of the parents of the students.

Lastly, although tangential to the issue you raised, there may be instances in which you or another attorney retained by the Board

provide legal advice, orally or in writing, to the Board. In those cases, communications between the Board and its attorney may be subject to the attorney-client privilege. However, if such a communication is made in the presence of others, the privilege in my opinion would effectively be waived. Therefore, if there is an intent to maintain or preserve an attorney-client relationship or to claim that communications between the Board and its attorneys are privileged and confidential, it is suggested that the former member be excluded from such communications. In my view, his presence during or receipt of attorney-client communications would effectively terminate any privilege that might otherwise exist or be asserted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8282
OML-AO 2376

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

July 26, 1994

Mr. Philip Lambert
[redacted]

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

Dear Mr. Lambert:

As you are aware, your letter of June 6 addressed to Attorney General Koppell has been forwarded to the Committee on Open Government. The Committee is authorized to advise with aspect to the Freedom of Information and Open Meetings Laws, and my remarks will be restricted to issues relating to those statutes.

The correspondence deals with the establishment of an easement in 1993 in the Town of New Hartford. According to the materials attached to your letter, on July 8, 1993, you requested minutes of meeting of the Town Board held on the preceding day, as well as "easement documents". In an acknowledgement of the receipt of your request on July 13, the Town Clerk wrote that the minutes "are subject to approval prior to copying for the public and approval may be considered at the August 4, 1993 Town Board meeting." She also wrote that, upon receipt of the easement documents, you would be notified as to your right to inspect and/or copy them. Although it is unclear whether you have received the records sought, I offer the following comments.

First, §106 of the Open Meetings Law pertains to minutes of meetings and provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or

> summary of the final determination of such action, and the date and 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.

Moreover, 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. Again, I believe that the language of §106(3) is clear, for it states that minutes shall be available "within two weeks from the date of such meetings."

Second, with regard to 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 §87(2)(a) through (i) of the Law.

Although I am unfamiliar with the records that you requested, insofar as they were prepared by town employees or transmitted between agencies (i.e., between the Town and DEC), one of the grounds for denial would be particularly relevant. Due to the structure of that provision, however, it often requires disclosure. Section 87(2)(g) states that an agency may withhold records that:

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

> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> 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.

Records involving communications between the Town and the public could not be characterized as inter-agency or intra-agency material and would likely be available in view of facts that you provided.

Lastly, for future reference, 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)].

I hope that 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: Gail Wolanin Young

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2377

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 2, 1994

Hon. Henry L. Rogers, Supervisor
Town of Arietta
Box 37
Piseco, NY 12139

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

Dear Supervisor Rogers:

I have received your recent letter and related correspondence. As I interpret your remarks, you are seeking an advisory opinion concerning the ability of a member of a public body to disclose information acquired during an executive session or information that would ordinarily be subject to the attorney-client privilege. You indicated that one member of the Hamilton County Board of Supervisors "has admitted...to having dialog with the opposite side during litigation that [you] feel has compromised" the County's position in litigation.

In this regard, I offer the following comments.

First, by way of background it is noted that the Open Meetings Law is permissive. While that statute 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. 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. 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 an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns, 67 NYS 2d 562, 567 (1986)].

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). In my opinion, although information might have been obtained during an executive session properly held or from records that might have been characterized as confidential, a claim of confidentiality can only be based upon a statute other than the Open Meetings Law or the Freedom of Information Law that specifically confers or requires confidentiality.

Second, the Open Meetings Law provides two vehicles under which the public, in appropriate circumstances, may be excluded from meetings of public bodies. One is an executive session, a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §102(3)]. Members of a public body have the right to attend executive session of the body [see §105(2)].

Relevant to the issue that you raised is §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.

The other 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 relevance to the situation that you described 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. Records subject to the attorney-client privilege would be exempted from disclosure pursuant to §87(2)(a) of the Freedom of Information 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)].

As indicated earlier, unless a statute prohibits disclosure, I know of no law that would preclude a member of a public body from disclosing information acquired during an executive session.

Similarly, I know of no judicial decisions involving the Open Meetings Law and disclosure by a member of public body of information that would be subject to the attorney-client privilege. When the privilege is operable in the context that you described, it exists between the client, the public body, and its attorney. Although the client may waive the privilege, it is unclear whether a waiver can only be accomplished when a majority of the members of the body choose to do so, or whether a single member, acting independently, has the authority to waive the privilege and disclose what otherwise would be confidential.

When a member of a public body has sued that body and is its legal adversary, I believe he or she could validly be excluded from a gathering between the other members and their attorney in which the attorney-client privilege is properly invoked. The member-adversary in that instance would not be the client, and that person's exclusion would, in my view, be consistent with the thrust of case law concerning the intent of §105(1)(d), the litigation exception for litigation. In that situation, the gathering would be exempted from the Open Meetings Law insofar as the attorney-client privilege applies. However, if a member of a public body is not an adversary party in litigation (but perhaps a dissenter or person with a minority view), that person would have the right under §105(2) of the Open Meetings Law to attend an executive session.

Lastly, while there may be no prohibition against disclosure of information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. The unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created in order to reach collective determinations, determinations that better reflect various interests 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 of the majority of a public body should in my opinion generally 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 the revelation of litigation strategy, in unwarranted invasions of personal privacy,

impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Richard Perdue

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2398

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 2, 1994

Mr. David A. Farmelo
Hodgson, Russ, Andrews, Woods
& Goodyear
Attorneys at Law
1800 One M & T Plaza
Buffalo, NY 14203-2391

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

Dear Mr. Farmelo:

I have received your recent letter in which you referred to an advisory opinion addressed to Robert A. Barlette on July 19 and our discussion relating to that response.

In your capacity as attorney for the Dunkirk City School District, you expressed the belief that Mr. Barlette, a member of the Board of Education, "may have been asking about a particular situation which is not covered by the general statements set forth in [my] letter." In brief, the opinion sent to Mr. Barlette included advice concerning minutes of meetings and their contents, voting (i.e., taking action) by school boards, and the notion of action taken by means of what may be characterized as "consensus". I wrote that "if a board of education reaches a 'consensus' that is reflective of its final determination of an issue, I believe that minutes must be prepared..."

You wrote that you recently met in executive session with the Board "to discuss a pending legal claim against the District and a proposed settlement offer that had been received from the attorney for the claimant." Having discussed the matter with the Board, you sought its advice with respect to the proposed settlement. There was no formal settlement document and you were "merely seeking guidance as to the manner in which to proceed in [your] discussions with the attorney for the claimant." You indicated further that there was insufficient support for acceptance of the proposed settlement or any settlement, and that the Board took no formal action.

If indeed the situation that you described was construed or interpreted as an "action" taken by the board that must be memorialized in minutes, I would respectfully disagree with his contention. To reiterate a point made earlier and in the opinion addressed to Mr. Barlette, if the Board reaches a consensus that is its final determination of a matter, I believe that minutes must be prepared and that a school board must take action in public. In contrast, if the Board reaches a "meeting of the minds" or engages in a so-called "straw vote" regarding interim step in a process that is incomplete, it would not be taking final action that would require a public vote or the preparation of minutes. In the context of the facts that you presented, the "action", which in no way represented the final determination of the matter, was merely an interim step in an ongoing process. Consequently, I do not believe that there would been any requirement that minutes be taken or that votes be cast in public.

You asked in your summary whether I agree with the following statements:

> "1. It is proper for an attorney to meet with a board of education in executive session to discuss 'proposed, pending or current litigation' (Public Officers Law §105(1)(d).
>
> 2. In such an executive session, it is proper for the board to give the attorney direction as to the handling of the litigation, (e.g., whether to assert certain positions or whether to pursue a settlement, and, if the letter, on what terms), so long as that direction does not require formal action by the board (e.g., final acceptance and approval of a settlement).
>
> 3. When giving its attorney direction not requiring final action, there are no legal requirements as to 'votes' or 'consensus' by a board.
>
> 4. If and when a final settlement of a claim is reached, approval of such settlement by the board would properly take place by a vote in an open session of a board meeting.
>
> 5. No vote need be taken if the board is not going to accept and approve a final settlement. In the absence of any action, it simply is neither approved nor accepted."

While I am in general agreement with those statements for reasons described above and in part in the opinion addressed to Mr. Barlette, I offer the following additional comments.

First, as you suggested, §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)].

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.

Second, an executive session, a portion of an open meeting during which the public may be excluded, 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Terry L. Wolfenden
Robert A. Barlette

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2379

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 4, 1994

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

I have received your letter of July 20. In brief, you have complained that it is difficult to hear deliberations held in a "board room" use for meetings of the Board of the New York City Health and Hospitals Corporation and subsidiary boards and commissions.

In this regard, indicated in your letter, the intent of the Open Meetings Law as expressed in its legislative declaration is clear. Section 100 of that statute states that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process. Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. Consequently, I believe that the entities that are the subject of your complaint must situate themselves and conduct their

meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basis requirement of the Open Meetings Law.

If a sound system has been installed and if its use would guarantee that those present can indeed hear what is said at meetings, I believe that it should be used in order to comply with the Open Meetings Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Directors
Secretary of Board of Directors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2380

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 4, 1994

Ms. Isidore Gerber
[redacted]

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

Dear Ms. Gerber:

I have received your letter of July 21 and a newspaper article attached to it. Although you referred to an enclosure consisting of unapproved minutes of a meeting of the Village of Liberty Board of Trustees, that document was not included with your correspondence.

As I understand your remarks, you have requested an advisory opinion concerning the propriety of an executive session held to discuss "threatening litigation." In this regard, I offer the following comments.

As you are aware, 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)].

Based on the foregoing, 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. As indicated in the passage quoted above, the threat or 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].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-2381

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 5, 1994

Hon. Lance D. Clarke, Trustee
Village of Hempstead
99 Nichols Court
PO Box 32
Hempstead, NY 11551

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

Dear Mr. Clarke:

As you are aware, I have received your letter of July 26. In your capacity as a member of the Village of Hempstead Board of Trustees, you wrote that the Board recently held a special meeting for the purpose of voting on a change of zoning. Although notice of the meeting "was given by posting notice on the front door of the Village Hall," you indicated that notice was not given to the news media, and that you were informed that "past practice has been to send no notice to the news media."

You have asked whether in my view the meeting was "legal" and "whether any vote taken is void or voidable." 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, §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. Although neither the Open Meetings Law nor the Village Law make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Second, the judicial interpretation of the Open Meetings Law suggests that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so, and that the requirements of the Law are met only when notice is given by means of posting and by informing the news media of the time and place of a meeting. 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 §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 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, in my opinion, merely posting a single notice would fail to comply with the Open Meetings Law, for the Law specifies that notice be posted and given to the news media.

Third, with respect to the status of the action taken, §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 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."

As I interpret the provisions quoted above, even though a public body might have failed to comply with the Open Meetings Law, the action that it has taken is not automatically void; rather it

would be voidable. Further, whether there is or has been an "unintentional failure to fully comply with the notice provisions" is likely a question of fact. From my perspective, if a public body routinely gives notice to the news media and posts notice as required by §104 but fails to notify the media prior to a special meeting due to an oversight, such failure could be characterized as unintentional. However, since the notice requirements of the Open Meetings Law have remained unchanged since the Law went into effect in 1977, it would seem that a "practice" of not notifying the news media of meetings could not be construed as unintentional. If that is so, I believe that the vote taken at the meeting in question would be voidable.

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-2382

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 8, 1994

Ms. Betty A. Loriz
[redacted]

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

Dear Ms. Loriz:

I have received your letter of July 23. You referred to an advisory opinion prepared in August of last year concerning the Liberty Central School District Board of Education and its practice of scheduling and conducting executive sessions prior to its "public" meetings. Notwithstanding the language of the Open Meetings Law and the thrust of that opinion, you wrote that the board "has chosen to completely ignore the law..." As proof of your claim, you enclosed a copy of a recent notice stating that the Board scheduled a meeting for July 25, "starting with a 6 p.m. executive session", followed by a "public meeting [which] will convene in the high school cafeteria at approximately 7 p.m.".

You have asked for "advice on what actions are open to frustrated residents..." In this regard, I offer the following comments.

First, from my perspective, although a copy of last year's opinion was forwarded to the Board, I will send copies of that opinion to the Board and the Superintendent. It is my hope that opinions rendered by this office are educational and persuasive. In this instance, I hope that a review of that opinion will enhance compliance.

Second, public interest and pressure often serve to improve the operation of government. It is suggested that you contact Board members to suggest that they comply with law and that you encourage others, including the news media, to do the same.

Third, as a last resort, the public can seek to compel a public body to comply with the Open Meetings Law by initiating a judicial proceeding. Section 107(1) of the Open Meetings Law states in relevant part that:

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education
Richard Beruk, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8402
OML-AO-2383

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 9, 1994

Mr. John Fromel
[redacted]

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

Dear Mr. Fromel:

As you are aware, your letter of June 17 addressed to the State Comptroller was forwarded to the Committee on Open Government on July 25. The Committee is authorized to provide advice concerning the Freedom of Information and Open Meetings Laws.

According to your letter to the Comptroller, at a meeting of the Jordan Village Board, citing the Freedom of Information Law, you requested a variety of information, including the balance that remains to be paid on a sewer bill, the number of man hours, amounts paid and locations of sewer projects, the source of funding used to pay a particular individual, and an explanation of the allocation of certain public monies. Having received no reply at or following the meeting, you sought assistance in the matter. In this regard, I offer the following comments.

First, 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 participate, I believe that it should do so based upon reasonable rules that treat members of the public equally.

Second, although an agency may respond to an oral request made under the Freedom of Information Law, §89(3) of that statute authorizes an agency to require that a request be made in writing.

Further, while a board may choose to furnish information or records during a meeting, it may require that a request be made in accordance with its rules and regulations adopted under the Freedom of Information Law.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a village board of trustees, to adopt rules and regulations consistent with the Law and the Committee's regulations.

Further, §1401.2 of the regulations, provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so.
>
> (b) The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests.

Section 1401.4 of the regulations entitled "Hours for public inspection" states that:

> "(a) Each agency shall accept requests for public access to records and produce records

during all hours they are regularly open for business.

(b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Third, for purposes of clarification, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information 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, in a technical sense, the Village in my view is not obliged to provide the information sought by answering questions raised during a meeting, preparing tabulations in an effort to be responsive, or offering an explanation of its action. Nevertheless, it is likely that the Village maintains records reflective of some of the information sought, and that it can readily disclose "information" derived from existing records. For example, books of account, ledgers, and similar records would likely contain much of the information you seek. In short, in the future, rather than seeking information by raising questions, it is suggested that you request existing records, in writing, and that such request be made to the Village's records access officer.

Lastly, 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. Insofar as records exist containing the information of your interest, I believe that they would be available, for none of the grounds for denial would be applicable.

Enclosed for your review is "Your Right to Know", which describes the Freedom of Information and Open Meetings Laws.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8411
OML-AO-2344

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 10, 1994

Ms. Elke Steger
[redacted]

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

Dear Ms. Steger:

I have received your recent letter in which you requested an advisory opinion concerning access to minutes of a Town of Ripley Planning Board meeting held on June 6.

You wrote that the Town Clerk indicated that she has no access to planning board records and files and that minutes and other records are kept at home of the secretary to the Planning Board. In this regard, I offer the following comments.

First, 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, it is clear that minutes 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 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.

Second, §30 of the Town Law states in part that the town clerk: "Shall have the custody of all the records, books and papers of the town". Therefore, even though Planning Board minutes and other records may not be in the physical possession of the clerk, the clerk nonetheless would have legal custody of the records. Additionally, pursuant to the Local Government Records Law (Article 57-A, Arts and Cultural Affairs Law), the town clerk is the "records management officer," and §57.25 of the Arts and Cultural Affairs Law states in part that it is the responsibility of every local officer "to cooperate with the local government's records management officer on programs for the orderly and efficient management of records...".

Third, in a related vein, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Town Board, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. In most towns, the town clerk has been designated as records access officer. If that is so in this instance, I believe that the town clerk has the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information Law. If a person other than the clerk has been designated records access officer, that person would have the same authority and responsibility. In the context of the problem that you have encountered, I believe that the records access officer would have the authority either to acquire the minutes for the purpose of responding to a request or directing the Planning Board's secretary to disclose the records as required by law.

In an effort to enhance compliance with the Freedom of Information and Open Meetings Laws, copies of this opinion will be forwarded to Town officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Town Clerk
Marie Perkins
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2385

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 11, 1994

Mr. Andrew V. Lalonde
Corporation Counsel
City of Auburn
Memorial City Hall
24 South Street
Auburn, NY 13021-3832

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

Dear Mr. Lalonde:

I have received your letter of August 2 in which you sought an advisory opinion "on the Issue of Penalty Concerning 'Open Meetings Law'."

You wrote that a public body in the City of Auburn was found in May to have violated the Open Meetings Law and that, subsequently, the District Attorney 'has announced his intent to conduct an investigation into the events surrounding the City's activities." You have asked for clarification concerning the "types of penalties" that may be imposed under the Open Meetings Law and questioned whether that statute "provide[s] for any criminal sanctions to be considered against a municipality, an employee or agency of the Municipality."

In this regard, §107 of the Open Meetings Law, entitled "Enforcement", states in relevant part that:

> "1. Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.

> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.
>
> 2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party."

Based upon the foregoing, the Open Meetings Law does not include any provision involving criminal sanctions.

This is not to suggest, however, that sanctions other than those specified in the Open Meetings Law cannot be imposed. For instance, when it was determined that it failed to comply with previous court orders requiring compliance, a county legislature was found to be in contempt and fined [Orange County Publications v. County of Orange, 120 AD 2d 596 (1986)]. Further, although I am not an expert on the subject, I would conjecture that, upon investigation, a district attorney could, depending upon his or her findings, contend that members of a public body violated provisions of the Penal Law (see e.g., §195.00 concerning "official misconduct").

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2386

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

August 11, 1994

Mr. William E. Doyle, Jr.
Program Director
Public Education Association
39 West 32nd Street
New York, NY 10001

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

Dear Mr. Doyle:

I have received your letter of August 3. You have sought an advisory opinion concerning the following situation:

> "The Board of Education of the City of New York is composed of seven members, five of whom are appointed by the borough presidents of the five boroughs encompassed by the school system and two of whom are appointed by the mayor of the City of New York. The current Mayor, Rudolf Giuliani, has appointed a member of his 'cabinet', Deputy Mayor for Education Ninfa Segarra, to the Board of Education. Ms. Segarra has attend executive session meetings in which the Board of Education discussed litigation against the Mayor and City stemming from a dispute over the City's budget allocation to the Board of Education."

In conjunction with the foregoing, you have asked whether "the presence of the Mayor's deputy foreclose[s] the litigation rationale for discussion of this topic in executive sessions." You contend that the rationale for invoking the litigation exception for entry into executive session "seems to evaporate when confidentiality is compromised by the attendance of 'the other side', so to speak."

In this regard, I offer the following comments.

First, 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). In my opinion, although information might be obtained during an executive session properly held or from records that might have been characterized as confidential, a claim of confidentiality can only be based upon a statute other than the Open Meetings Law that specifically confers or requires confidentiality.

Second, the Open Meetings Law provides two vehicles under which the public, in appropriate circumstances, may be excluded from meetings of public bodies. One is an executive session, a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §102(3)]. Members of a public body have the right to attend executive sessions of the body pursuant to §105(2) of the Open Meetings Law. That provision states in relevant part that "[a]ttendance at an executive session shall be permitted to any member of the public body..."

The focal point of the issue that you raised is §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. Further, the Concerned Citizens case involved a situation in which a public body and its adversary in litigation met to discuss settling the litigation. It was held in that

instance that there was no basis for conducting an executive session due to the presence of the adversary in litigation.

If a member of a public body is the body's adversary in litigation, that person could excuse herself from executive sessions concerning the litigation. As you suggest, to do otherwise could defeat the purpose of an executive session held under §105(1)(d). While I know of no judicial decisions dealing with a situation in which a member of a public body is the body's adversary in litigation, there would appear to be no clear basis for suggesting that the issue would be determined differently than the Concerned Citizens decision.

The other 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 to the situation that you described 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)].

As indicated earlier, unless a statute prohibits disclosure, I know of no law that would preclude a member of a public body from disclosing information acquired during an executive session. Similarly, I know of no judicial decisions involving the Open Meetings Law and disclosure by a member of public body of information that would be subject to the attorney-client privilege. When the privilege is operable, it exists between the client, the public body, and its attorney. Although the client may waive the privilege, it is unclear whether a waiver can only be accomplished when a majority of the members of the body choose to do so, or whether a single member, acting independently, has the authority to waive the privilege and disclose what otherwise would be confidential.

When a member of a public body is an adversary in litigation against that body, I believe he or she could validly be excluded from a gathering between the other members and their attorney in which the attorney-client privilege is properly invoked. The member-adversary in that instance would not be the client, and that person's exclusion would, in my view, be consistent with the thrust of case law concerning the intent of §105(1)(d), the litigation exception for litigation. In that situation, the gathering would be exempted from the Open Meetings Law insofar as the attorney-client privilege applies. If a member of a public body is not an adversary party in litigation (but perhaps a dissenter or person with a minority view), that person would have the right under §105(2) of the Open Meetings Law to attend an executive session.

Lastly, while there may be no prohibition against disclosure of information acquired during executive sessions, 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. Inappropriate disclosures could work against the interests of a public body as a whole and the public generally. The unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created in order to reach collective determinations, determinations that better reflect various interests 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 of the majority of a public body should in my opinion generally 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 the revelation of litigation strategy, in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mary Tucker, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2387

162 Washington Avenue, Albany, New York 12231
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August 11, 1994

Mr. Jeffrey H. Greenfield
NGL Realty Co.
Sidney Newman 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 information presented in your correspondence.

Dear Mr. Greenfield:

I have received your letter of August 1. You asked whether the Lynbrook Board of Ethics "must meet in open and public session" and questioned as to "what posting requirements for the meeting are necessary." You added that the Board of Ethics was established by a local 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."

A village board of ethics in my view is a public body subject to the Open Meetings Law, for it is created by a village board, and in this instance, by law; it consists of at least two members; it may conduct its business only by means of a quorum (see General Construction Law, §41); and it conducts public business and performs a governmental function for a public corporation, a village.

Second, §103(a) of the Open Meetings Law requires that all meetings be convened open to the public. 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).

In short, based upon the direction given by the courts, when 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, the Open Meetings Law is based on a presumption of openness. Meetings must be conducted open to the public, except to the extent that an executive session may be held pursuant to §105 of the Law.

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.

Often relevant to the duties of a board of ethics is §105(1)(f), which permits a public body to enter into an executive session to discuss:

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

If the issue before a board of ethics involves a particular person in conjunction with one or more of the subject listed in §105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person, §105(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

Lastly, §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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Ethics

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8423
OML-AO-2385

162 Washington Avenue, Albany, New York 12231
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August 12, 1994

Ms. Shari M. Vance
[redacted]

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

Dear Ms. Vance:

I have received your letter of August 6 in which you requested an advisory opinion concerning access to minutes of a Town of Ripley Planning Board meeting held on June 6. Although an opinion was prepared recently concerning the same issue, I will reiterate the points made in that response.

You wrote that the Town Clerk indicated that she has no access to planning board records and files and that minutes and other records are kept at home of the secretary to the Planning Board. In this regard, I offer the following comments.

First, 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, it is clear that minutes 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 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.

Second, §30 of the Town Law states in part that the town clerk: "Shall have the custody of all the records, books and papers of the town". Therefore, even though Planning Board minutes and other records may not be in the physical possession of the clerk, the clerk nonetheless would have legal custody of the records. Additionally, pursuant to the Local Government Records Law (Article 57-A, Arts and Cultural Affairs Law), the town clerk is the "records management officer," and §57.25 of the Arts and Cultural Affairs Law states in part that it is the responsibility of every local officer "to cooperate with the local government's records management officer on programs for the orderly and efficient management of records...".

Third, in a related vein, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions

> of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Town Board, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. In most towns, the town clerk has been designated as records access officer. If that is so in this instance, I believe that the town clerk has the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information Law. If a person other than the clerk has been designated records access officer, that person would have the same authority and responsibility. In the context of the problem that you have encountered, I believe that the records access officer would have the authority either to acquire the minutes for the purpose of responding to a request or directing the Planning Board's secretary to disclose the records as required by law.

In an effort to enhance compliance with the Freedom of Information and Open Meetings Laws, copies of this opinion will be forwarded to Town officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk
Marie Perkins
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2389

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August 12, 1994

Mr. Marc A. Agnifilo
Besterman & Agnifilo
584 Broadway
SoHo
New York, NY 10012

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

Dear Mr. Agnifilo:

I have received your letter of July 28, which reached this office on August 5.

You have raised the following questions:

> "1. Whether the Nassau Library System is subject to the requirements of the Open Meetings Law? It should be noted that the Library System is funded by the State of New York, chartered by the N.Y.S. Education Department and is subject to rules and regulations of the Commissioner of Education for the State of N.Y.
>
> 2. On four separate occasions, the Library System Board of Trustees has held executive sessions outside of regular meetings. The only notice that was provided for one of these meetings was a posting in the Service Center of the Nassau Public Library System. No notice for the other meetings was provided at all. The meetings were not to handle emergencies, and were called on less than 72 hours notice. The question is whether legal notice is required for meetings which are solely executive sessions? Secondly, can guests join executive sessions?
>
> 3. Whether a Board of Trustees can take specific action within an Executive Session or whether the Board is limited to taking action

only in public session even when it involves personnel actions dealing with one individual?

Whether the Board is obligated to record these actions taken in executive session in the minutes of a meeting?

4. Whether a Board of Trustees can legally engage a law firm without adopting a resolution in a regular meetings of the Board?"

In this regard, I offer the following comments.

First, §260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law. Provided, however, notwithstanding the provisions of subdivision one of section ninety-nine of the public officers law, public notice of the time and place of a meeting scheduled at least two weeks prior thereto shall be given to the public and the news media at least one week before such meeting."

Article 7 of the Public Officers Law is the Open Meetings Law. Based on §260-a of the Education Law, the board of trustees of a public library system, such as the Nassau Library System, is, in my opinion, clearly required to comply with the Open Meetings Law.

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

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that

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

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

Based upon the direction given by the courts, if a majority of the Board of Trustees gathers to discuss the business of the Library System, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

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, even if the only subject to be considered could properly be discussed during an executive session, the Board must first convene in public and then accomplish the procedure described above. 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.

Section 105(2) of the Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, assuming that there is a reasonable basis for doing so, a public body may permit persons other than its members to attend an executive session.

With regard to notice, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of the 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."

While the Law does not require that a paid legal notice must be published, 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. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, 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. Section 260-a of the Education Law also refers to notice of meetings scheduled at least two weeks in advance by library boards of trustees and states that notice must be given in those instances at least a week prior to such meetings. I point out that that reference in §260-a to §99 of the Open Meetings Law should be construed to mean §104, for the Open Meetings Law was renumbered.

The judicial interpretation of the Open Meetings Law suggests 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 §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 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, the Open Meetings Law requires that notice be given to the news media and posted "conspicuously" in one or more "designated public locations" prior to meetings. Further, absent an emergency or urgency, the court in Previdi suggested that it may be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

Third, as inferred earlier in §105(1), an entity subject to the Open Meetings Law may vote during a proper executive session, unless the vote is to appropriate public money. Further, §106 of the Open Meetings Law refers specifically to action taken in an executive session. That provision pertains to minutes, and subdivision (2) 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 an entity subject to the Open Meetings 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 that entity 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, if it can be assumed that only the board of trustees of a library system is authorized to engage a law firm for the library system, I believe that its action to do so could validly occur only during a meeting of the Board held in accordance with the Open Meetings Law. Any such action, in my opinion, must be memorialized in minutes of the meeting.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Nassau Library System

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8428
OML-AO-2390

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August 15, 1994

Mr. Gary L. 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 information presented in your correspondence.

Dear Mr. Rhodes:

I have received both of your letters of August 4. One pertains to access to records in the Town of Henderson. The other deals with Open Meetings Law. In conjunction with the information provided in the letters and the materials attached to them, I offer the following comments, some which are similar to those offered to you in 1993 when you were supervisor.

First, §30 of the Town Law states in part that the town clerk: "Shall have the custody of all the records, books and papers of the town". Therefore, even though some town other records may not be in the physical possession of the clerk, the clerk nonetheless would have legal custody of the records. Additionally, pursuant to the Local Government Records Law (Article 57-A, Arts and Cultural Affairs Law), the town clerk is the "records management officer," and §57.25 of the Arts and Cultural Affairs Law states in part that it is the responsibility of every local officer "to cooperate with the local government's records management officer on programs for the orderly and efficient management of records...".

In a related vein, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Town Board, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. In most towns, the town clerk has been designated as records access officer. If that is so in this instance, I believe that the town clerk has the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information Law. If a person other than or in addition to the clerk has been designated records access officer, that person would have the same authority and responsibility.

It is also noted that 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)].

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. Some of the records of your interest are required to be maintained and made available pursuant to §29(4) of the Town Law. That provision states that the supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

Based upon response to a request sent to you by the current supervisor, he is willing to disclose the records to you after August 20 at a initially agreeable time.

I know of no law that specifies which "documentation [is] supposed to go to the town clerk" or where a "supervisor's records [are] supposed to be kept." However, there are provisions of law that deal with the custody, preservation, retention and disposal of records. For example, §57.25 of the Arts and Cultural Affairs Law, which is part of the "Local Government Records Law", states in part that:

> "It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office."

As such, local government officials have a responsibility to "protect" and ensure the "preservation of records of enduring value".

The remaining issues deal with the Open Meetings Law, and you questioned the status of committees "made up of non town board members." In this regard, 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."

Recent decisions indicate generally that advisory 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)].

You also wrote that "no one knows what is being discussed" during executive sessions held by the Town Board and that actions are taken but are not recorded in the minutes.

As you may be 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..."

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 and limit the subjects that may appropriately be considered during an executive session.

Although it is used frequently, the term "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. 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 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 §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, or when the issue bears upon a group of employees, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel".

Moreover, 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 [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. 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 frequently cited relates to "litigation". Again, that kind of minimal description of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is §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].

Similarly, with respect to "negotiations", the only ground for entry into executive session that mentions that term is §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, §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 §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into 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].

Lastly, §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 that 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Hon. Paul M. Scott, Supervisor
Marie Ross, Town Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2391

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 17, 1994

Mr. Kim A. Higgs
County Manager
County of Essex
County Government Center
Elizabethtown, NY 12932

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

Dear Mr. Higgs:

I have received your letter of August 12. You have requested an advisory opinion concerning the propriety of an executive session held by the Essex County Board of Supervisors in 1990.

By way of background, you wrote that the purchase of a parcel known as the "Marvin Property" had been considered and discussed for years by the Board. In November of 1988, the Board, by resolution, authorized the County Attorney to commence negotiations for the possible purchase of the property. Although a proposed purchase agreement was prepared, the Board chose not to pursue the matter at that time. The issue was raised again at a special meeting held on May 29, 1990. According to your letter and the minutes of that meeting, prior to that meeting, the County Attorney and two members of the Board met with the owner of the property to discuss its purchase. You wrote that "[a]s a result of their discussion, a Contract of Sale was prepared by the County Attorney and executed by Mr. Marvin on May 24, 1990, five days before the Special Board Meeting was held on May 29, 1990 to discuss the purchase." The selling price was specified in the contract of sale, which was signed by Timothy Marvin, then the owner of the property on May 24, and by the Chairman of the Board of Supervisors on May 29.

The question of holding an executive session was raised at the meeting when the County Attorney was asked how consideration of the matter in public could "affect us." He responded by stating that "[i]t could affect your ultimate success, it could affect the price, it could affect a lot of things dealing with your negotiations." Later in the open session, Ms. Morency, a member of the Board, indicated that she was approached concerning the issue

earlier in the week. In referring to Mr. Marvin, the owner of the property, she stated that:

> "What we obtained from him is a contract of sale is simply if the board does not approve of this then the paper isn't worth the paper it is written on, it needs your approval. There was another purchased interested so in order for use to at least get it back in our ball park we did this contract of sale. He is willing the sell the building to us - is it a secret about the price, Rick. I don't know, I get real nervous."

Rick, Mr. Meyer, the County Attorney, responded, stating that:

> "That is one of the issues, that is why the law is written to have Executive Session because when you discuss the price it may affect, it may promote others to come in and bid higher and therefore the county's opportunity to buy at the price that has been offered may go out the window. That is up to the board to decide."

After discussion of the matter, the Board entered into executive session, recessed to tour the Marvin property, and returned to an open session, at which time a resolution was approved to purchase the property.

In this regard, as you are aware, §105(1)(h) of the Open Meetings Law 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 upon the materials that you provided, it is difficult to envision how public discussion of the matter, "publicity", would have had any impact on the value of the property. The location of the parcel had been disclosed publicly, and a contract of sale had already been signed by the owner of the parcel; all that remained to complete the sale was approval by the Board. As I understand the matter, upon approval by the Board, the seller would have had no choice but to sell the property at the price agreed to on May 24. If that is so, in my opinion, publicity would have had no effect upon the value of the property when the matter was discussed on May 29, and there would have been no basis for conducting an executive session.

I hope that I have been of assistance and wish you well in your new job in Michigan.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8445
OML-AO-2392

162 Washington Avenue, Albany, New York 12231
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August 17, 1994

Ms. Eleanor Hoffman
[redacted]

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

Dear Ms. Hoffman:

I have received your letter of August 10. You wrote that you submitted a written request under the Freedom of Information Law on July 29 for minutes of the Town of Ripley Planning Board meeting held on June 27. You indicated, however, that the minutes "are not available to either the Town Clerk or the Chairman of the Ripley Planning Board because they are at the present time at the home of the Clerk-secretary of the Ripley Planning Board and they have not been made available."

You have asked what "can be done to obtain these minutes" and sought assistance in the matter. In this regard, I offer the following comments.

First, 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, it is clear that minutes 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 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.

Second, §30 of the Town Law states in part that the town clerk: "Shall have the custody of all the records, books and papers of the town". Therefore, even though Planning Board minutes and other records may not be in the physical possession of the clerk, the clerk nonetheless would have legal custody of the records. Additionally, pursuant to the Local Government Records Law (Article 57-A, Arts and Cultural Affairs Law), the town clerk is the "records management officer," and §57.25 of the Arts and Cultural Affairs Law states in part that it is the responsibility of every local officer "to cooperate with the local government's records management officer on programs for the orderly and efficient management of records...".

Third, in a related vein, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions

> of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Town Board, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. In most towns, the town clerk has been designated as records access officer. If that is so in this instance, I believe that the town clerk has the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information Law. If a person other than the clerk has been designated records access officer, that person would have the same authority and responsibility. In the context of the problem that you have encountered, I believe that the records access officer would have the authority either to acquire the minutes for the purpose of responding to a request or directing the Planning Board's secretary to disclose the records as required by law.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which an agency 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)].

In an effort to enhance compliance with the Freedom of Information and Open Meetings Laws, 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: Rebecca Rowe Johnston, Town Clerk
Marie Perkins, Clerk/Secretary, Planning Board
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2393

162 Washington Avenue, Albany, New York 12231
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August 17, 1994

Hon. Daisy Healy, Councilwoman
Town of Cochecton
Box 101
Cochecton, NY 12726

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

Dear Councilwoman Healy:

As you are aware, I have received your letter of August 13. You have questioned the legality of a portion of a contract between the Town of Cochecton and its highway employees.

Section 12 of the contract states that "pursuant to a request by the Highway employees, the Town Board agrees to meet with the highway employees, in a closed meeting, at least ten (10) days before the Tentative Budget is prepared." You indicated that the employees are not members of any union. In this regard, I offer the following comments.

First, 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" 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 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, when a majority of the Board gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Second, I do not believe that a provision of a contract could validly remove a meeting otherwise subject to the Open Meetings Law from the coverage of that statute. Section 110(1) of the Open Meetings Law states that:

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

If it is more restrictive with respect to public access than the Open Meetings Law, even a local law would be superseded by the Open Meetings Law, and I believe that the intent of §110(1) is clear. Specifically, unless a statute, an act of the State Legislature, authorizes a public body to close a meeting that would ordinarily

be subject to the Open Meetings Law, a public body cannot restrict public access to meetings in a manner inconsistent with the Open Meetings Law. In this instance, Section 12 of the contract is more restrictive with respect to public access than the Open Meetings Law. Consequently, since it diminishes rights conferred by and is inconsistent with the Open Meetings Law, a statutory enactment, it is invalid.

Third, meetings of public bodies are presumptively open to the public, and I believe that budget related discussions must generally be conducted in public. As you are likely 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.

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.

Lastly, §105(1)(e) of the Open Meetings Law permits a public body to conduct an executive session regarding "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the "Taylor Law", and it pertains to the relationship between public employers (i.e., municipalities) and public employee unions. Since the highway department employees are not members of a union, I do not believe that §105(1)(e) would be applicable or serve as a basis for conducting an executive session.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8443
OML-AO-2394

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 18, 1994

Jerome A. Mirabito, Esq.
Smith & Mirabito, P.C.
P.O. Box 477
Fulton, NY 13069-0477

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

Dear Mr. Mirabito:

I have received your letter of August 15 in which you sought advice concerning a matter relating to the Open Meetings Law.

You have asked whether it is "permissible for a member of the legislative body who participates in a valid executive session, to discuss with members of the public/press, the confidential information that was shared in the executive session, after the conclusion of the executive session."

In this regard, I offer the following comments.

First, the Open Meetings Law is permissive. While that statute 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 can be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

Second, while information might have been obtained during an executive session properly held or from records characterized as "confidential", the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires

confidentiality [see Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)].

An example of a situation in which there could be a claim of confidentiality would involve a discussion by a board of education concerning a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.). In my view, the discussion would have to occur in private and the record would have to be withheld insofar as a 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, absent the consent of the parents of a student, because a statute requires confidentiality. However, no statute of which I am aware would generally confer or require confidentiality with respect to the matters discussed during executive sessions.

In a situation similar to that described in your letter, in which the issue was "whether discussions had at an executive session of a school board are privileged and exempt from disclosure", 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 participant 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 short, unless a statute specifically prohibits disclosure of certain information or records, I do not believe that statements made during an executive session or information derived from an executive session could be characterized as "confidential". Absent a statutory prohibition against disclosure, in my opinion a person present at an executive session would not be precluded from discussing or disclosing what transpired during the session, notwithstanding whether such disclosure would be appropriate, completely ethical or in the public interest.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8444
OML-AO-2395

162 Washington Avenue, Albany, New York 12231
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August 18, 1994

Mr. Robert W. Dutcher
Board Member
RD #3, Box 273
Auburn, NY 13021

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

Dear Mr. Dutcher:

I have received your letter of August 6. Please note that the Committee on Open Government is a unit of the Department of State; it is not a part of the State Education Department. In your capacity as a member of the Board of Education of the Port Byron Central School District, you have requested an advisory opinion.

You wrote that "five of the seven board members are meeting by telephone and/or in groups in which board business is being discussed", and that a "majority of [the] board has been meeting without all members being notified and preparing resolutions that are brought before the board to take action on." In addition, you referred to a portion of one such resolution authorizing a law firm retained as special counsel "to have full access to all personnel records, books and records of the District..." You expressed the understanding that personnel records "may only be reviewed during Executive Session, with the Superintendent present, and for a specific purpose."

In this regard, I offer the following comments.

First, 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.

Viewing the matter from a somewhat different vantage point, 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 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 reasonable notice to all of the members. Therefore, if, for example, five of seven 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.

With respect to telephone conferences, §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 syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

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

I also direct your attention to the legislative declaration of the Open Meetings Law, §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 short, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they may validly conduct meetings by means of telephone conferences, vote or make collective determinations by means of telephonic communications.

Second, I know of no statute that would preclude the Board or the District from disclosing personnel records to its attorneys. While disclosure to its attorneys could not be equated with disclosure to members of the public in response to requests made under the Freedom of Information Law, it is clear in my opinion that many aspects of personnel records would be available to any member of the public. Similarly, there is no general prohibition against disclosure of information considered in an executive session, and a characterization of such information or records as confidential is in most instances inaccurate. The term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as a 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, absent the consent of the parents of a student, because a statute requires confidentiality. However, no statute of which I am aware would generally confer or require confidentiality with respect to the matters discussed during executive sessions, including personnel records.

In a situation in which the issue was "whether discussions had at an executive session of a school board are privileged and exempt from disclosure", 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 participant 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 short, unless a statute specifically prohibits disclosure of certain information or records, I do not believe that statements made during an executive session or information derived from an executive session could be characterized as "confidential" or that there would be a valid basis for sustaining a claim of confidentiality.

Moreover, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. In any case, neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

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-2396

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 18, 1994

Ms. Roberta Russell Krieger
[redacted]

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

Dear Ms. Krieger:

I have received your recent letter in which you raised a series of questions concerning the Town Attorney of the Town of Harrietstown and requested an opinion concerning the following:

> "Does the Town Attorney have the right to invoke client attorney privilege in order to discuss his concerns about being investigated by the Grievance Committee, and his fears that I may initiate such an investigation, and that he will then have to get his own attorney? Was it proper for him to suggest such a privileged meeting during a Variance hearing on August 12, 1994 in Harrietstown? The chairman of the Zoning Board, Mr. Voudren, originally asked for an executive session, but Mr. Maher corrected him and changed his request to Attorney/Client meeting. This was conducted for forty-five minutes while 40 people waited for the meeting to continue. Does Mr. Maher have the right to block communication between me and Board members in order to protect himself from investigation for professional misconduct? Is the portion of the meeting which discussed these concerns privileged? Does Mr. Maher, the Town Attorney, have the right to tell the board how to vote based on these consideration [sic]?
>
> "Is it proper for Mr. Maher to send out a letter to Government officials which contains false statements about me? Is it proper for him to ignore my requests that he rectify

> these statements in accord with evidence I have on video tape showing that he has inaccurately construed allegations about me?"

In this regard, the Committee on Open Government is authorized to provide advice regarding the Open Meetings Law and the Freedom of Information Law. Consequently, my comments will pertain only to matters falling within the scope of the Committee's advisory jurisdiction.

The primary issue that you raised involves the propriety of the assertion of a privileged relationship between the Town Attorney and the Zoning Board of Appeals to discuss a possible investigation of the Town Attorney.

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 an executive session, a portion of an open meeting that is closed to the public in accordance with §105 of the Open Meetings Law. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. 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 relevance to the assertion of the attorney-client privilege 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. Further, after a public body has sought and obtained legal advice from its attorney and has started to discuss and deliberate a matter of public business, I believe that the attorney-client privilege would end and that the Open Meetings Law would apply.

From my perspective, the major function of a municipal attorney involves providing legal advice and expertise concerning

matters that fall within the scope of the duties of his or her client, i.e., a municipal officer or body, such as a zoning board of appeals.

While I am unaware of the nature of the communications between the Town Attorney and the Board at the gathering in question, I believe that the attorney/client privilege could properly have been invoked insofar as those communications involved the rendition of legal advice relative to the duties of the Board. It would appear that other matters may not have fallen within the scope of the privilege.

Finally, although I believe that a municipal attorney may provide a public body with advice concerning a course of action, I do not believe that he or she can "tell" or direct the body how to vote.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Zoning Board of Appeals
James Maher, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2397

162 Washington Avenue, Albany, New York 12231
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August 19, 1994

Hon. Martin A. Luster
Member of the Assembly
106 East Court Street
Ithaca, NY 14850

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

Dear Assemblyman Luster:

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

By way of background, you wrote that:

> "The National Academy of Science has been designated by the Department of Health pursuant to subdivision 11 of §29-0303 of the Environmental Conservation Law to review and evaluate certain procedures and decisions of the Commission for Siting Low-level Radioactive Waste Disposal Facilities. As such, the NAS is clearly a 'public body' as defined in §102 of the Public Officers Law.
>
> "The NAS has scheduled an 'executive session' for Tuesday, August 23, 1994 from 8:30 a.m. to 3 p.m. at the Ramada Inn in Syracuse, New York. There has been no indication that this executive session has been called in accordance with §105 of the Public Officers Law."

Section 29-0303(11) requires that the Department of Health "shall arrange to have one or more independent panels of technical and scientific experts review and evaluate the commission's decision and report on its selection of a tentative preferred disposal method and decisions and report on lands excluded from consideration for siting permanent disposal facilities..." That provision also requires that the panel, the entity that has

scheduled the executive session, "assess the nature, sources and quality of any specific data the commission relied upon, the nature of assumptions made, and the specific analytical methods, procedures or techniques employed..." and to prepare a written report containing its findings, conclusions and recommendations. Subdivision (12) of §29-0303 states that the panel's report is public and that notice of its preparation must be published in the State Register.

During our discussion of the matter, you indicated that the panel is a subcommittee of a committee of the NAS and that it has a specific membership.

In this regard, I offer the following comments.

First, although you concluded that the panel in question is clearly a "public body", it is, in my view, a unique statutory creation. As you are aware, §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."

It is noted that judicial decisions indicate generally that advisory bodies 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, it has been found that an advisory body created by statute is a public body subject to the Open Meetings Law [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977)]. In this instance, the panel is designated by statute and is required by that statute to perform certain functions for the State.

Second, assuming that the panel is a public body required to comply with the Open Meetings Law, 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. Moreover, the Law 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].

Lastly, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, paragraphs

(a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2398

162 Washington Avenue, Albany, New York 12231
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September 14, 1994

Mr. Bob Black
[redacted]

Dear Mr. Black:

As you are aware, I have received your letter of August 22. Please accept my apologies for the delay in response.

You referred to an advisory opinion prepared at your request on June 13 concerning the status of the Department of History at the State University of Albany under the Open Meetings Law. The opinion was based on provisions found in the policies of the Board of Trustees of the State University and the judicial interpretation of the Open Meetings Law. It is your contention that the Graduate Committee of the History Department acts in fact as a governing body that makes final and binding decisions and that I "have ample evidence" to conclude that the entity in question is subject to the Open Meetings Law. You concluded by stating that it is my "responsibility...to see to it that the meetings of governmental bodies, de jure and defacto, are upon to the public."

In this regard, neither myself not the Committee on Open Government has the authority to "see to it" that meetings are open to the public; we have the authority to offer advice but no power to enforce the Open Meetings Law or to compel an entity to conduct open meetings. Further, while I am not questioning your veracity, the only "evidence" that I have concerning the matter consists of information that you provided. I do not know whether others would agree that your conclusions are accurate, and it is likely that only a court could finally determine the matter.

Finally, even if the entity in question is determined to be a public body subject to the Open Meetings Law, it would appear that the subjects of your primary interest could properly be discussed in private. Matters involving hiring and firing of faculty members ordinarily could be discussed in executive session when the discussion relates to a particular person or persons [see Open Meetings Law, §105(1)(f)]. Matters identifiable to specific students could likely be discussed outside the scope of the Open Meetings Law due to provisions of the federal Family Educational Rights and Privacy Act [20 U.S.C. §1232(g)] when read in

conjunction with §108(3) of the Open Meetings Law. That provision exempts from the coverage of the Open Meetings Law matters made confidential by federal or state law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8459
OML-AO-2399

162 Washington Avenue, Albany, New York 12231
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September 16, 1994

Mr. Terry Williams
Pension & Investments
220 East 42nd Street
New York, NY 10017

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

Dear Mr. Williams:

As you are aware, I have received your letter of August 24. Please accept my apologies for the delay in response.

You referred in your letter to the New York State Common Retirement Fund and the retirement system. Because the retirement system "hires outside vendors", "manages money on behalf of state employees", and makes decisions concerning the investment of assets of the Fund, you wrote that it is a public body and that its decisions should be made at public meetings. Based on that contention, you requested records reflective of the Comptroller's schedule of meetings with the investment staff of the Retirement Fund, as well as the "time of those meetings, and prior to the holding of those meetings, a copy of the agenda."

You asked that I assist in obtaining the information sought. In this regard, I offer the following comments.

First, I believe that your assumption that the meetings at issue involve a public body is inaccurate. The phrase "public body" is defined in §102(2) of the Open Meetings Law to mean:

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

Based on the foregoing, a public body, in general, is an entity consisting of two or more members that conducts public business and performs a governmental function, collectively, as a body. Typical public bodies would be city councils, town boards, boards of education and the like. The staff of an agency would not in my view constitute a public body. Consequently, I do not believe that the meetings in question would involve a public body or that the requirements of the Open Meetings Law would apply.

Second, with respect to access to records, I point out the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency need not create a record in response to a request. Having received a copy of the response to your request prepared by Robyn Patton, the records access officer at the Office of the State Comptroller, it appears that the agendas that you seek are not generally prepared in conjunction with meetings with investment staff of the Retirement Fund. If no such records exist, the Freedom of Information Law would be inapplicable.

Third, insofar as records are prepared prior to the kinds of meetings to which you referred, I have been informed that they would consist largely of recommendations offered by staff. If that is so, the provision to which Ms. Patton referred, §87(2)(g), would be pertinent. That provision states that an agency may withhold records that:

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

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

disclosure of information regarding the purchase or sale of securities could have a significant impact on the market and/or price of the securities.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information and Open Meetings Laws and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robyn A. Patton, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2400

162 Washington Avenue, Albany, New York 12231
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September 21, 1994

Ms. Gail S. Shaffer
Secretary of State
Dept. of State
162 Washington Avenue
Albany, NY 12231

<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 information presented in your correspondence.</u>

Dear Secretary Shaffer:

Your interest in compliance with the Open Meetings Law is greatly appreciated. You have sought my opinion concerning a matter described in a letter addressed to you by Sal J. Sialiano, a member of the Yonkers City Council.

The situation to which he referred involved a visit to your office and the State Comptroller's Office in Albany by some fifteen officials of the City of Yonkers, including Councilman Sialiano and four other Councilmembers. In this regard, as you are aware, the Open Meetings Law applies to meetings of public bodies. Section 102(2) of that statute defines the phrase "public body" to mean:

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

Based on the foregoing, the staff of the executive or legislative branches of a city government do not constitute a public body. When staff people gather, either among themselves, or perhaps with the head of a State agency and his or her staff, no public body is present, and the Open Meetings Law is inapplicable. Nevertheless, when a majority of a public body gathers to conduct public business, the Open Meetings Law clearly applies.

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, Second Department, which includes Westchester County and 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, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

It is noted, too, that in a relatively 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 person who was not a member [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)].

If a majority of the City Council had met in Albany to discuss public business, I believe that it would have done so in a manner inconsistent with the Open Meetings Law. In my opinion, a meeting of a municipal body must be held at a location where members of the public who might want to attend could reasonably do so. Again, since a majority of the City Council was present, a "meeting" would have occurred; nevertheless, residents of the City, despite their possible interest in the matters under consideration, would have been unable to attend.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Sal J. Sialiano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2401

Committee Members

Robert B. Adams
William Bookman, Chairman
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Executive Director

Robert J. Freeman

162 Washington Avenue, Albany, New York 12231
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September 23, 1994

Mr. Edward J. Barauskas
[redacted]

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

Dear Mr. Barauskas:

As you are aware, I have received your letter of September 2. Please accept my apologies concerning the delay in response. You have sought advice concerning the implementation of the Open Meetings Law by a local board of education.

You described the situation as follows:

> "Our school board schedules executive sessions at 7:00 pm as a regular part of each and every board meeting. The school board president at that time reads from a card that the board in accordance with the Open Meetings Law will move into executive session to discuss litigation, contractual agreements, personnel matters and real estate. He then asks for a second and a vote of board members. We are then asked to leave and the doors are closed."

Additionally, you described two situations in which executive sessions were held for reasons you believe to be inconsistent with the Open Meetings Law.

In this regard, I offer the following comments.

First, 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. Further, the ensuing provisions of §105(1) specify and limit the subjects that may validly be discussed in an executive session. Consequently, a public body cannot conduct an executive session to discuss the subject of its choice, and the two particular issues to which you referred do not appear to have been appropriate subjects for consideration in private.

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].

Therefore, following the initiation of the meeting in public, when a subject arises that may be discussed in executive session, the procedure described earlier in §105(1) should be carried out.

Second, based upon the language of the Open Meetings Law and its judicial interpretation, motions to conduct executive sessions citing the subjects to be considered as "personnel", "litigation", "negotiations", or "contractual agreements" for example, without additional detail, are inadequate. The use of those kinds of terms alone do not provide members of public bodies or members of the public who attend meetings with enough information to know whether a proposed executive session will indeed be properly held.

For instance, although it is used frequently, the term "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. 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 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 §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, or when the issue bears upon a group of employees, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel".

Moreover, 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 [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. 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 frequently cited relates to "litigation". Again, that kind of minimal description of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is §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].

Similarly, with respect to " contract negotiations" the only ground for entry into executive session that mentions that term is §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, §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 §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into 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].

Although one of the grounds for entry into executive session refers to real property, that provision limits the ability to enter into executive session. Section 105(1)(h) permits a public body to enter into an executive session to discuss:

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

Based on the foregoing, a public body may discuss the proposed acquisition of real property, for example, behind closed doors, "but only when publicity would substantially affect the value" of the property. Conversely, when publicity would not have any substantial effect upon the value of real property, §105(1)(h) could not in my opinion be properly asserted to enter into an executive session. While I do not believe that motion to enter into executive session must necessarily identify the parcel or parcels of land under consideration, in view of the language of §105(1)(h), there must be some indication in the motion that publicity would substantially affect the value of the property.

Lastly, an aggrieved person may seek to enforce the Open Meetings Law by initiating a proceeding based on §107 of that statute. Enclosed is a copy of the Open Meetings Law. When the public body that is the subject of an inquiry is known, a copy of the opinion is forwarded to that body in an effort to enhance compliance with and understanding of the law. Since you did not identify the school district, it is suggest that you make a copy of this opinion available to the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2402

162 Washington Avenue, Albany, New York 12231
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September 26, 1994

Hon. Frank Coccho, Sr.
Alderman
City of Corning
[redacted]

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

Dear Alderman Coccho:

I have received your recent letter in which you sought an advisory opinion concerning the propriety of a proposed executive session.

By way of background, you wrote that:

> "A City employee (mid management/non union) contemplating retirement, has requested a joint executive session with the Council and Board of Public Works Commissioners. Reason given for the session is a 'specific personnel matter'.
>
> "It is expected that the employee will request the respective governing bodies to consider awarding him a monetary 'cash out' package (current contractual provision for unionized employees) for accumulated sick days even though the City is neither legally or contractually obligated to do so. In addition, the employee recently pled guilty to a felony in a U.S. district court. As a result, there is a possibility that the personnel aspects of the employee's life could be a topic of discussion, which under normal circumstances would be a legitimate personnel matter. However, the events surrounding and including the plea were publicly disclosed in the local media. Unfortunately, the publicity

> on this matter has now made the employee's life an 'open book'."

It is your view that the matter "could be considered as policy or precedent setting" and that there would be no legal basis for conducting 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 open to the public, except to the extent that the subject matter under consideration may properly be discussed during an executive session.

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.

Second, 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 under that provision 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.

Although the language of §105(1)(f) is not restricted to issues involving prospective, current or former employees, it does not permit a public body to discuss every subject that might arise in relation to a "particular person". Again, the language of that provision is precise and pertains only to certain enumerated subjects that relate to an individual. I agree with your contention that the matter essentially involves an issue of policy, i.e., whether the City should award a "'cash out' package" now only available to union members to employees who are not union members.

Moreover, even though any action taken might relate currently only to one employee, presumably that action would affect or serve as precedent in cases arising in the future pertaining to other non-union employees. In a decision involving different facts but in my opinion the same principle, it was held that the "personnel" exception for entry into executive session was not validly asserted. The court stated that:

> "In relying on the exception contained in paragraph f, the town asserts that its decision 'applied to a particular person, the Appellant herein'. While the town board's

> decision certainly did affect petitioner, and indeed at the time the decision was made affected only him, the town board's decision was a policy decision to not extend insurance benefits to police officers on disability retirement. Presumably this policy decision will apply equally to all persons who enter into that class of retirees. Thus, it cannot be said that the purpose of the meeting was to discuss 'the medical, financial, credit or employment history of a particular person'" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

In sum and in conjunction with the information that you provided, while a discussion of an individual's financial history, for example, could be considered in executive session, that issue must in my opinion be distinguished from consideration of the possible award of a "cash out" package. For reasons discussed previously, the latter pertains to a matter of policy that could or would affect non-union employees in the future. Consequently, I do not believe that an executive session could properly be held to discuss the award of a cash out package.

Lastly, I point out that the Open Meetings Law is permissive. Although a public body has the authority to conduct an executive session, it has no obligation to do so. Therefore, even if some aspect of the discussion may be held in private, the Open Meetings Law would not require that an executive session be held.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James Bacalles, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2403

162 Washington Avenue, Albany, New York 12231
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September 27, 1994

Mr. Glenn Pontier
Editor
The River Reporter
Box 150
Narrowsburg, NY 12764

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

Dear Mr. Pontier:

As you are aware, I have received your correspondence of August 30, which reached this office on September 6. I have also received your correspondence of September 14 dealing with the same issue.

You enclosed a release transmitted by the Superintendent of the Monticello Central School District stating that:

> "The next regular Monticello Central School Board of Education meeting will be held on Thursday, September 22, 1994, at 7:00 P.M. in Room 200 in the Monticello High School."

Below the sentence quoted above the release refers to:

> "Executive Session 7:00 - 8:00 P.M.
> Regular Session 8:00 P.M."

You have asked whether the foregoing is "legal." In this regard, I offer the following comments.

By way of background, 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.

Second, 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].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired

result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eileen P. Casey, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2404

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

September 28, 1994

Mr. Terry Williams
Pensions & Investments
200 East 42nd Street
New York, NY 10017

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

Dear Mr. Williams:

I have received your letter of September 8 in which you questioned the propriety of an executive session conducted by the Board of Directors of the Teachers' Retirement System of the City of New York. You were informed that reason for holding the closed session was to discuss investments.

In this regard, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be held pursuant to §105(1) of the Open Meetings Law. Paragraphs (a) through (h) of that provision specify and limit the subjects that may validly be discussed during an executive session.

From my perspective, two of the grounds for entry into executive session are relevant to the situation that you described.

Section 105(1)(f) of the Open Meetings Law 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."

Based on the foregoing, discussions concerning the financial or credit history of a particular corporation may be conducted in private.

Also pertinent is §105(1)(h), which permits a public body to enter into executive session to discuss:

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

Therefore, when a public body discusses the purchase of securities, or the sale or exchange of securities that it holds, and when public discussion would substantially affect the value of the securities, an executive session may justifiably be held.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Donald Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2405

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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September 30, 1994

Mr. Owen McGuinness
[redacted]

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

Dear Mr. McGuinness:

I have received your letter of September 9 and read the correspondence attached to it.

The materials pertain to a series of issues relating to the Middle Country Library. Although you complained about difficulty in obtaining information and questioned the validity of charging $4,000 for copies to be made available under the Freedom of Information Law, you did not specifically describe or enclose requests for records. Without additional information, I cannot provide effective guidance or advice.

Additionally, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. If you have questions concerning those laws, I will be pleased to attempt to respond. However, the Committee on Open Government is not empowered to conduct investigations of the operation of an agency or compel an agency to grant access to records.

One issue that you described in sufficient detail involves your claim that the members of the Board of Trustees speak "so low that residents 15' away cannot hear them." In this regard, with respect to the capacity to hear what is said at meetings, I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:

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

> deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process. Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basis requirement of the Open Meetings Law.

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

I hope that I have been of some assistance.

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 2406

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(518) 474-2518
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September 30, 1994

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

I have received your letter of September 7 addressed jointly to the Attorney General and me.

You referred to entities created by the New York City Health and Hospitals Corporation, specifically "Outpatient Pharmacy Inc. (OPI)." According to your letter:

> "OPI is in absolute violation of the Open Meetings Law. It fails to announce its meetings to the public by any known means. It fails to list its board meetings on the list published monthly by the NYCHHC board chair -- a list of all meetings of board committees, the corporation's only other known functioning subsidiary, and the board itself. It fails to post them in the only known location for such postings."

In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law applies to meeting of public bodies. Section 102(2) of that statute defines the phrase "public body" to mean:

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

As the foregoing pertains to OPI, Chapter 214-A of the Unconsolidated Laws, §5(20)(a), authorizes the Health and Hospitals Corporation "[t]o exercise and perform all or part of its purposes, powers, duties, functions or activities through one or more wholly-owned subsidiary public benefit corporations..." If indeed OPI is a public benefit corporation created pursuant to the provision referenced above, its governing body is, in my view, clearly a public body required to comply with the Open Meetings Law.

While the Open Meetings Law does not require that notice of a meeting be given, on request, to individuals, it does require that notice be given to the news media and to the public by means by posting. Specifically, §104 of the 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Luis Miranda, Chairman, OPI
Alan R. Sorin, President, OPI
G. Oliver Koppell, Attorney General

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8489
OML-AO 2407

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 4, 1994

Mr. John E. Anderson, Sr.
[redacted]

Dear Mr. Anderson:

I have received your letter of September 12. As a resident of the Town of Austerlitz, you wrote that there "are no office hours" for the elected and appointed Town officials. Consequently, you have asked whether the law requires that those officials "have days of the week when you can take a problem to them at Town Hall."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information and Open Meetings Laws. Although those statutes and the issue that you raised pertain to the accountability of government, neither of those laws deals directly with your inquiry. Further, I know of no provision in the Town Law that would require town officials to establish office hours. Nevertheless, in an effort to assist you, I offer the following comments.

As inferred above, one vehicle for acquiring government information involves the use of the Freedom of Information Law to seek records. I point out that the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to a request. 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)].

Section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a town board, to adopt rules and regulations consistent with the Law and the Committee's regulations.

Potentially relevant to your complaint is §1401.2 of the regulations, which provides in relevant part that:

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

> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor..."

In view of the foregoing, the records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests.

Section 1401.4 of the regulations entitled "Hours for public inspection" states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Therefore, insofar as Town offices operate during regular business hours, I believe that the public should have the opportunity to request and review records during those hours. As indicated above, if there are no regular business hours, an appointment procedure must be devised. Further, I know of no provision that requires that town records be kept in town offices at all times, and it has been held that a clerk may maintain temporary possession of records at her home, so long as that person complies with the Freedom of Information Law [see Town of Northumberland v. Eastman, 493 NYS 2d 93 (1985)]. As such, when a request is made in advance, if there are no regular business hours, perhaps an appointment could be made to inspect the records in a timely manner, either at Town offices or at the home of the Clerk or a deputy.

Another vehicle for acquiring information about the Town pertains to the public's right to attend meetings under 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)]. Based upon the direction given by the courts, when a quorum 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.

Section 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.

Enclosed is "Your Right to Know", which describes the Freedom of Information and Open Meetings Laws in detail. I hope that it will be useful to you and that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 2408

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 4, 1994

Mr. Michael D. Lesick
Superintendent of Schools
Fonda-Fultonville Central School
[redacted]

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

Dear Mr. Lesick:

I have received your letter of September 13 and appreciate your interest in compliance with the Open Meetings Law.

According to your letter, often when you prepare an agenda prior to a meeting of the Board of Education, you are "aware of a need" to hold an executive session to discuss "planned personnel appointments", for example, or collective bargaining negotiations recently held. With that awareness, you wrote that you had scheduled an executive session on an agenda "in consideration of the public." Having learned that such a practice may be improper, you recently prepared an agenda indicating that an executive session would be held only "if needed."

You asked whether an executive session may be referenced on an agenda in the manner that you described. In this regard, I offer the following comments.

First, by way of background, 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.

Second, 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].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Superintendent or the Board on

its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Similarly, your reference to an executive session to be held, "if needed", would not guarantee that such a session will be held, but rather that it might be held. From my perspective, that kind of reference would be fully appropriate.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2409

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 5, 1994

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 information presented in your correspondence.

Dear Mr. Luebbert:

I have received your letter dated September 2, which reached this office on September 15.

You have sought an opinion concerning the "budget review process" as it is allegedly conducted in the Town of Newburgh. According to your letter, one member of the Town Board and the Supervisor meet in the Supervisor's office to review the proposed budget while another Board member waits in a nearby office. You wrote that "then an ongoing switch is made with the other councilman and on it goes with the switching of the councilman."

In this regard, a "meeting" for purposes of the Open Meetings Law would involve a situation in which a quorum of a public body convenes for the purpose of conducting public business. In the case of a town board consisting of five members, a quorum would be three, and a gathering of less than three would fall beyond the coverage of the Open Meetings Law. However, it has been inferred judicially that gatherings of fewer than a quorum of the members of a public body held in order 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 involves 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)]. Therefore, if it is determined that meetings are held by less than a quorum for the purposes of circumventing the Open Meetings Law, a court might find such action to violate the Open Meetings Law.

I hope that I have been of some assistance.

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2410

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 7, 1994

Hon. Richard E. Slagle, Mayor
Village of Celoron
21 Boulevard Avenue
Celoron, NY 14720

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

Dear Mayor Slagle:

I have received your letter of September 16 in which you raised a series of questions relating to meetings of the Village Board of Trustees.

On the date of your letter, we discussed a controversy that arose concerning a Board meeting held on August 22. A resolution was submitted at that meeting to authorize the clerk to attend the Fall Training School sponsored by the New York Conference of Mayors and the Office of the State Comptroller. You and three trustees were present, and the vote on the matter was 2-2. Soon after, a special meeting was held to address a separate issue and to resubmit the resolution to enable the clerk to attend the School. The full Board was present at that meeting and the resolution was approved by a vote of 3-2.

A member of the Board has contended that as Mayor, you cannot vote a second time to break a tie. She referred to a portion of a manual stating that:

> "A problem arises when a tie exists even after the mayor or president has voted. For example, when there is a vacancy in office or a trustee is absent and the mayor opts to vote, a tie vote may result; (e.g., two trustees, yes, one trustee, no, and mayor, no). In that situation, the issue at hand has not passed. There is no provision in the State Law to resolve such an occurrence. The Mayor may not vote a second time to break the tie. Municipalities may, however, provide the procedure to be followed when such a tie does

act on the resolution concerning attendance by the Clerk at the Training School. In this regard, there is nothing in the Open Meetings Law nor is there any provision of which I an aware in the Village Law that deals specifically with special meetings or the subjects that may be considered at those meetings. Consequently, I do not believe that the Board would have been prohibited from acting on a second resolution concerning the clerk's attendance.

You also raised several questions pertaining to minutes and their correction or amendment. The Open Meetings Law pertains to minutes 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 will accept the member's statement in writing, which would then be entered as part of the minutes (1980 Op. St. Compt. File #82-181). As such, I do not believe that member of the Board may "order the Clerk to alter the minutes or any other record."

In my opinion, the most important attribute of minutes is that they be accurate. Further, I agree with your inference that when

> occur by local law. If the local law increases or decreases the number of votes which any member of the legislative body is entitled to cast, or if it abolishes, transfers or curtails any power of an elective office, such law is subject to a mandatory referendum."

She also referred to sources of information stating that only village trustees may introduce legislation and, consequently, contends that the mayor of a village may not do so.

From my perspective, the Trustee who has questioned your capacity to vote or introduce legislation likely misunderstands the status and role of a mayor of a village. In short, a mayor is a member of a board of trustees. Section 3-301(4) of the Village Law states that: "The mayor and the trustees of a village shall constitute the board of trustees thereof." In this instance, as Mayor, you are one among five members of the Board of Trustees, which is the legislative body of the Village. Consequently, I believe that you have the same authority to introduce resolutions as any other member of the Board.

Additionally, §4-400(1)(a) of the Village Law states that it is a mayor's responsibility:

> "To preside at the meetings of the board of trustees, and may have a vote upon all matters and questions coming before the board and he shall in case of a tie, however on all matters and questions, he shall vote only in his capacity as mayor of the village and his vote shall be considered as one vote" (emphasis added).

As I understand the preceding language, a mayor may but is not required to vote on all matters before the board, unless there is a tie between the members other than the mayor, in which case the mayor is required to vote. If there is a tie between the members when the mayor has voted, which occurred on August 22, the mayor cannot vote twice; in other words, the mayor cannot have two votes on the same matter in order to break a tie. I know of no provision of law, however, that precludes the resubmission of the resolution at a later of meeting of a board, which in fact occurred on August 26. The action taken then was in my view separate and distinct from the vote taken four days earlier. While I believe that your vote on August 26 was required to break what otherwise would have been a tie, that action represented a new action taken by the Board. Clearly you did not cast two votes in the same matter; rather, as prescribed by the Village Law, you cast one vote, as a member of the Board of Trustees, out of a total of five.

You asked whether at the special meeting of August 26 held to discuss the renewal of a bond anticipation note, the Board could

the Trustees vote on the minutes, they are considering "the accuracy of the minutes as a village record," "not on whether they agree with what happened at the meeting."

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-2411

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 11, 1994

Ms. M. Helene Hamlin
Scholl and Hamlin, P.C.
408 Lomond Place
Utica, NY 13502-5991

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

Dear Ms. Hamlin:

I have received your letter of September 15. In your capacity as the attorney for the Village of Ilion Zoning Board of Appeals, you have sought an advisory opinion "as to the legality of holding meetings by teleconference."

In this regard, it is noted at the outset 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.

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 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 that are preceded by reasonable notice given to all members. Therefore, if reasonable notice of a meeting is not given to a member or members, I do not believe that a public body has the authority to perform its duties, even though a majority of its members may be present.

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 syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

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

I also direct your attention to the legislative declaration of the Open Meetings Law, §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 short, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they may validly conduct meetings by means of telephone conferences, vote or make collective determinations by means of telephonic communications.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8501
OML-AO-2412

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 14, 1994

Mr. Leslie A. Miller
[redacted]

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

Dear Mr. Miller:

As you are aware, your letter of September 7 addressed to Peter Sullivan, Assistant Attorney General, has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information and Open Meetings Laws.

In brief, your letter and related materials pertain to the inability of the public to obtain minutes of meetings of the Town of Ripley Planning Board. The clerk of the Board has apparently refused to release the minutes, notwithstanding requests for those records by members of the public, the news media and the Chairman of the Planning Board. In this regard, I offer the following comments.

First, 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, it is clear that minutes 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 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.

Second, §30 of the Town Law states in part that the town clerk: "Shall have the custody of all the records, books and papers of the town". Therefore, even though Planning Board minutes and other records may not be in the physical possession of the clerk, the clerk nonetheless would have legal custody of the records. Additionally, pursuant to the Local Government Records Law (Article 57-A, Arts and Cultural Affairs Law), the town clerk is the "records management officer," and §57.25 of the Arts and Cultural Affairs Law states in part that it is the responsibility of every local officer "to cooperate with the local government's records management officer on programs for the orderly and efficient management of records...".

Third, in a related vein, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation

> pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Town Board, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. In most towns, the town clerk has been designated as records access officer. If that is so in this instance, I believe that the town clerk has the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information Law. If a person other than the clerk has been designated records access officer, that person would have the same authority and responsibility. In the context of the problem that you have encountered, I believe that the records access officer would have the authority either to acquire the minutes for the purpose of responding to a request or directing the Planning Board's secretary to disclose the records as required by law.

In an effort to enhance compliance with the Freedom of Information and Open Meetings Laws, copies of this opinion will be forwarded to Town officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk
Marie Perkins
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8502
OML-AO-2413

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 17, 1994

Hon. Guy Thomas Cosentino
Mayor
City of Auburn
Memorial City Hall
24 South Street
Auburn, NY 13021-3892

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

Dear Mayor Cosentino:

I have received your letter of September 16 in which you requested an advisory opinion.

According to your letter:

> "Since the City Counsel of the City of Auburn has executive sessions from time to time, [you] have the Secretary to the Mayor present to take minutes. She then types up minutes and files a copy in the City Clerk's Office within the guide lines set forth in the law and distributes them to members of the City Council."

You have asked whether the secretary's notes, "which are detailed and lengthy", can be obtained under the Freedom of Information Law. In this regard, I offer the following comments.

First, §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, if minutes or notes are prepared concerning an executive session, even when there is no requirement to do so, any such documents would fall within the coverage of the Freedom of Information Law. It is noted that §86(4) of the statute defines the term "record" broadly to mean:

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

Based upon the foregoing, any notes or minutes that are prepared would constitute "records" subject to rights conferred by the Freedom of Information Law.

This is not to suggest that all such records would be available. 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. Therefore, the specific contents of the records would determine the extent to which records are available or deniable. For instance, while minutes indicating that the Board decided to fill a vacant position by hiring a particular individual would clearly be public, insofar as minutes or notes pertain to an individual's medical condition or

would, if disclosed, impair collective bargaining negotiations, I believe that they could be withheld [see Freedom of Information Law, §89(2)(b) and (c)].

Lastly, it is emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session 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).

I hope that I have been of some assistance. If you would like to consider the matter further, I will be pleased to discuss it with you in Auburn on November 3.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2414

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 18, 1994

Mr. Terry Williams
Pensions & Investments
220 East 42nd Street
New York, NY 10017

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

Dear Mr. Williams:

I have received your letter of September 21, which pertains to a meeting of the Board of the New York City Employees Retirement System.

According to your letter, soon after it began, the Chairman "took the meeting into executive session." When you questioned the basis, you were informed that "it was to discuss investment issues." You also wrote that a review of the minutes of the meeting "reveals no obvious reasons for going into executive session." You have sought my views on the matter. In this regard, I offer the following comments.

First, based on the agenda, it appears that two of the grounds for entry into executive session might have been applicable with respect to portions of the meeting.

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..."

Some aspects of the Board's deliberations might have involved the financial history of a particular corporation; discussions concerning selected managers might have involved the employment history of a particular person or firm or matters leading to the appointment, employment or perhaps dismissal or removal of a person

or firm. In those instances, I believe that executive sessions may properly be held.

As indicated in previous correspondence, §105(1)(h) may be applicable. That provision authorizes a public body to enter into executive session to discuss:

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

When public discussion of the purchase or sale of securities would have a substantial impact on their value, §105(1)(h) would serve as a basis for conducting an executive session.

Second, it is emphasized that the grounds for entry into executive session are specified and limited by §105(1) of the Open Meetings Law. Stated differently, a public body cannot conduct an executive session to discuss the subject of its choice. Other than the two areas referenced earlier, it does not appear that the Board would have had proper grounds for conducting an executive session. The extent to which those areas were indeed discussed is unknown to me.

Lastly, 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..."

Based on the foregoing, I do not believe that the Chairman can simply "take a meeting into executive session." Rather, a rationale for a proposed executive session must be offered in public, and the rationale must be consistent with one or more grounds for entry into executive session authorized by law.

I hope that I have been of some assistance.

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- 2415

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 19, 1994

Mr. Kevin P. Gorman
[redacted]

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

Dear Mr. Gorman:

I have received your letter of September 19, which reached this office on September 26. You have requested an advisory opinion involving the Open Meetings Law.

You questioned whether the Charter Revision Committee designated by the City of Yonkers must comply with the Open Meetings Law. Additionally, if it is subject to that statute, you asked whether it complied with the notice requirements imposed by the Law. You referred specifically to a meeting held on September 1 at 6 p.m. and indicated that the "only public information of the meeting was printed in daily news portion of The Herald Statesman, a local paper. The article appeared in the Tuesday August 30, 1994, issue which was not available to the public until after 6 A.M. of that date." You asked "whether the 72 hour notification is satisfied by publishing a notice at 6 A.M. on a Tuesday calling for a meeting at 6 P.M. on Thursday. The number of hours total 60", and you contended that "Even if the publication was said to be 12:01 Tuesday, the number of hours would be 66."

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and the phrase "public body" is defined in §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."

In my opinion, a city charter commission created by a city constitutes a public body subject to the Open Meetings Law, even though its authority may be advisory. When an advisory body is created by statute, it has been held that such a body falls within the requirements of the Open Meetings Law [see MFY Legal Services v. Toia, 93 Misc. 2d 147, 402 NYS 2d 510 (1977)]. In this instance, a statute authorizes the creation of a charter commission. Specifically, §36 of the Municipal Home Rule Law indicates that a legislative body may adopt a local law providing for the establishment of a city charter committee or that such a commission may be created by the mayor of any city. Consequently, it is my view that the entity in question was required to comply with the Open Meetings Law.

Second, the Open Meetings Law requires that notice of the time and place be given by a public body prior to every meeting. Section 104 of that statute states that:

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

Subdivision (3) specifies that the notice required to be given need not be a legal notice. Consequently, there is no requirement that a public body pay to place a legal notice prior to a meeting. Further, while the Open Meetings Law requires that notice be given to the news media, the news media is not obliged to publish the notice. When a newspaper, for example, chooses to publicize a meeting, I believe that it may do so at any time. Certainly a newspaper is not bound by the Open Meetings Law to print the notice at any particular time prior to a meeting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Yonkers City Charter Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2416

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 20, 1994

Ms. Barbara Fuchs
[redacted]

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

Dear Ms. Fuchs:

I have received your letter of September 20, which reached this office on September 26. You referred to two meetings held by the Gardiner Town Board in private and without prior public notice. You have sought my views on the matter.

In this regard, I offer the following comments.

First, it is emphasized that the definition of "meeting" [see Open Meetings Law, §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, §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 §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 §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, a copy of this opinion will be forwarded to the Gardiner Town Board.

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 OML-AO-2417

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 21, 1994

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 information presented in your correspondence.

Dear Ms. Richtmyer:

I have received your letter of September 29 in which you requested a "ruling" concerning the Open Meetings Law.

In brief, having been excluded from a meeting of the Watkins Glen Central School District Curriculum Committee of the Board of Education, the issue is whether that entity is required to comply with the Open Meetings Law.

Before commenting on the matter, I point out that the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law. The Committee cannot render a "ruling" or otherwise enforce the Open Meetings Law. Nevertheless, based on the information that you provided, I offer the following remarks.

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.

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 [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 601 NYS 2d 29, ___ AD 2d ___ (1993)].

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.

It is also noted that every meeting of a public body must be convened open to the public, 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. In addition, a procedure must be accomplished, during an open meeting, before an executive session may be held. Specifically, §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 may conduct an executive session for the below enumerated purposes only..."

Further, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered in executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Vicki Schamel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2418

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 21, 1994

Mr. Richard E. Scudellari
Tax Pac, Inc.
P.O. Box 188
Greenlawn, NY 11740-0188

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

Dear Mr. Scudellari:

I have received your letter of September 27 and the materials attached to it.

The documentation relates to action taken in response to a opinion that I prepared on your behalf in which it was advised that, in a technical sense, a public body cannot schedule an executive session in advance of a meeting. It was also advised that a public body may include in or with the notice of a meeting an indication that a motion would be made to enter into executive session to discuss a particular topic immediately after the convening of an open meeting. Following the issuance of the opinion, Dr. Raymond A. Walters, Superintendent of Schools, wrote that the Board had altered its policy to include statements in its notices indicating that a Board meeting will begin at a certain time and that a motion to conduct an executive session will be made immediately thereafter. He also wrote that the Board calls its meetings to order in public and that motions are then accepted to move into executive sessions. In conjunction with the foregoing, you enclosed a copy of the District's 1994-95 calendar and directory and circled a number of references to scheduled meetings of the Board of Education. Typical among those notices is the following:

"Board of Education Regular Meeting 7:30 PM
Public Meeting 8:15 PM."

You have asked that I review that documentation "and state, yes, they are in violation of such and such a law or no they are not violating any laws, statutes or regulations."

In this regard, it is emphasized at the outset that neither the Committee on Open Government nor myself is empowered to find an

entity "in violation" of law. From my perspective, only a court can render such a determination. The Committee and its staff are, however, authorized to provide advice and opinions, and the ensuing remarks should be considered in that light.

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. Section 105(1) of the Law states that:

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

From my perspective, the purpose and intent of the foregoing are clear: the public should have the right to know when a public body enters into an executive session, and that there is a proper basis for so doing. Consequently, a motion to conduct an executive session must be made in public and it must include reference to the subject or subjects to be considered behind closed doors.

Often public bodies or their staffs have the capacity to recognize in advance of a meeting that a topic to be considered at a meeting falls within one or more of the grounds for entry into executive session. In those kinds of situations, in consideration for the public, some have sought to schedule executive sessions so that members of the public will know in advance that they need not attend while an executive session is ongoing. As expressed in the earlier opinion addressed to you, technically, I do not believe that a public body can know with certainty that an executive session will be held. In short, it cannot be known with certainty that a motion to enter into an executive session will indeed be carried. For those reasons, I advised as I did, that a public body cannot schedule an executive session but may in its notice indicate that a motion to enter into executive session may be made to discuss a certain topic. When it is known that a certain topic will in fact be considered and that there is a basis for discussing that topic in executive session, the practice that I recommended and which was described to you by Dr. Walters in his letter of July 12 would be unobjectionable and in my view consistent with the Open Meetings Law.

However, the calendar tacitly includes scheduled executive sessions, without any indication of the subject to be considered, with respect to meetings to be held as far in advance as August of 1995. I doubt that a public body can know in October of 1994 that there will indeed by a basis for conducting an executive session in August of 1995. In my opinion, Dr. Walters' written statement regarding the implementation of the Open Meetings Law is consistent with law. However, if in practice the Board schedules closed sessions far in advance of meetings, without consideration as to

the topics that may be discussed, that practice would in my opinion be inconsistent with the Open Meetings Law, particularly in terms of its purpose and intent.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Raymond A. Walters
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2419

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 24, 1994

Hon. Salvatore B. Indelicato
Councilman
[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 information presented in your correspondence, unless otherwise indicated.</u>

Dear Councilman Indelicato:

I have received your letter of September 26 in which you referred to an opinion that I prepared in August.

A portion of the opinion was based upon the fact that Cochecton Town Highway Department employees were not members of a union, and that, therefore, a discussion of their salaries, as a group, would not fall within the coverage of §105(1)(e) of the Open Meetings Law. That provision authorizes a public body to enter into executive session to consider "collective negotiations pursuant to article fourteen of the civil service law." As you are aware, Article 14 is commonly known as the "Taylor Law" and deals with the relationship between public employers and public employee unions, which are characterized in §201(5) of the Civil Service Law as "employee organizations."

In this regard, you wrote that in addition to an elected highway superintendent, the Town employs five heavy machine equipment operators, and that "[t]hese five men, collectively united, sought and received the services of an attorney to represent them before the town board to negotiate their labor contract." You added that "[t]o your knowledge, this attorney has no other business association with the highway department."

Since the phrase "employee organization" in defined to mean "an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees", you asked whether "we [should] assume section 105(1)(e) of the Public Officer's [sic] Law is applicable."

Because I am not an expert regarding the Taylor Law, I contacted the Public Employment Relations Board (PERB) in an effort to obtain guidance. I was informed by an attorney for the Board that in order to be considered an employee organization for purposes of the Taylor Law, certain criteria must be met. The organization must be certified by PERB or recognized by an employer in order to engage in collective bargaining negotiations. I was also informed that to be an employee organization, an entity must function as a collective bargaining unit in an ongoing manner with respect to all issues involving the terms and conditions of employment.

In the context of the situation in Cochecton, it was advised by PERB that if the attorney represented the five employees only for purposes of negotiating their contract, and if there is no ongoing relationship between the employees, as a negotiating unit, and the Town, the group of five is not an employee organization for purposes of the Taylor Law.

Based on the information made available to me, it appears that the group is not an employee organization. If that is so, §105(1)(e) of the Open Meetings Law would not have served as a basis for conducting an executive session.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2430

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

October 26, 1994

Ms. Rose M. Floramo
[redacted]

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

Dear Mr. Floramo:

I have received your letter of October 1. As a member of the Dunkirk Board of Education, you have sought "an opinion as to which way a meeting should be called off after public notice was given..."

In this regard, there is nothing in the Open Meetings Law or any statute of which I am aware that specifies the method of cancelling or postponing a meeting. From my perspective, the most appropriate method of so doing would be the method that is most sensible given the circumstances.

When notice of a meeting has been posted in one or more locations as required by §104 of the Open Meetings Law, it would be appropriate in my view to post notice of cancellation at the same locations. When notice of an upcoming meeting is given to members of the news media, they should also be informed of its cancellation. In some instances, it may be appropriate to contact additional news media. For instance, even though notice might have been given prior to a meeting to a newspaper, a radio station may be able to inform the public more quickly that a meeting has been cancelled.

In short, again, I believe that notification of the cancellation of a meeting should be accomplished by taking steps that are most sensible in view of attendant facts and circumstances.

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

OML-AO 2421

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 2, 1994

Ms. Valerie Pfundstein
[redacted]

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

Dear Ms. Pfundstein:

I have received your letter of October 4 in which you sought advice concerning the implementation of the Open Meetings Law by the Board of Education of the Deer Park Union Free School District.

According to your letter:

> "Before virtually every meeting, the Board meets privately in what they refer to as an 'Executive Session'. These meetings are never motioned for in open meetings and if anyone questions the purpose of these meetings, they are told simply 'personnel matters'.
>
> "In addition, it seems that they discuss the upcoming agenda and reveal to each other how they plan to vote in the public meeting."

In this regard, I offer the following comments.

First, 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, when 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, 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. 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) specify and limit the subjects that may appropriately be considered in executive session.

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].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of

the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. Similarly, a reference to an executive session to be held, "if needed", would not guarantee that such a session will be held, but rather that it might be held. From my perspective, that kind of reference would be appropriate.

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, §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 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 §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 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 §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.

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 §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].

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.

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 2422

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 16, 1994

Mr. Scott Schaffrick, President
New Paltz Police Benevolent Association
23 Plattekill Avenue
New Paltz, NY 12561

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

Dear Mr. Schaffrick:

I have received your letter of October 15, which reached this office on October 24.

According to your letter, at a meeting of the Town of New Paltz Civilian Police Commission, a member of the public in attendance asked to confer in an executive session with the Commission. When you asked if you could attend the private discussion, you were informed, in your words, "that the Commission could speak with anyone it wanted and that if anything discussed required any action [to] be taken that it would be addressed in the open session of the next meeting."

You have questioned the propriety of the executive session and asked whether "minutes of this so called private discussion" should be made available. You also wrote that the Commission has not yet received a "mission statement" from the Town Board and asked whether, without such a statement, the Commission may conduct an 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 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..."

Based on your commentary, the requirements imposed by the provision quoted above were not met. 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) specify and limit the subjects that may properly be considered in executive session. Because the Commission did not indicate the subject matter of its discussion, the public had no way of knowing whether the issue could properly have been considered in private.

Second, with respect to minutes, §106 of the Open Meetings Law states that:

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

Based on the foregoing, if a public body discusses an issue during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared. If action is taken, minutes indicating the nature of the action taken and the vote of each member must be prepared and made available to the extent required by the Freedom of Information Law.

Lastly, from my perspective, the presence or absence of a "mission statement" is not determinative of a public body's capacity to conduct an executive session. As indicated previously, the subject matter of the discussion is the factor used to determine whether an executive session may validly be held.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Civilian Police Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8541
OML-AO 2423

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 17, 1994

Ms. Sharon R. Herb
[redacted]

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

Dear Ms. Herb:

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

You referred to presentations made in April and May at meetings of the Arlington Central School District Board of Education in which you asked that public records distributed to Board members prior to meetings be posted on a bulletin board for public review in advance of meetings. Having inquired as to the status of your request, you were informed at an August meeting that "they would review the issue at their Board Development Committee Workshop in which the whole Board would present." In a letter of October 11 addressed to you by the president of the Board, you were informed that the Board "reviewed your request" and "elected to maintain its current policy and make such information available to the public at the Central Office the following business day."

In conjunction with the foregoing, you wrote as follows:

> "I made my request in an open meeting shouldn't they have discussed this issue in public not in a closed session? Also the letter implies they voted on the issue, 'elected to maintain its current policy' which I though was not allowed in closed sessions. My research shows there has been no minutes to this meeting and the district clerk or her representative was not at this workshop. My second question stems from the fact the letter refers to a current policy but I'm unable to find this policy. And over the last few years I have been unable to obtain this type of information on the next business day without

> filing a freedom request and waiting the usual 7-10 days. If they did alter a policy, wouldn't this needed to have been done in a public session with two readings of the new policy?."

In this regard, it is noted by way of background 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. In a related vein, if an issue involves or requires action taken by a board of education, such action may be taken in my view, only at a meeting of the board.

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 my opinion, if the Board discussed your proposal and/or its policy on the matter, any such discussions should have occurred during an open meeting. In short, none of the grounds for entry into executive session would have been applicable in my opinion.

With respect to minutes, 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."

Based on the foregoing, if indeed the Board made a decision, I believe that the decision must be memorialized in minutes.

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.

With regard to access to and requests for records, I believe that records reflective of an agency's policy would clearly be available, for §87(2)(g)(iii) of the Freedom of Information Law requires that intra-agency materials consisting of "final agency policy or determinations" must be disclosed.

Lastly, §89(3) of the Freedom of Information Law authorizes an agency to require that request be made in writing and provides that an agency must respond in some manner within five business days of

the receipt of a request. However, an agency may, by means of policy or rule, accept oral requests and produce records in less than five business days. If it is the Board's policy to disclose certain records at a particular location on the next business day after a meeting, I believe that it should abide by its own policy.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Vincent Bellino, President
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2424

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 17, 1994

Mr. Paul G. Wheeler
Concerned Residents of New Lebanon
PO Box 681
New Lebanon, NY 12125

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

Dear Mr. Wheeler:

I have received your letter of October 18. In your capacity as president of the Concerned Residents of New Lebanon (C.R.O.N.L.), you requested an advisory opinion concerning the Open Meetings Law.

You referred to a meeting of the New Lebanon Town Board during which the Board sought to enter into an executive session to interview candidates who expressed interest in or who had been asked to serve on the Zoning Board of Appeals. You objected based on several contentions, particularly that the issue did not involve a "personnel matter".

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 an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

Second, although it is used frequently, the term "personnel" does not appear in the Open Meetings Law. Some so-called personnel matters may validly be discussed in private; others may not. Further, the language of the provision cited to discuss personnel matters does not necessarily deal with those matters. Specifically, §105(1)(f) of the Open Meetings Law permit a public body to enter into an executive session to discuss:

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

While I agree that the issue in question did not constitute a personnel matter, I believe that it would have involved a matter leading to the appointment of a particular person. Therefore, even though some of your contentions may have merit, I believe the Board could validly have conducted an executive session pursuant to §105(1)(f) of the Open Meetings Law.

Lastly, even though a public body may conduct an executive session to discuss a certain matter, as in this instance, it is not obliged to do so. In other words, the Board could have chosen to conduct the interviews in public, despite its authority to do so in an executive session.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8543
OML-AO 2425

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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November 17, 1994

Mr. Stewart S. Lilker
[redacted]

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

Dear Mr. Lilker:

I have received your letter of October 19 and related materials. You have sought an advisory opinion concerning your right to obtain copies of minutes of meetings of the Freeport School District Board of Education prior to their "acceptance" by the Board.

In this regard, I offer the following comments.

First, when records are accessible under the Freedom of Information Law, they must be made available for inspection and copying. Further, §89(3) of that statute requires that an agency prepare copies of accessible records on request upon payment of the appropriate fee.

Second, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

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

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 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.

Lastly, viewing 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 §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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Bonen, Superintendent
Donna Cantwell, District Clerk
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2426

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

November 23, 1994

Mr. Richard P. Beruk
Superintendent of Schools
Liberty Central School District
115 Buckley Street
Liberty, NY 12754

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

Dear Mr. Beruk:

I have received your letter of October 20. Based upon a conversation between myself and John M. Donoghue, the District's attorney, you wrote that I advised him "that if the Liberty Central School District were to amend its agendas for days on which executive sessions are anticipated, to note 'Executive Session - If Necessary', this notation would satisfy the requirements of the law..." You have asked that I confirm your understanding of the matter.

In this regard, I offer the following comments.

First, as you may be aware, 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.

Second, 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].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Similarly, your reference to an executive session to be held, "if necessary", would not guarantee that such a session will be held, but rather that it might be held. From my perspective, that kind of reference would be fully appropriate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2427

162 Washington Avenue, Albany, New York 12231
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November 29, 1994

Ms. Mary Briggs
[redacted]

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

Dear Ms. Briggs:

As you are aware, I have received a letter prepared by your husband on October 24 in which he raised issues concerning the Open Meetings Law and asked that I respond to you.

The focus of his commentary involves "the legality of the Canajoharie Village ZBA entering an executive session to decide the legality of a private property owner renting out part of his residence to a private dance school." In addition, although the owner of the property asked that he be notified of the date of the meeting during which the matter would be discussed, you wrote that the owner was informed that he "would not be invited to the session deciding his fate because it would be an executive session."

In this regard, I offer the following comments.

First, 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.

Based on the language of the Law and its judicial interpretation, 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].

Therefore, choosing not to provide notice as required by the Open Meetings Law due to the possibility that an executive session may be held would, in my opinion, be inappropriate.

Second, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered in an executive session. From my perspective, none of the grounds for entry into an executive session could validly have been cited to discuss the matter described. Although it appears that the Board relied upon §105(1)(h), in my view, that provision could not justifiably have been asserted. Section 105(1)(h) permits a public body to enter into executive session to discuss:

> "the proposed acquisition, sale or lease of real property or the proposed acquisition of

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

In my opinion, the capacity of a public body to discuss a real property transaction under the language quoted above involves only those circumstances in which a governmental entity may be involved in the acquisition, sale or lease of the property. In this instance, the Village was not a party to such a transaction. Moreover, even when an issue clearly involves the proposed acquisition, sale or lease of real property by a governmental entity, §105(1)(h) may properly be asserted "only when publicity would substantially affect the value" of the property. As I understand the situation, the issue of the use of the property in question has been widely publicized and well known by the public. If that is so, I cannot envision how public discussion of the matter would have affected the value of the property. In short, for both of the reasons expressed in this paragraph, I do not believe that §105(1)(h) of the Open Meetings Law would have served as a proper basis for conducting an executive session.

Lastly, while the Open Meetings Law does not require that notice of a meeting be given to particular individuals, §104 of the Law requires that notice of the time and place of every meeting be given to the news media and to the public by means of posting "in one or more designated public locations."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Village of Canajoharie Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2428

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 2, 1994

Ms. Rose Mary Christian
Sixth Ward Councilwoman
[redacted]

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

Dear Ms. Christian:

As you are aware, I have received your letter of October 27 and the materials attached to it.

You referred to executive sessions held on October 11 by the Batavia City Council, and it is your view that the Council was "called into executive session under false pretenses." Although you enclosed minutes of the meeting, as you suggested, the pages are not numbered. Consequently, in an effort to learn more of the matter and to focus on relevant portions of the minutes, I contacted Rebecca Chatt Swanson, City Clerk. Based on my conversation with her, although executive sessions were called for several reasons, it is my understanding that the executive session that is the focus of your inquiry involved litigation relating to a contested assessment. You have sought my views concerning your "rights and responsibities in the matter." Further, you highlighted a summary of an opinion that I prepared involving the ability to disclose information acquired during an executive session.

In this regard, I offer the following comments.

First, the Open Meetings Law provides two vehicles under which the public, in appropriate circumstances, may be excluded from meetings of public bodies. One is an executive session, a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §102(3)]. Members of a public body have the right to attend executive session of the body [see §105(2)].

Relevant to the issue that you raised is §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.

The other 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 relevance to the situation that you described 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)].

Therefore, insofar as the City Council sought legal advice from its attorney and the attorney offered legal advice, the communications between the Council and the attorney would, in my opinion, have been confidential and outside the coverage of the Open Meetings Law.

Second, 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). In my opinion, although information may be obtained during an executive session properly held, a claim of confidentiality can only be based upon a statute that specifically confers or requires confidentiality.

Unless a statute prohibits disclosure, I know of no law that would preclude a member of a public body from disclosing information acquired during an executive session. Similarly, I know of no judicial decisions involving the Open Meetings Law and disclosure by a member of public body of information that would be subject to the attorney-client privilege. When the privilege is operable in that context, it exists between the client, the public body, and its attorney. Although the client may waive the privilege, it is unclear whether a waiver can only be accomplished when a majority of the members of the body choose to do so, or whether a single member, acting independently, has the authority to

waive the privilege and disclose what otherwise would be confidential.

When a member of a public body has sued that body and is its legal adversary, I believe he or she could validly be excluded from a gathering between the other members and their attorney in which the attorney-client privilege is properly invoked. The member-adversary in that instance would not be the client, and that person's exclusion would, in my view, be consistent with the thrust of case law concerning the intent of §105(1)(d), the litigation exception for litigation. In that situation, the gathering would be exempted from the Open Meetings Law insofar as the attorney-client privilege applies. However, if a member of a public body is not an adversary party in litigation (but perhaps a dissenter or person with a minority view), that person would have the right under §105(2) of the Open Meetings Law to attend an executive session.

Lastly, while there may be no prohibition against disclosure of information acquired during executive sessions 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. Inappropriate disclosures could work against the interests of a public body as a whole and the public generally. The unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created in order to reach collective determinations, determinations that better reflect various interests 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 of the majority of a public body should in my opinion generally 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 the revelation of litigation strategy, in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: City Council
Rebecca Chatt Swanson, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8558A
OML-AO 2429

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 9, 1994

Mr. Richard Reade
[redacted]

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

Dear Mr. Reade:

I have received your letter of October 15 and the materials attached to it. Please note that your correspondence did not reach this office until October 26, and I apologize for the delay in response.

You have complained with respect to various activities of the Village of Old Field. In brief, Village officials have failed to answer your questions, and the Board of Trustees has limited the time during which members of the public may speak at meetings. In this regard, I offer the following comments.

First, for purposes of clarification, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information 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, for example, the Village does not maintain records containing the information sought, I do not believe that staff would be required by the Freedom of Information Law to prepare new records your on behalf. In the future, rather than seeking to elicit information by raising questions, it is suggested that you request existing records.

Second, 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 the foregoing serves to clarify your understanding of the Freedom of Information and Open Meetings Laws.

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 2430

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 12, 1994

Hon. Paul Feiner
Town Supervisor
Town of Greenburgh
P.O. Box 205
Elmsford, NY 10523

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

Dear Supervisor Feiner:

I have received your letter dated October 7. For reasons unknown, it did not reach this office until October 31. Please accept my apologies for the delay in response.

You wrote that the Greenburgh Town Board "recently established a new concept called Interactive Town Board Meetings", and that "[r]esidents of the Town are encouraged to call in while watching the Town Board live. They can speak at public hearings and express their views on Town issues before a Town Board vote." In a related vein, you asked whether absent members of the Town's public bodies can use the same system and "vote by phone if they are unable to attend a meeting because of health reasons or other emergencies."

In this regard, it is noted at the outset 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 members or calls among the members which results in a decision or a meeting held by means of a telephone conference, would in my view be inconsistent with law.

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 reasonable notice to all of the members. As such, a public body has the capacity to carry out its duties only during duly convened meetings that are preceded by reasonable notice given to all members.

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 the Committee's opinion, the term "convening" means a physical coming together. 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", the Committee believes that a "convening" of a quorum requires the assembly of a group in order to constitute a quorum of a public body.

I also direct your attention to the legislative declaration of the Open Meetings Law, §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."

When a member or members of a public body participate in a meeting by telephone, those in attendance have no ability to "observe" that person or persons. The right to "observe the performance of public officials" is a basic principle of the Open Meetings Law. Moreover, participation by means of a conference call could enable members of public bodies to avoid the people they serve or represent. In addition, as suggested by the Committee's elected local government member, if an individual can participate by phone, neither other members nor the public can know who "may be whispering in the member's ear."

While I am not in any way suggesting that the proposal indicates an intent to evade the requirements of the Open Meetings Law, for the reasons specified in the preceding comments, the Committee believes that meetings held by conference call would be inconsistent with both the letter and the spirit of that statute.

Further, if a meeting is held by conference call and a quorum is not physically present, it is possible that action taken could, if reviewed by a court, be deemed null and void.

I hope that I 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 2431

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 12, 1994

Ms. Katherine L. Better
[redacted]

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

Dear Ms. Better:

I have received your letter of October 27 and appreciate your continuing interest in compliance with the Open Meetings Law. Please accept my apologies for the delay in response.

In your capacity as President of the Ichabod Crane School District Board of Education, you sought an opinion concerning an issue that continually arises in your District. As president, you wrote that you "have appointed standing committees composed of three or more Board members that address an entire area of work, i.e., Facilities Planning or Contract Negotiations." You added that the meetings of the Board and the standing committees "are convened and held in public." You wrote, however, that you recently "asked two board members to review several recommended financial policies and bring back their suggestions to the full Board." You "stated clearly that the two members had no authority", and that they were asked to study an issue in order to "facilitate the process more quickly." The Superintendent and a Board member questioned whether the members that you chose to carry out the task must do so in accordance with the Open Meetings Law.

In my opinion, while the Board and its standing committees constitute public bodies required to comply with the Open Meetings Law, I do not believe that the two members asked to carry out a certain duty, as you described the situation, would be subject to that statute. In this regard, I offer the following comments.

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

enacted. Perhaps the leading case on the subject 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 and subcommittees. 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" has since been 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 school board consisting of two or three of its members, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see 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, §41). As such, in the case of a committee consisting of three, for example, a quorum would be two.

Further, 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 [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

From my perspective, there is a distinction between the standing committees and the situation that precipitated your question. A standing committee is an "entity" that carries out a duty in a particular area, collectively, as a body. The situation that you described in my view does not involve an "entity" or the designation of members to carry out a continuing duty, as in the case of a standing committee. The two members were apparently not designated as a committee nor would they function in the manner of a committee. If my understanding of the facts is accurate, your designation of those persons in the manner described did not involve the creation of 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

OML-AO 2432

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 12, 1994

Ms. Debra Foreman
Secretary
Concerned Citizens of Eagle, Inc.
P.O. Box 6
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 information presented in your correspondence. unless otherwise indicated.

Dear Ms. Foreman:

I have received your letter of October 26 concerning an executive session held by the Eagle Town Board relative to attempts by three firms to site a landfill in the Town. It is your fear that the executive sessions may often be inappropriately held, and you sought assistance from a state agency "that may audit the Town Board with some type of checks and balances system, to make them accountable to the public and to assure that all is on the 'up and up'."

In this regard, I know of no state agency that has the authority to oversee or otherwise control the activities of a municipality. The Office of the State Comptroller is empowered to conduct audits of municipalities, and it might be worthwhile to contact that agency.

With respect to the Open Meetings Law, as you are likely aware, 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 properly be considered in executive session are specified in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. Because those subjects are limited, a public body cannot conduct an executive session to discuss the subject of its choice.

Based upon communications with you and others, it appears that the only ground for entry into executive session in relation to the landfill issue that could possibly have been cited would be §105(1)(f). The language of that provision is, in my view, quite

precise, for it 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..."

Based on the foregoing, not every issue relating to a particular person or corporation may be discussed in private. As I understand the matter in the context of your inquiry, executive sessions could be held only to discuss the financial or credit histories of the firms involved.

I point out, too, that although certain negotiations may be conducted or discussed in executive session, not all negotiations fall within the grounds for entry into executive session. The only provision that pertains specifically to negotiations, §105(1)(e), deals with collective bargaining negotiations between a public employer and a public employee union. That provision clearly would be inapplicable to the situation at issue.

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

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8569
OML-AO 2433

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 12, 1994

Mr. David Porter
[redacted]

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

Dear Mr. Porter:

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

According to your letter, you requested from the Town of New Paltz Planning Board copies of "all DEIS material submitted by a private developer...as part of the SEQR process for its proposed shopping mall..." Although the Town Clerk is the Town's designated records access officer, the Chairman of the Planning Board responded and indicated that he "will not permit the release of such material until the Board officially decides that it is 'complete' for review and comments by the public as part of the SEQR process." Since that process could take several months, you submitted a request to the Town Clerk. She informed you subsequently that the Chairman of the Planning Board refused to turn the material over to her in order that she could appropriately respond to your request. Similarly, you wrote that requests for minutes of Planning Board meetings, some of which were held months ago, have been denied until the minutes are approved. You also questioned your right to obtain copies of tape recordings of the meetings in question.

In this regard, I offer the following comments.

First, the records submitted by the developer, although in the physical custody of the Chairman of the Planning Board, are not in his legal custody. The Town Clerk, pursuant to §30 of the Town Law, is the legal custodian of all Town records. Therefore, even though she does not have physical possession of the records sought, I believe that she has legal custody of the records.

Second, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to

promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing board of a public corporation, the Town of New Paltz, is the Town Board, and I believe that the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law. The attachments to your letter indicate that the Board has done so.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation, and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.

> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
>
> (4) Upon request for copies of records:
>
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records.
>
> (5) Upon request, certify that a record is a true copy.
> (6) Upon failure to locate the records, certify that:
>
> (i) the agency is not the custodian for such records; or
> (ii) the records of which the agency is a custodian cannot be found after diligent search."

Since the Town Clerk is the Town's designated records access officer, she has the duty of coordinating the Town's response to requests for records. Therefore, at her direction, I believe that the Chairman of the Planning Board must either turn the records over to the Clerk or disclose the records to the extent ordered by the Clerk.

Third, the Freedom of Information Law pertains to all agency records, and §86(4) of the Law defines the term "record" expansively to mean:

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

Since the Chairman acquired the materials in question in his capacity as a Town official, I believe that the materials clearly constitute "records" subject to rights conferred by the Freedom of Information Law.

With respect to rights of access, the Freedom of Information Law 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. From my perspective, the records submitted by the developer must be made available, for none of the grounds for denial would appear to be applicable.

It is noted, too, that it has been held that tape recordings of meetings of public bodies constitute "records" that fall within the coverage of the Freedom of Information Law, and, assuming that the tapes involve open meetings, they must be disclosed (see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau County, NYLJ, Dec. 27, 1978).

Lastly, the Open Meetings Law provides guidance concerning minutes, their contents and the time within which they must 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.

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 are 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

cc: Town Board
Mae DeMaria, Town Clerk
Leon Dener, Planning Board Chairman

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2434

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 12, 1994

Mr. Peter W. Sluys
Managing Editor
Community Media Inc.
25 W. Central Avenue, Box 93
Pearl River, NY 10965

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

Dear Mr. Sluys:

I have received your letter of October 26 concerning meetings involving members of the Orangetown Town Board.

According to your letter:

> "Twice in September, Supervisor Jack Cassidy - a Republican - met with three members of the Orangetown Town Board, all Republicans, together with staff of the Town of Orangetown, including the finance director [a Democrat], the town attorney [a Republican] and other staffers.
>
> "The purpose of these meetings was to discuss the preparation of the town budget of the town of Orangetown.
>
> "The fifth Town Board member, Dr. Edward Fisher, was excluded on the grounds that he was a Democrat, though allegedly he was 'filled in' at what transpired at these meetings thereafter."

On October 18, you wrote to the Supervisor and contended that the Board had violated the Open Meetings Law. In a letter prepared by the Town Attorney, the Supervisor indicated, in brief, that the gatherings in question constituted political caucuses exempt from the Open Meetings Law.

You have sought my opinion on the matter.

In this regard, since the Open Meetings Law became effective in 1977, it has contained an exemption concerning political committees, conferences and caucuses. Again, when a matter is exempted from the Open Meetings Law, the provisions of that statute do not apply. Questions concerning the scope of the so-called "political caucus" exemption have continually arisen, and until 1985, judicial decisions indicated that the exemption pertained only to discussions of political party business. Concurrently, in those decisions, it was held that when a majority of a legislative body met to discuss public business, such a gathering constituted a meeting subject to the Open Meetings Law, even if those in attendance represented a single political party [see e.g., Sciolino v. Ryan, 81 AD 2d 475 (1981)].

Those decisions, however, were essentially reversed by the enactment of an amendment to the Open Meetings Law in 1985. Section 108(2)(a) of the Law now states that exempted from its provisions are: "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or the legislative body of a county, city, town or village, who are members or adherents 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..."

Therefore, in general, either the majority or minority party members of a legislative body may conduct closed political caucuses, either during or separate from meetings of the public body.

Many local legislative bodies, recognizing the potential effects of the 1985 amendment, have taken action to reject their authority to hold closed caucuses and to continue to conduct their business open to the public as they had prior to the amendment. Additionally, there have been recent developments in case law regarding political caucuses that suggest that the exemption concerning political caucuses has in some instances been asserted as a means of excluding the public from gatherings that have little or no relationship to political party activities or partisan political issues.

One of the decisions, Humphrey v. Posluszny [175 AD 2d 587 (1991)], involved a private meeting held by members of a village

board of trustees with representatives of the village police benevolent association. Although the board characterized the gathering as a political caucus outside the scope of the Open Meetings Law, the Appellate Division, Fourth Department, held to the contrary. In a brief discussion of the caucus exemption and its intent, the decision states that:

> "The Legislature found that the public interest was promoted by 'private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies' (Legislative Intent of L.1985,ch.136,§1). Nonetheless, what occurred at the meeting at issue went beyond a candid discussion, permissible at an exempt caucus, and amounted to the conduct of public business, in violation of Public Officers Law §103(a) (see, Public Officers Law §100. Accordingly, we declare that the aforesaid meeting was held in violation of the Open Meetings Law" (id., 588).

The Court did not expand upon when or how a line might be drawn between a "candid discussion" among political party members and "the conduct of public business." Although the decision was appealed, the appeal was withdrawn, because the membership on the board changed.

The second decision, Buffalo News v. City of Buffalo Common Council [585 NYS 2d 275 (1992)], involved a political caucus held by a public body consisting solely of members of one political party. As in Humphrey, the court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, and found that:

> "In a divided legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it would be fair to assume the meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless. Therefore, the meeting of February 8, 1992 was in violation of Article 7 of the Open Meetings Law...

> "When dealing with a Legislature comprised of only one political party, it must be left to the sound discretion of honorable legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of Public Officers Law Article 7" (id., 278).

I hope that the foregoing serves to clarify your understanding of the Open Meetings Law, and that I have been of assistance. A copy of this response will be forwarded to the Town Supervisor.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Hon. Jack Cassidy, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8570
OML-AO 2435

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 12, 1994

Hon. Mario DeSantis
Mayor
Village of Solvay
[redacted]

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

Dear Mayor DeSantis:

I have received your communication of October 31. In conjunction with the materials, you sought opinions concerning the Open Meetings Law and the disclosure of personnel records.

The materials indicate that members of the Board of Trustees discuss public business and apparently take action without convening meetings in accordance with the Open Meetings Law. By means of example, you referred to an agreement reached by four trustees, during a Memorial Day parade, to place a certain person on the Village payroll.

In this regard, while no law would preclude one member of the Board from conferring with another, 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 §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 village board of trustees 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 §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 village 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.

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 syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of a board of trustees, 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.

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 public business, in their capacities

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

The second issue involves the authority of a payroll clerk to disclose personnel records without having received a request in writing or following established procedures.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing board of a public corporation, the Village of Solvay, is the Board of Trustees, and I believe that the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

"The records access Officer is responsible for assuring that agency personnel:

(1) Maintain an up-to-date subject matter list.
(2) Assist the requester in identifying requested records, if necessary.
(3) Upon locating the records, take one of the following actions:

(i) make records promptly available for inspection; or
(ii) deny access to the records in whole or in part and explain in writing the reasons therefor.

(4) Upon request for copies of records:

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

(5) Upon request, certify that a record is a true copy.
(6) Upon failure to locate the records, certify that:

(i) the agency is not the custodian for such records; or
(ii) the records of which the agency is a custodian cannot be found after diligent search."

Based on the foregoing, the records access officer has the duty of coordinating an agency's response to requests for records. Unless the person who made the disclosure had been authorized to do so, I believe that the request should have been forwarded to the Village's designated records access officer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2436

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 12, 1994

[redacted]
P.O. Box 248
Dobbs Ferry, NY 10522

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

Dear [redacted]:

I have received your letter of November 3 in which you requested an advisory opinion concerning the Open Meetings Law.

Attached to your letter is correspondence addressed to you by the Superintendent of the Greenburgh Eleven Union Free School District. She advised that "staff members, including yourself, who are prohibited from being on the campus due to disciplinary reasons may not attend meetings which are held on the campus" (emphasis supplied by the Superintendent). Although the Superintendent offered to make tape recordings of the meetings available for the "usual $5.00 reproduction fee", she effectively precluded you and certain others from attending meetings of the Board of Education. You added by way of background that "the teachers and staff members being denied access were not dismissed or brought up on dismissal charges for any disruptive behavior or for any unlawful conduct at prior Board of Education meetings."

In my opinion, since the Open Meetings Law confers the right to attend meetings of public bodies upon the "general public", any person would have the right to attend meetings of the Board. The Open Meetings Law does not distinguish between residents and non-residents, employees or others; it simply states in §103 that "Every meeting of a public body shall be open to the general public." From my perspective, when disciplinary action is imposed against an employee, it is imposed upon that person as an employee, not as a member of the general public. While the Superintendent may have the authority to take certain action against you in your capacity as an employee, I do not believe that she has the authority to prohibit any member of the public, including yourself, from attending an open meeting of a public body.

By means of analogy, in a case brought under the Freedom of Information Law, the companion statute of the Open Meetings Law, an agency sought to preclude the use of that law by a person who had initiated litigation against the agency. In rejecting that contention, the Court of Appeals, the State's highest court, held that: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation does not affect either the rights of the public or a litigant under the Freedom of Information Law. In the context of your inquiry, the imposition of disciplinary action against you as an employee is in my view irrelevant to your right as a member of the public to attend meetings that are open to the "general public."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sandra G. Mallah, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2437

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 13, 1994

Mrs. Laura H. Epstein
[redacted]

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

Dear Mrs. Epstein:

I have received your letter of November 2 and the materials attached to it. You have raised a series of issues relating to the activities of the Islip Union Free School District.

One of the issues involves notice of meetings of the Board of Education. In this regard, §104 of the Open Meetings Law requires that notice be given prior to every meeting to the news media and to the public by means of posting. Specifically, 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 posting.
>
> 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 in advance, 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 lcoal news media and by posting notice in one or more designated locations.

As you are aware, a public body, such as a board of education, may conduct closed or "executive sessions" to discuss certain topics. Of particular relevance to the matters raised in your correspondence is §105(1)(f) of the Open Meetings Law (see attached), which permits a public body to enter into an executive session to discuss:

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

Therefore, if a discussion involves, for example, matters leading to the discipline of a particular teacher or student, I believe that an executive session may be held. Pursuant to §105(2), the school board may authorize the parents of a student to join the Board in an executive session.

I point out that §108 of the Open Meetings Law describes "exemptions". If a matter falls within the scope of an exemption, the Open Meetings Law does not apply. Section 108(3) exempts from the Open Meetings Law "any matter made confidential by federal or state law." If, for instance, the Board is reviewing a student's records that are confidential under Family Educational Rights and Privacy Act (20 U.S.C. 1232g), the discussion may be exempt from the Open Meetings Law, for it deals with a matter made confidential by federal law. If, for instance, the sole purpose of a meeting is to discuss an issue pertaining to a student, due to confidentiality requirements imposed by federal law, the Open Meetings Law, in my view, would be inapplicable.

Lastly, several items that you enclosed relate to the position of "Dean of Students". As I understand the matter, it does not involve the Freedom of Information or the Open Meetings Laws; rather it appears to pertain to the propriety of the creation or characterization of such a position under other laws. Consequently, that issue appears to be beyond the scope of the jurisdiction or expertise of this office.

If I have misinterpreted the materials that you forwarded, please provide clarification.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Mel Rubenstein, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2438

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 15, 1994

Mr. Daniel R. Sanders
[redacted]

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

Dear Mr. Sanders:

As you are aware, I have received your letter of November 10.

According to your letter, the Sterling Town Board met in October with the Chairman of the Cayuga County Legislature, other legislators and the County Treasurer "to finalize an inter-municipal agreement covering a recently purchased piece of property." You added that the "public was not a party to those discussions even though the Board know of the meeting a couple of days in advance", and that each of the participants "is claiming ignorance of the law covering Open Meetings." The Town Board has apparently contended that it "did nothing wrong" because the Board "did not call the meeting." You also indicated by phone that the location of the property purchased by the County had long been known by the public.

You have questioned whether there was a "violation of the Open Meetings Law", whether an agreement can be vacated, and what procedure can be followed, particularly when one has a modest income.

In this regard, I offer the following comments.

First, 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 public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

It is also noted 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 a person who is not a member of the Town Board, I believe that it was a meeting, for 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.

Third, 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.

Since the matter involved a real property transaction, I emphasize that the exception concerning issues pertaining to such transactions is limited. Specifically, §105(1)(h) permits a public body to enter into an executive session to discuss:

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

Therefore, a public body may discuss the proposed sale 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 were well known to the public. If that was so, 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.

Lastly, 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.

It is also noted that §107(2) of the Open Meetings Law provides that:

> "In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party."

As such, the authority to award attorney's fees is discretionary rather than mandatory.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sterling Town Board
Chairman, Cayuga County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8579
OML-AO 2439

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 22, 1994

Ms. Betty A. Loriz
[redacted]

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

Dear Ms. Loriz:

I have received your letter of November 4.

According to your letter, minutes of meetings of the Liberty Central School District Board of Education "can only be obtained by submitting a F.O.I.L. request." You wrote, however, that it has been your belief that "board minutes should always be available to residents." Additionally, you indicated that the public is "being charged twenty-five cents per page for board minutes."

In this regard, I offer the following comments.

First, 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, for §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.

Second, §89(3) of the Freedom of Information Law authorizes an agency to require that a request for records be made in writing. Consequently, a school district could in my view require members of the public to seek minutes in writing in a request made under the Freedom of Information Law. There is nothing in that statute, however, that would preclude an agency from accepting an oral request. Particularly in the case of minutes of meetings, which are usually easy to locate and are clearly accessible to the public, agencies frequently accept oral and informal requests.

Lastly, while records available under the Freedom of Information Law may be inspected at no charge, §87(1)(b)(iii) of the Freedom of Information Law authorizes agencies to charge up to twenty-five cents per photocopy for records, including minutes.

I hope that the foregoing serves to enhance your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8582
OML-AO 5439A

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
FAX (518) 474-1927

December 27, 1994

Mr. Kenneth Hoch
[redacted]

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

Dear Mr. Hoch:

I have received your letter of November 11 and the materials attached to it.

You wrote that the Lakeland Central School District Board of Education "has negotiated a tuitioning contract for high school students from neighboring Putnam Valley" but "refused to divulge the cost of this contract to Lakeland residents" because disclosure "would compromise our negotiations for the future." You have questioned the District's ability to withhold that information. In addition, you wrote that the Board "conducted all discussion of this contract in executive session."

You have sought my views on the matter. 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.

The only ground for denial of relevance concerning access to the contract is §87(2)(c), which permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." As I understand the matter, an agreement was reached and a contract was signed. If that is so, neither §87(2)(c) nor any other ground for denial could justifiably be asserted. In short, the contract represents the culmination of negotiations and does not, at this juncture, relate to "present or imminent contract awards." Consequently, I believe that the contract would be available from either of the districts subject to the agreement.

It is also noted that the state's highest court has on many occasions construed the Freedom of Information Law broadly. In one such decision, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" [Capital Newspapers v. Burns, 67 NY 2d 562, 565-566 (1986]).

Based on the foregoing, it is clear in my view that the contract in question must be disclosed under the Freedom of Information Law.

With respect to the meetings during which the contract was discussed, the Open Meetings Law, like the Freedom of Information Law, is based on a presumption of openness. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify the subjects that may appropriately be considered during execution sessions. 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.

None of the grounds for entry into executive session deal in general with 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, and it does not appear that any of the other grounds for entry into executive session would have been relevant to the matter at issue.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8583
OML-AO 2440

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 28, 1994

Hon. Guy Thomas Cosentino
City of Auburn
Memorial City Hall
24 South Street
Auburn, NY 13021-3892

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

Dear Mayor Cosentino:

I have received your letter of December 2 and appreciate your kind words. Please accept my apologies for the delay in response.

The first issue that you raised involves "an anonymous donation that the City received to clean up a property that was ravaged by fire." Since the donor does not wish to be identified, you have asked whether you can "keep the donor's identity confidential."

In my opinion, you may do so. Although the Freedom of Information Law provides broad rights of access, §87(2)(b) enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2) provides a series of examples of unwarranted invasions of privacy, two of which in my opinion may be cited to justify the withholding of identifying details pertaining to the donor. Section 89(2)(b) states in part that unwarranted invasion of personal privacy includes but shall not be limited to:

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

In conjunction with subparagraph v. in particular, the anonymous character of the donation represents information of a personal nature; the donation was apparently made in confidence; and the identity of the donor has no impact on and is irrelevant to the City's duties.

The second issue involves "an annual small social gathering [you] host at [your] house between City Council members and the County Legislators who represent City districts." You have asked whether that gathering must be open to the public.

From my perspective, if the sole intent of the gathering is to socialize, the Open Meetings Law would not apply. 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 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 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 social gatherings or 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. If less than a quorum is present, the Open Meetings Law would not, in my opinion, be applicable.

In short, if the gathering that you described is held to socialize and celebrate the season, and with no intent to discuss or conduct public business, I do not believe that the Open Meetings Law 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
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2441

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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December 29, 1994

Ms. Dina M. Viscarde
[redacted]

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

Dear Ms. Viscarde:

I have received your letter of November 17. Please accept my apologies for the delay in response. Your inquiry deals with the status of the board of your condominium complex under the Open Meetings Law.

In this regard, 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, a public body is a governmental entity that performs a governmental function. Assuming that the condominium complex is not part of government, its meetings would not be subject to the Open Meetings Law.

It is suggested that you review the by-laws concerning the condominium complex in order to ascertain your current rights and learn how you might attempt to increase them if necessary.

As you requested, enclosed is a copy of "You Should Know", which describes the Personal Privacy Protection Law.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8587
OML-AO 2441A

162 Washington Avenue, Albany, New York 12231
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December 29, 1994

Ms. Vicki L. Barbus
[redacted]

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

Dear Ms. Barbus:

I have received your letter of November 16. Please accept my apologies for the delay in response.

You commentary pertains to the format used by the Lackawanna Board of Education to enable members of the public to speak at meetings. According to your letter and the Board's procedure, those who desire to address the Board must sign on a "speaker's list" prior to a meeting, and speakers have up to two minutes to address the Board. The normal maximum time for public comment is a total of fifteen minutes. Your frustration is not with the limitation on the ability to speak, but rather with the Board's policy of not responding to questions or comments during the meetings. You wrote that: "At no time is the public allowed to engage in any conversational exchanges with members of the Board, collectively or individually." You have questioned the propriety of the Board's policy.

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, 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. The Board's policy appears to be reasonable.

From my perspective, however, part of the duty of elected officials involves being responsive to the public. While neither the Open Meetings Law nor any other law of which I am aware would require the Board to respond to questions posed by those who attend and speak at meetings, there is a different statute that may be useful to you. Specifically, the Freedom of Information Law requires that agencies disclose records to the public. I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. Consequently, as in the case of the Open Meetings Law, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information 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, a request should involve records rather than an attempt to elicit responses to questions.

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.

Enclosed for your review is "Your Right to Know", which describes both the Open Meetings and the Freedom of Information Laws and includes a sample letter of request.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Enc.
cc: Board of Education