STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8592
OML-AO-2442

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

January 4, 1995

Mr. Egbert J. Slocum
[redacted]

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. Slocum:

I have received your letter of November 21 and the materials related to it. You have sought an advisory opinion concerning two requests for records made to the Town of Dover.

The first involves a "Repair Shop License of 1976" allegedly issued to an individual during that year. The Town has been unable to locate such a record, and you "refuse to accept this."

In this regard, if the Town maintains a copy of the license, I believe that such a record 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. From my perspective, none of the grounds for denial could properly be asserted to withhold a repair shop license.

If the Town does not have possession of the record sought, the Freedom of Information Law would not apply. I point out that if it is asserted that an agency does not maintain or cannot locate a record, you may seek a certification so stating. Section 89(3) of the Freedom of Information Law provides in part that, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

It is also noted that a motor vehicle repair shop cannot operate unless it has validly registered with the Department of Motor Vehicles (see Vehicle and Traffic Law, §389-c). That provision became effective in 1974, and it might be worthwhile to contact the Department in an effort to ascertain when the repair shop in question initially registered.

The second issue pertains to your request for the report made by the Town's Code Enforcement Officer to the Zoning Board of Appeals to prepare the Board for an upcoming meeting. In response to that request, the Code Enforcement Officer wrote that:

> "The Zoning Board of Appeals held informal workshop sessions prior to the formal meeting of January 24, 1994, in which [he] presented all the information to the Board members. These informal workshops are used as fact finding discussions among the membership so that they, on an individual basis, can assure themselves that they have all the information they need to settle their own minds and render a reasonable decision.
>
> "...These gatherings are informal therefore, no decisions are made and no minutes are kept because they are only workshop sessions."

It is unclear whether the information was presented wholly orally or perhaps in writing as well. If written information was presented, the Freedom of Information Law would be applicable. Insofar as written information was prepared by the Code Enforcement Officer and transmitted to the Board, §87(2)(g) of the Freedom of Information Law would be relevant. 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.

If the information was presented orally at workshops during which a quorum of the Board was present, the Open Meetings Law would have applied. It is noted that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions", "agenda sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law.

With respect to minutes of "workshops", as well as other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

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

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all

motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during workshops, technically, I do not believe that minutes must be prepared.

Lastly, since the Open Meetings Law does not require the preparation of detailed or expansive minutes, I point out that it has been held that a member of the public may use a tape recorder at open meetings [see 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:jm

cc: Terry J. Binotto, Code Enforcement Officer
Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8593
OML-AO-2443

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

January 4, 1995

Mr. Jerry Brixner
[redacted]

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. Brixner:

I have received your letter of November 18 and the materials attached to it. Enclosed, as requested, is the latest copy of "Your Right to Know."

You referred to an advisory body, the Facilities Advisory Committee, designated by the Chili Town Board and the refusal by the chair of that body to recognize members of the public or permit them to speak at meetings. Other correspondence concerns a request for records from a Town task force. 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."

Recent decisions indicate generally that citizens advisory committees and similar advisory ad hoc entities, other than committees consisting solely of members of public bodies, that have 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 neither the Facilities Advisory Committee nor the Chili Challenge Task Force, both of which are advisory bodies created by the Town Board consisting of citizens, would be public bodies subject to the Open Meetings Law. This is not to suggest that they cannot hold open meetings, but rather that the requirements of the Open Meetings Law would not apply.

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

Lastly, although the entities to which you referred may not be subject to the Open Meetings Law, I believe that the documents they prepare fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to mean:

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

Any materials prepared by the Committee or the Task Force would be produced for the Town. Therefore, I believe that they would constitute Town records subject to rights conferred by the Freedom of Information Law.

Having reviewed your request of November 16 concerning the Task Force, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. In some aspects of the request, particularly items 9, 10 and 11, you sought information by raising questions. In my opinion, although Town officials may provide information by

responding to questions, they would not be obliged to do so by the Freedom of Information Law. Similarly, if records do not exist reflective of the information sought, the Town would not be required to prepare new records on your behalf containing the information.

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

OMC- AO-2444

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

January 10, 1995

Mr. Richard Mackay
[redacted]

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. Mackay:

I have received your letter in which you raised questions concerning the implementation of the Open Meetings Law by the Board of Education of the Gilbertsville-Mt. Upton School District.

The first involves the Board's practice of entering into executive session to discuss "specific personnel matters." When you have asked for greater specificity, the Board, according to your letter, "refuses to answer."

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. 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 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).

Based on 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.

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" or as a "specific personnel matter" 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving employment, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1)(f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, ___ AD 2d ___ (December 29, 1994)].

The second issue relates to the sale of school property. You wrote that:

> "Back in May, we put our old buildings out for bid and voted on the highest bid. Everything passed and everything was sold. The price was set. Our first school board meeting of November was held and again the board went into executive session. This time they gave the reason to be to discuss the sale of the district property. [You] questioned the board on this matter and they told [you] it was legal because it might hurt negotiations of the selling price. [You] thought the voters had set the price when they voted on the highest bid."

If indeed the "price was set" and the property was sold, it is difficult to envision how any ground for executive session would have applied. The only provision of apparent relevance to the matter 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."

Based on the language quoted above, not every discussion of a real estate transaction may be discussed in private; on the contrary, only when publicity would substantially affect the value of the property could an executive session appropriately be held. In consideration of the facts as you presented them, §105(1)(h) would not apparently have served as a valid basis for entry into executive session.

As you requested and in an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to District officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Douglas Exley, Superintendent
Bruce Guida, President

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2445

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

January 10, 1995

Mrs. Linda LeMoyne
[redacted]

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. LeMoyne:

I have received your letter of November 21, which reached this office on November 28. Please accept my apologies for the delay in response. You have sought an advisory opinion concerning "the legality of an executive session to discuss contractual negotiations."

According to your letter, when a motion was made to discuss "contractual negotiations" in executive session, you asked the Supervisor whether the negotiations involved the Taylor Law, and he responded in the negative. Further, even though you offered information describing the grounds for entry into executive session and objected to the motion, the Board nonetheless moved into executive session.

In this regard, I offer the following comments.

First, as you are likely aware, the Open Meetings Law requires that 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.

Second, although certain "contractual negotiations" may be conducted or discussed in executive session, not all such 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

under Article 14 of the Civil Service Law, which is commonly known as the Taylor Law.

Third, there is a different ground for entry into executive session that may, depending upon the nature of the discussion, be asserted to discuss certain matters pertaining to contract negotiations. Section 105(1)(f) 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..."

In some instances, a public body's discussion might focus on the financial or credit history of a particular corporation. To the extent that a discussion involves such matters, I believe that an executive session could properly be held. However, it is reiterated that the ability to discuss or engage in "contractual negotiations" in executive session is limited.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8614
OPL-AO-2446

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

January 13, 1995

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 letters of November 28 and various materials related to them.

One series of correspondence relates to your request to the Liberty Central School District for an "Explanation of longevity payments appearing on Page 31 of the Teachers' Contract." Rather than providing an explanation, a District official sent a copy of a portion of the contract, and you questioned whether he has "a problem with comprehension."

In this regard, it appears that you might misunderstand the Freedom of Information Law. 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, provide information by responding to questions, or offer "explanations" of the contents of records, 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, there is no record containing an explanation of the matter of your interest, District staff could but would not be required to prepare an explanation on your behalf.

A second issue involves notice of a meeting of the Board of Education. In brief, although you were apparently informed that notice of a particular meeting had been sent to a newspaper, you wrote that you could not find any announcement of the meeting in that newspaper.

As you may be aware, §104 of the Open Meetings Law requires that public bodies provide notice of the time and place of meetings to the news media. However, subdivision (3) of that provision specifies that the notice need not be a legal notice, and a public body is not required to pay to publish a notice of a meeting held in accordance with the Open Meetings. Moreover, even though notice must be given to the news media, there is no obligation on the part of the news media to publish the notice or otherwise publicize the meeting. Consequently, situations may arise in which a public body properly provides notice of a meeting to a newspaper, for example, but the newspaper, for whatever reason, chooses not to print it.

In a similar vein, when the news media chooses to publicize a meeting, it is not obligated to print a verbatim account of the notice provided by a public body.

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: Richard P. Beruk, Superintendent
Linda Etess, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2447

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

January 13, 1995

Hon. Sean Treacy
Village of North Tarrytown
[redacted]

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 Treacy:

I have received your letter of November 28 and the materials attached to it. Please accept my apologies for the delay in response.

According to your letter, notice of a public hearing to be held by the Board of Trustees of the Village of North Tarrytown on October 18 at the Philipse Manor Restoration was properly sent to the news media and posted, and an affidavit of publication prepared by the Gannett Suburban Newspapers indicates that notice was published on October 5. Following the publication of notice, the Board of Trustees, adopted a resolution "calling for all future board meetings to be held exclusively at Village Hall." While that issue was being considered, the Village Attorney advised that notice of the hearing "had already been filed with the newspaper and time did not permit the renoticing of the meeting." On October 18, several Village officials, two trustees and yourself convened the hearing at the time and location specified in the notice. The four remaining trustees held a meeting at exactly the same time in Village Hall without ever saying "a word to [you] that they would be meeting at a different location other than the Restoration." You have asked whether the meeting at Village Hall was validly held.

In this regard, I offer the following comments.

First, I point out that the Open Meetings Law does not necessarily apply to a hearing, and that there is a distinction between a meeting and a hearing. A meeting generally involves a situation in which a quorum of a public body convenes for the purpose of deliberating as a body and/or to take action. A public hearing, on the other hand, generally pertains to a situation in

which the public is given an opportunity to express its views concerning a particular issue, such a zoning or land use matter, a local law or a budget proposal. Further, the notice requirements pertaining to meetings found in §104 of the Open Meetings Law are separate from those pertaining to hearings. In this instance, it is clear that a legal notice was given with respect to a hearing involving a proposed amendment to the Village Code.

Second, 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 village board of trustees, cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. 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 would constitute a quorum or 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. If indeed no notice was given to you or other members of the Board, the purported meeting would, in my opinion, have been a nullity.

A remaining issue involves the site of meetings and access to physically handicapped persons. Here I note that §103(b) of the Open Meetings Law states that:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty or the public buildings law."

The same direction appears in §74-a of the Public Officers Law regarding public hearings. Based upon those provisions, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings and hearings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a facility that is accessible to handicapped persons, I believe that the meetings should be held in the location that is most likely to accommodate the needs of those persons.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2448

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

January 19, 1995

Mr. James W. Rathbun
[redacted]

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. Rathbun:

I have received your letter of December 3, which reached this office on December 9. Please accept my apologies for the delay in response.

You have sought my views concerning the implementation of the Open Meetings Law by the Village of Montgomery Planning Board and what you characterized as "a disregard for appropriate legal protocol regarding public meetings, and, in particular, executive sessions."

Based upon a review of the materials, I offer the following comments.

It is emphasized at the outset that there are two methods that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

Relevant under the circumstances is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the

> purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

Insofar as the Board sought legal advice from its attorney and the attorney was rendering legal advice, I believe that the attorney-client privilege could validly have been asserted and that communications made within the scope of the privilege would have been outside the coverage of the Open Meetings Law. Therefore, even though there may have been no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly have been held based on the proper assertion of the attorney-client privilege pursuant to §108.

The intent of this response is not to be overly technical but rather to offer clarification regarding the scope of the Open Meetings Law. I hope that my comments serve to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Noorlander, Chairman
Kevin T. Dowd

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2449

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

January 19, 1995

Ms. Betty 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 letters of December 6 and December 11, as well as various related materials. You have raised questions concerning an unscheduled "special" meeting of the Board of Education of the Liberty Central School District.

In this regard, the Open Meetings Law makes no specific reference to "special" meetings. Rather, the notice provisions distinguish meetings scheduled at least a week in advance from those scheduled less than a week in advance. 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.

In addition, 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.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D.2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as the one at bar:
>
> > "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten

> announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

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

Lastly, although the Open Meetings Law does not specify which news media outlet or outlets should receive notice, that law, like any other, should in my opinion be implemented in a manner that gives reasonable effect to its intent. Notice given to a weekly newspaper might not, due to the time of publication, serve to enable that newspaper to inform the public of a meeting. The newspaper might nonetheless send a reporter to cover a meeting. In some circumstances, it may be appropriate to provide notice to a local radio station which could quickly publicize a meeting to be held on short notice.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2450

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

January 30, 1995

Hon. Willard A. Genrich
Regent & Chancellor Emeritus
The Board of Regents
The University of the State of New York
4287 Main Street
Buffalo, NY 14226

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 Chancellor Emeritus Genrich:

I have received your letter of January 16, which reached this office on January 23. Your kind words are much appreciated.

According to your letter, during a recent appearance before the New York State School Boards Association, you were questioned concerning your "willingness to participate in the Executive Session for the election of a Chancellor of the Board of Regents prior to a public vote." Louis Grumet, Executive Director of the School Boards Association, apparently believes that an executive session would be "in direct opposition to the open meetings law." Nevertheless, you wrote that you recalled that I had suggested that the issue was, in your words, "a grey area" and that I did not offer a "definite opinion" during my presentation before the Board of Regents. You have sought my opinion on the matter.

In this regard, I believe that your recollection is correct. The possibility of discussing election of chancellor in an executive session was the subject of a lengthy exchange between members of the Board of Regents and myself, as well as several inquiries by the news media following the event. In short, the issue has not been the subject of any judicial decision of which I am aware, and the validity of an executive session would, from my perspective, be dependent on the specific nature of a discussion and, potentially, the construction of the Open Meetings Law by a court.

By way of background, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, an

executive session is not separate and distinct from an open meeting; on the contrary, an executive session is a part of an open meeting that must be convened open to the public and preceded by notice given to the news media and by means of posting in accordance with §104 of the Open Meetings Law. Further, a public body cannot enter into an executive session without accomplishing the procedure described in §105(1) of the Open Meetings Law. That provision states in relevant part that:

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

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.

The only provision that appears to be relevant to the "election of chancellor", §105(1)(f), permits a public body to conduct an executive session to discuss:

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

Insofar as the Regents consider the criteria inherent in the position of chancellor or the attributes or qualifications of any person who might serve in that position, I do not believe that §105(1)(f) could be asserted. That kind of discussion would not focus on any "particular person" but rather on the functions associated with the position of chancellor and characteristics that any person who fulfills that role should or perhaps should not possess. However, if and when the discussion does pertain to a particular person, the language of §105(1)(f) may become applicable.

The first clause authorizes an executive session to consider the "medical, financial, credit or employment history of a particular person." There may be instances in which one or more of those subjects may be discussed regarding a candidate for chancellor. The physical ability of an individual to hold the position could be an issue, particularly if that person has a history of health problems. In view of the time consuming nature of the position, it is possible that a discussion might involve an individual's financial history, i.e., consideration of whether that person can afford to spend the time needed to carry out the duties of chancellor. One's employment history might also be considered

in an effort to determine whether a candidate's work or professional experience renders that person suitable for the position. In short, to the extent that the Board of Regents discusses the medical, financial or employment history of a particular person, I believe that the initial clause of §105(1)(f) may clearly be invoked as a basis for conducting an executive session.

The second clause pertains to "matters leading to the appointment, employment, promotion" etc. "of a particular person". In my view, discussions concerning the choice of a chancellor would not involve a matter concerning employment or promotion. I do not believe that a regent could be characterized as an employee. Arguably, however, discussion of the issue might pertain to the "appointment...of a particular person".

Section 101 of the Education Law states in part that the Regents "shall *appoint* and, at pleasure, may remove, the commissioner of education.." Section 203 of the Education Law provides in relevant part that: "The *elective* officers of the university shall be a chancellor and a vice-chancellor who shall serve without salary, and such other officers as are deemed necessary by the regents, all of whom shall be chosen by ballot by the regents and shall hold office during their pleasure; but no election, removal or change of salary of an *elective* officer shall be made by less than six votes in favor."

Sections 101 and 203 were enacted together in 1947, and the reason for referring to the "appointment" of a commissioner, as opposed to the characterization of the position of chancellor as "elective" is unclear. Assuming that there was a reason and that the use of the terms is not interchangeable, an election would not be the equivalent of an appointment. Having reviewed a number of dictionary defintions of pertinent terms, while one can distinguish between appointments and elections in some contexts, there may be little difference between the two in others. I would conjecture that the appointment of commissioner involves a process of reviewing the characteristics and relative merits of a number of candidates for that position. Although the Regents choose a chancellor from among their members, the process is likely analogous, in that the members weigh the strengths, weaknesses and other factors concerning those under consideration for chancellor.

If the terms "appointment" and "election" are to be construed narrowly and literally, the discussion of individual regents under consideration for the position of chancellor would not constitute "a matter leading to the appointment...of a particular person" that could validly be considered in executive session. However, if those terms are construed in recognition of the nature of the deliberations that focus on particular individuals, a court might find that those deliberations are reflective of a matter leading to the appointment of a particular person that could justifiably be discussed behind closed doors.

From my perspective, the application of the second clause of §105(1)(f) to the issue indeed falls within a "grey area" of the Open Meetings Law. Due to the absence of unequivocal judicial direction, I cannot offer specific guidance concerning its scope.

In sum, first, I believe that discussions involving the position of chancellor, the procedure relating to the means by which a new chancellor will be selected, and the attributes of any person who might hold that position must be discussed in public, for none of the grounds for entry into executive session could be asserted; second, that §105(1)(f) of the Open Meetings Law would clearly justify the holding of an executive session insofar as a discussion pertains to "the medical, financial, credit or employment history" of a particular Regent under consideration for election as Chancellor; and third, that the extent to which discussion of the relative merits of specific candidates for the position constitutes "a matter leading to the appointment...of a particular person" is an issue requiring judicial interpretation in order to provide clear direction.

It is emphasized that the intent of this opinion is not to encourage litigation. On the contrary, attempts are made as a matter of routine to offer specific advice in efforts to avoid litigation. Nevertheless, for reasons described in the preceding commentary, I do not believe that I could, in good faith, advise as to any specific course of action other than to confirm that an element of the issue remains "grey" and unresolved.

I appreciate your interest in compliance with the Open Meetings Law and regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chancellor Carballada
Commissioner Sobol

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2451

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

January 30, 1995

Hon. Joseph J. Cerbone
Town Justice
Village/Town of Mount Kisco
40 Green Street
Mount Kisco, NY 10549

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 Judge Cerbone:

I have received your letter of December 15 in which you referred to a summary of an opinion that I prepared concerning the Open Meetings Law. The summary states that: "When entering into executive session to discuss proposed, pending or current litigation, the public body must identify with particularity, the proposed, pending or current litigation to be discussed during the executive session."

Attached to your letter is a response by the Mount Kisco Village Attorney to an editorial that apparently criticized practices of the Village Board of Trustees. He wrote that in his view:

> "the Village Board's practice of refusing to identify the litigation matter which will be discussed is entirely correct. There is no authoritative judicial decision which holds otherwise. The few trial court decisions which seem to say that more is required, do so only in extraneous comments not necessary to reach the decision in the case, which are, therefore, not binding precedent. There has not been any definitive appellate ruling on the subject. Until such time as there is, my opinion to the Board, which is based upon the direct language of the statute, will not change."

You have asked whether I concur with the Village Attorney's opinion. In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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.

Second, the provision 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 by the Appellate Division, Second, Department, 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.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co. , Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

The Daily Gazette decision was recently cited by the Appellate Division, Third Department, in which one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue." Specifically, it was held that:

> "...the public body must identify the subject matter to be discussed (see, Public Officers Law § 105 [1], and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsbrugh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of 'a personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person' (id. [emphasis

> supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to 'a personnel issue' is the functional equivalent of identifying 'a particular person'."

Based upon the foregoing, I believe that there is judicial authority indicating that motions for entry into executive session cannot validly be as general as the Village Attorney has suggested.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert A. Spolzino, Village Attorney
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2452

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

January 31, 1995

Hon. Charles M. Swanick
Erie County Legislature
3200 Elmwood Avenue
Room 216
Kenmore, NY 14217

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 Legislator Swanick:

You letter of December 23 addressed to Richard Rifkin, Executive Director of the NYS Ethics Commission, has been forwarded to the Committee on Open Government. As you may recall from our earlier communications, the Committee is authorized to advise with respect to the Open Meetings Law.

Attached to your letter are news articles describing a meeting of the Tonawanda City Council held to discuss a plan for a new supermarket. One article indicated that:

> "Before its public session Tuesday, the Council held a closed meeting with county Industrial Development Agency Executive Director Ron Coan and City Attorney Joseph Cassata to see what could be done to save the project. Tops representatives also sat in, the Mayor said."

The article also states that:

> "Cassata and [Mayor] Roth defended the decision to close the meeting. Cassata said that because he offered legal advice, the meeting could be closed. And Mrs. Roth said the executive session was legal because financial matters relating to Tops were discussed."

A second article states that in "a lengthy executive session before the Common Council's regular meeting", the City Attorney "said 'various legalities' concerning the Tops project were discussed with Tops officials."

I note that the City Attorney wrote to this office on January 5 at the direction of the Mayor and Common Council concerning the same meeting. His version of the incident is somewhat different from newspaper reports. Although both newspaper accounts referred to an executive session held prior to the meeting, the City Attorney, based on his recollection of the matter, wrote that a motion was made to conduct an executive session "at the open work session of the Common Council." Further, while both newspapers referred to "legal" matters as the justification offered by the City Attorney for entry into executive session, he wrote that one issue involved "a personnel matter for a particular person", and that the other pertained to "certain financial matters of Tops Market."

Not having been present, I cannot conjecture with respect to which series of facts may be most accurate. Nevertheless, I offer the following comments.

By way of background, the Open Meetings Law envisions two vehicles under which the public may be excluded from a meeting of a public body. One involves entry into an executive session. The phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Further, §105(1) of the Law requires that a procedure be accomplished, during an open meeting, before an executive session may be held. Specifically, that provision states in relevant part that:

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

Based on the foregoing, an executive session is not separate from a meeting; rather it is a portion of an open meeting from which the public may be excluded. Further, a public body cannot conduct an executive session to discuss the subject of its choice; on the contrary, the ensuing provisions of §105(1) specify and limit the subjects that may properly be considered in executive session.

The other vehicle involves exemptions from the Open Meetings Law, which are delineated in §108. If a matter is exempt from the Open Meetings Law, the provisions of that statute do not apply. When an exemption applies, a public body may meet in private, and there is no requirement that the procedural steps necessary to conduct an executive session be followed.

Since one of the articles refers to legal advice rendered by the City Attorney, relevant to an analysis of the matter is §108(3), which exempts from the Open Meetings Law:

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

When an attorney-client relationship has been invoked, 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.

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)].

In this instance, representatives of Tops and Erie County Industrial Development Agency were present at the closed session. Since they could not be characterized as clients of the City Attorney, their presence in my view negated the capacity to exclude the public based on a contention that the discussion occurred in private based on the assertion of the attorney-client privilege. Therefore, the gathering in my opinion would not have been exempt from the Open Meetings Law.

The only basis for entry into executive session that would have justified closed session would have been §105(1)(f). That provision 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..."

From my perspective, an executive session would properly have been held only insofar as that the discussion involved the financial or credit history of a particular corporation, Tops Market.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council
Joseph Cassata, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2453

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

January 31, 1995

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 information presented in your correspondence.

Dear Mr. Reninger:

I have received your letter of December 30 in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter:

> "The Town of Greenburgh has a 'Fire District Advisory Committee'. The Fire District Advisory Committee was established by resolution of the Town Board, the members of the Committee are appointed by the Town Board and the individual members of the Committee execute oaths of office.
>
> "The Committee regularly meets in open session and proper notice is given for all meetings. The Chairman of the Committee acts as Secretary of the Committee and publishes minutes of the Committee."

You added, however, that minutes of the Committee meetings "are never released to taxpayers until they have been approved by the Committee members." You also contended that the minutes contain "factually inaccurate statements" that it has failed to correct.

In this regard, I offer the following comments.

First, it is noted that recent decisions indicate generally that entities consisting of persons other than members of public bodies having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function"

[Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, an advisory body such as a citizens' advisory committee would not in my opinion be required to comply with the Open Meetings Law.

Second, assuming that the Committee in question is a public body or that the Town Board has directed that the Committee comply with the Open Meetings Law, that statute provides direction concerning minutes of meetings, their contents, and the time within which they must be prepared and disclosed. 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, minutes must be prepared and made available within two weeks. Further, although minutes need not consist of a verbatim account of every comment that was made, I believe that it is implicit that in order to comply with the Open Meetings Law, minutes of meetings must be accurate.

Lastly, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Fire District Advisory Committee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2454

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

January 31, 1995

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 January 12 in which you raised an issue concerning attendance at executive sessions.

You wrote that you were informed by the attorney for a local public body "that the only person allowed in executive sessions are members of a body and their staff; no one from the outside is allowed in these sessions." You have asked whether "others can be invited into Executive Sessions at the request of the body."

In this regard, §105(2) of the Open Meetings Law states that:

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

Based on the foregoing, the members of a public body have the right to attend an executive session, and they have the authority to permit "any other persons" to attend.

There are many instances in which persons other than the staff of a public body are invited to attend executive sessions. For instance, a person who has applied for employment may be interviewed during an executive session; a representative of a commercial enterprise may be invited into an executive session to discuss the financial history of a corporation. In short, I believe that, in appropriate circumstances, the members of a public body may authorize persons other than staff to attend an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2455

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

January 31, 1995

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, unless otherwise indicated.

Dear Mr. Rhodes:

I have received your letter of December 21 in which you complained that meetings of certain committees of the Town of Henderson were conducted in private. You referred to one such gathering that included three members of the Town Board, and a news article attached to your letter indicates that the Supervisor contended that advisory committees are not subject to the Open Meetings Law when they spend no public money.

From my perspective, the issue is whether the committees in question constitute public bodies, not whether they spend or have the authority to spend public money. In this regard, I offer the following comments.

First, it is noted that recent judicial 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 town board, 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 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 itself. 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 three, for example, a quorum would be two.

When a committee intends to gather to discuss public business, I believe that it is required to provide notice in accordance with §104 of the Open Meetings Law. Further, if a quorum of the committee is present for that purpose, such a gathering would in my view constitute a meeting of the committee that must be conducted in accordance with the Open Meetings Law.

Lastly, you wrote that the Supervisor "also refuses to comply with FOI requests for financial data." Having spoken recently with the Supervisor, I believe that the Town is engaging in ongoing efforts to respond appropriately be your requests, which, as I understand the situation, have been frequent and in some instances voluminous.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Paul M. Scott, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2456

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

January 31, 1995

Mr. Jon Moscow, Executive Director
Parents Coalition for Education
in New York City, Inc.
24-16 Bridge Plaza South, Suite 404
Long Island City, NY 11101

<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 Mr. Moscow:

I have received your letter and the materials attached to it. You have requested an advisory opinion concerning the status of "School-Based Management/Shared Decision Making" (SBM/SDM) committees in New York City public schools under the Open Meetings Law.

According to your letter:

> "When districts were required to set up school planning committees under State Education Dept. Regulation 100.11, schools which had SBM/SDM committees were allowed to continue these committees, rather than form new committees under 100.11. As SBM/SDM has been incorporated into the UFT contract, these committees fell under 100.11(h) which states that where a district had implemented a plan for participation of teachers in school-based decision making as a result of a collective bargaining agreement, the district 'shall incorporate such negotiated plan as a part of the district plan required by this section.'"

By way of background, I believe that it is useful to review pertinent provisions of the Commissioner's regulations. Section 100.11(b) states in relevant part that:

> "By February 1, 1994, each public school district board of education and each board of cooperative educational services (BOCES) shall

> develop and adopt a district plan for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking. Such district plan shall be developed in collaboration with a committee composed of the superintendent of schools, administrators selected by the district's administrative bargaining organization(s), teachers selected by the teachers' collective bargaining organization(s), and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by their peers in the manner prescribed by the board of education or BOCES, provided that those portions of the district plan that provide for participation of teachers or administrators in school-based planning and shared decisionmaking may be developed through collective negotiations between the board of education or BOCES and local collective bargaining organizations representing administrators and teachers."

Section 100.11(d) provides in part that:

> "The district's plan shall be adopted by the board of education or BOCES at a public meeting after consultation with and full participation by the designated representatives of the administrators, teachers, and parents, and after seeking endorsement of the plan by such designated representatives."
>
> "Each board of education or BOCES shall submit its district plan to the commissioner for approval within 30 days of adoption of the plan. The commissioner shall approve such district plan upon a finding that it complies with the requirements of this section..."

Additionally, §100.11(e)(1) states that:

> "In the event that the board of education or BOCES fails to provide for consultation with, and full participation of, all parties in the development of the plan as required by subdivisions (b) and (d) of this section, the aggrieved party or parties may commence an appeal to the commissioner pursuant to section 310 of the Education Law. Such an appeal may be instituted prior to final adoption of the

> district plan and shall be instituted no later that 30 days after final adoption of the district plan by the board of education or BOCES."

In this regard, I offer the following comments.

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

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

Second, recent decisions indicate generally that advisory 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)].

In this instance, however, although the committees in question 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 decision making plans. As stated earlier, the regulations specify that a district plan "shall be developed in collaboration with a committee." As such, a committee must, by law, be involved in the development of a plan. 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" a 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 issue presented here 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).

Again, according to the Commissioner's regulations, which have the force and effect of law, a plan cannot be adopted absent "collaboration" and participation by the committees that are the subject of your inquiry. Since they carry out necessary functions in the development of shared decision making plans, I believe that they perform a governmental function and, therefore, are public bodies subject to the Open Meetings Law.

In my opinion, the same conclusion can be reached by viewing the definition of "public body" in terms of its components. A committee is an entity consisting of more than two members; it is required in my view to conduct its business subject to quorum requirements (see General Construction Law, §41); and, based upon the preceding commentary, a committee conducts public business and performs a governmental function for a public corporation, such as a school district or a BOCES.

Lastly, while the Commissioner's 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 the committees in question perform pursuant to the Commissioner's regulations and the plans adopted in accordance with those regulations, I believe that they constitute "public bodies" subject to the requirements of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Ramon C. Cortines, Chancellor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 2457

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

February 2, 1995

Mr. Arnold J. Leckie
Town of Mendon
16 West Main Street
Honeoye Falls, NY 14472

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. Leckie:

I have received your letter of December 30 in which you asked whether you are "entitled to legally attend a Democratic caucus or not..."

By way of background, you wrote as follows:

> "First, I was endorsed as Democratic candidate for Town Board last year. However, as a registered Republican, I entered the Republican Primary election and won that also. Thereby being listed as a candidate for both parties in the General election.
>
> "Having been elected, I have aligned myself generally with the Democratic members on the Board. Does this, then provide reason for me to attend their caucuses?"

In this regard, I offer the following comments.

First, from my perspective, as a registered republican, you could not be considered a democrat, despite your endorsement by the democratic party or the fact that you may vote more often with democrats.

Second, §108(2)(a) of the Open Meetings Law states that exempted from its provisions are: "deliberations of political committees, conferences and caucuses." Additionally, §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..."

Based on the foregoing, in general, either the majority or minority party members of a legislative body may conduct closed political caucuses outside of the coverage of the Open Meetings Law. Further, since a political caucus is beyond the coverage of that statute, I do not believe that there is a "right" to attend such a caucus; rather, peoples' presence is essentially by invitation.

Lastly, if a majority of Town Board members meet to discuss public business, and the members include at least one member from each party, the gathering in my opinion could not be characterized as a political caucus exempt from the Open Meetings Law; on the contrary, due to the presence of members of more than one political party, I believe that it would constitute a "meeting" subject to the requirements of that statute.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2458

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

February 3, 1995

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 letters of December 31 and January 2 in which you raised a series of issues relating to a meeting of the Liberty Central School District Board of Education on January 2.

According to your letter:

> "There was a pledge to the flag and then a motion was made to enter executive session. There was no agenda available and no public participation. The public was abused again!
>
> "The residents who attended were informed that the newspaper notice in the ***Times Herald-Record*** served as the board's agenda. Please note, however, that the newspaper notice does not state specifically which unions or groups of employees; does not give the date of the meeting (states only Monday); does not state that the meeting is a 'special' meeting. Also, the ***Sullivan County Democrat*** is the official school newspaper and no announcement was made in the newspaper.
>
> "Was this a legal meeting? Is it proper for a school board to hold a 'public' meeting and then ask the public, who traveled through dangerous ice and snow, to leave immediately after an 'executive session' is declared? Is it legal not to have an agenda for a 'special' meeting? Is it legal to hold a board meeting on a holiday when the school is officially closed? Is it legal to state in an

announcement: 'The board 'expects' to hold an executive session for the discussion'?

"Mr. Pagnucco keeps referring to radio announcements which I don't believe are considered legal notifications for board meetings. I would appreciate clarification of this issue also. Doesn't the 72-hour law refer to official newspaper notification?"

In this regard, I offer the following comments.

First, although a public body is required to give notice of the time and place of a meeting to the news media, there is no requirement that the news media publish the notice or publicize the meeting. Further, if a newspaper, for example, chooses to print a notice of the meeting, there is no requirement that the notice consist of a verbatim duplication of the notice that the paper received. Consequently, the notice that you see in print or hear on the radio may not be precisely what was given to the news media.

It is also noted that the Open Meetings Law does not specify which news media must receive notice. In my view, a public body may comply with the Open Meetings Law by providing notice to a local radio station in accordance with §104 of the Law.

Second, the Open Meetings Law makes no reference to agendas, and I know of no law that requires the preparation of an agenda, that deals with the degree of detail in an agenda, or that compels a public body to follow its agenda exactly.

Similarly, 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.

Third, with regard to the legality of a meeting held on a holiday or when school is closed, again, the Open Meetings Law is silent on the matter. Although §24 of the General Construction Law enumerates certain days as "public holidays", I an unaware of any statute or judicial decisions that deal specifically with the issue of a public body's authority to conduct a meeting on a holiday or a weekend day. I have found a summary of an opinion rendered by the State Comptroller in which it was advised that a town is not legally obligated to close its offices on the holidays designated

in §24 of the General Construction Law, and that a town board has discretionary authority to close town offices in observation of those holidays (see 1985 Opinion of the State Comptroller, 85-33). In my view, due to the absence of specific statutory guidance, it appears that a public body may in its discretion conduct meetings on public holidays or weekends, so long as it complies with the applicable provisions of law, such as the Open Meetings Law. I point out, too, that many public bodies conduct organizational meetings on January 1, which is a public holiday.

Lastly, 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 an 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. However, in consideration of the public and to encourage technical compliance with the Open Meetings Law, it has also been advised that a public body 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 you described would in my opinion be unobjectionable and consistent with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Richard P. Beruk, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2459

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

February 3, 1995

Mr. Vincent Cestone
Fair Share of Philipstown
[redacted]

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. Cestone:

I have received your letter, which was prepared in your capacity as a representative of Fair Share of Philipstown. It is your belief that "the Open Meetings Law has and is continuing to be violated on a regular basis" by the Board of Education of the Lakeland Central School District.

You described a series of situations and raised questions in relation to them. Rather than restating the issues at length, I offer the following comments.

The first area of inquiry involves a "show of hands" occurring during an executive session, and whether a member may refuse to participate. As a general matter, I believe that a member of a public body may abstain from voting. There is only one decision of which I am aware that deals specifically with the notion of a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education in Westchester County, the issue pertained to access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.

> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

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

In contrast, a "straw vote", or something like it, that is not binding and does not represent members' action that could be construed as final, could in my view be taken in executive session when it represents a means of ascertaining whether additional discussion is warranted or necessary. If a "straw vote" does not represent a final action or final determination of the Board, I do not believe that minutes including the votes of the members would be required to be prepared.

In a related vein, 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."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must include reference to action taken by a public body.

It is noted that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Nevertheless, various interpretations of the Education Law, §1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote. As such, minutes of executive sessions need not generally be prepared by a board of education.

Second, §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, the "tuitioning issue" should have been discussed in public. In short, none of the grounds for entry into executive session would have applied.

Perhaps the most frequently cited ground for entry into executive session is the basis that 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.

From my perspective, a discussion pertaining to the Superintendent and his contract could likely have been discussed appropriately in executive session. The issue would have dealt with that person's performance, i.e., his employment history. With respect to the discussion concerning the salaries and benefits of non-union administrators, to the extent that the Board considered the administrators as group, rather than individually, I do not believe that there would have been any basis for conducting an executive session. On the other hand, insofar as the Board focused on particular administrators and their performance (i.e., whether a particular administrator merited an increase based on performance and, if so, how much), I believe that an executive session could properly have been held.

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. That advice was recently confirmed in a decision rendered by the Appellate Division, Third Department, in which one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue." Specifically, it was held that:

> "...the public body must identify the subject matter to be discussed (see, Public Officers Law § 105 [1], and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsbrugh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of 'a personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person' (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to 'a personnel issue' is the functional equivalent of identifying 'a

> particular person'" (Gordon v. Village of Monticello, ___ AD 2d ___, December 29, 1994).

Lastly, §107 of the Open Meetings Law pertains to the enforcement of that statute and 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."

Similarly, some decisions involving the interpretation of §1708 of the Education Law indicate that courts have invalidated action taken in private. However, it is emphasized that action taken by a public body remains valid unless and until a court renders a determination to the contrary, and that the authority to invalidate is discretionary on the part of a 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 of Education.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8664
OML-AO-2460

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

February 6, 1995

Mr. Robert E. Becker
[redacted]

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

Dear Mr. Becker:

I have received your letter of January 6 and a variety of materials attached to it. You have sought an advisory opinion concerning the propriety of a denial of your request for records by the Lawrence Union Free School District.

Your application for records indicates that you requested:

> "1. Decision of Board of Education pursuant to paragraph Fourth (a) of Agreement dated October 12, 1993 between the Lawrence Board of Education and Dr. Stewart Weinberg as to the total Merit increase for the 1994-95 School Year.
>
> 2. Total salary for Dr. Stewart Weinberg for the 1994-95 School Year."

Paragraph Fourth (a) of the agreement between the District and the Superintendent states that:

> "The Board agrees to pay the Superintendent for the 1993-94 school year, as the Superintendent's salary, the sum of $120,000. For each succeeding year, the Board agrees to pay the Superintendent a minimum additional amount equal to 3.5% plus merit increases of 1% for an overall evaluation rating of 'good,' 2% for an overall evaluation rating of 'very good,' and 3% for an overall evaluation rating of 'outstanding.'"

In response to your appeal, the Superintendent upheld the original denial and wrote that "the evaluation of the Superintendent of Schools has been deemed confidential information..." You stressed, however, that you did not request the evaluation, but rather "only 'The total Merit Increase for the 1994-94 School Year' as per paragraph Fourth (a) of Agreement..."

Based on the following analysis, I believe that the information sought, in whatever record or records it may exist, must be disclosed.

I point out initially that an assertion or claim of confidentiality, unless it is based upon a statute, is 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 enable an agency to withhold a record.

In a related vein, 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. 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.

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. While two of the grounds for denial may be relevant to an analysis of rights of access to the records in question, I do not believe that either could be cited to withhold the information sought.

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.

Also significant is §87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear based upon judicial decisions 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. Further, with regard to records pertaining to public employees, the courts have found in a variety of contexts that 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].

Although you did not request a record consisting of the evaluation of the Superintendent, the final rating could likely be considered as part of such an evaluation. Nevertheless, that portion of an evaluation or other record would in my view be available. While the contents of evaluations may differ, I believe that a typical evaluation contains three components.

One component involves a description of the duties to be performed by a person holding a particular position, or perhaps a series of criteria reflective of the duties or goals to be achieved by a person holding that position. Insofar as evaluations contain information analogous to that described, I believe that those portions would be available. In terms of privacy, a duties description or statement of goals would clearly be relevant to the performance of the official duties of the incumbent of the position. Further, that kind of information generally relates to the position and would pertain to any person who holds that position. As such, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In terms of §87(2)(g), a duties description or statement of goals would be reflective of the policy of an agency regarding the performance standards inherent in a position and, therefore, in my view, would be available under §87(2)(g)(iii). It might also be considered factual information available under §87(2)(g)(i).

The second component involves the reviewer's or, in this case, the Board's subjective analysis or opinion of how well or poorly the standards or duties have been carried out or the goals have been achieved. In my opinion, that aspect of an evaluation could be withheld, both as an unwarranted invasion of personal privacy and under §87(2)(g), on the ground that it constitutes an opinion concerning performance.

A third possible component, as in this instance, is often a final rating, i.e., "good", "excellent", "average", etc. Any such final rating would in my opinion be available, assuming that any appeals have been exhausted, for it would constitute a final agency determination available under §87(2)(g)(iii), particularly if a monetary award is based upon a rating. Moreover, a final rating concerning a public employee's performance is relevant to that person's official duties and therefore would not in my view result in an unwarranted invasion of personal privacy if disclosed.

While tangential to your inquiry, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

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

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 officers and employees and payments to them must be disclosed for the following reasons.

As indicated earlier, §87(2)(b) permits an agency to withhold record or portions of records when disclosure would result in an unwarranted invasion of personal privacy. However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational 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.

It has been contended that W-2 forms, which indicate gross wages, are specifically exempted from disclosure by statute on the basis of 26 USC 6103 (the Internal Revenue Code) and §697(e) of the Tax Law. In an effort to obtain expert advice on the matter, I contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by the Internal Revenue Service; those statutes do not pertain to records kept by an individual taxpayer [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)], nor are they applicable to records maintained by an employer, such as a school district. In short, the attorney for the Internal Revenue Service said that the statutes in question require confidentiality only with respect to records that it receives from the taxpayer.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. Moreover, in a recent decision, the same conclusion was reached, and the court cited an advisory

opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In short, records indicating an annual salary, an increase in pay, or gross wages of a public officer or employee must in my view be disclosed.

Lastly, the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available. Specifically, §106 of that statute provides that:

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

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.

From my perspective, if the Board took action in determining the Superintendent's rating, thereby conferring a merit increase, any such action should have been taken during an open meeting and memorialized in minutes of the meeting available to the public.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Stewart Weinberg
Board of Education
Carol Hoffman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2461

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

February 13, 1995

Hon. Jeanette Provenzano
Minority Leader
Ulster County Legislature
[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.</u>

Dear Legislator Provenzano:

I have received your letter of January 9, which reached this office on January 17. You requested that the Committee on Open Government conduct "an investigation into a meeting that was held at republican campaign headquarters on Thursday, January 5, 1995."

Specifically, you wrote that you were informed by:

> "Mr. Charles Shaw, Executive Director of the RRA (Resource Recovery Agency for Ulster County), that this meeting was called by the Majority Leader of the Ulster County Legislature Philip Sinagra. A select few Ulster County Legislators were invited to this meeting; all of whom were Republican majority members.
>
> "Mr. Shaw explained that he called Mr. Sinagra to inform him that his agency completed a study into the cost effectiveness of exporting Ulster County solid waste compared to building our own mega dump."

In this regard, it is emphasized at the outset that the Committee on Open Government has neither the authority nor the resources to conduct what might be characterized as an investigation. However, I offer the following comments concerning the situation that you described.

First, as you are likely 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 County Legislature would constitute a public body; similarly, the governing body of the RRA would also be a public body required to comply with the Open Meetings Law.

Second, a meeting subject to the Open Meetings Law occurs when a quorum of a public body, a majority of its total membership, convenes for the purpose of conducting public business. If there was no quorum of either the County Legislature or the governing body of the RRA, the Open Meetings Law would not have applied.

On the other hand, assuming that a quorum of the RRA board was present, I believe that the Open Meetings Law would have been applicable. 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 has also been held that joint meetings held by two or more public bodies are subject to the Open Meetings Law [Oneonta Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)], and that in a recent decision, it was held that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the Council was asked to attend by 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 County Legislator, I believe that it was a meeting, assuming that a quorum of the RRA was present for the purpose of conducting public business.

Lastly, as you may be aware, the Open Meetings Law exempts political caucuses from its coverage. Specifically, §108(2) of the Open Meetings Law exempts "deliberations of political committees, conferences and caucuses" from the Law, and paragraph (b) of that provision states in relevant part that:

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

In my view, the exemption concerning political caucuses applies to "the legislative body" of a county, i.e., the County Legislature. The language of §108 does not refer to public bodies other than legislative bodies. Therefore, again, if a majority of the RRA's governing body gathered to discuss public business, the Open Meetings Law, in my view, would have applied and the gathering would have constituted a "meeting". If no quorum was present, the Open Meetings Law would have been inapplicable.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Philip J. Sinagra, Majority Leader
Ulster County Resource Recovery Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8680
OML-AO 2462

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

February 14, 1995

Ms. Heather Eichelbaum
Ms. Patricia D'Ateno
Presidents' Council District 25
[redacted]

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. Eichelbaum and Ms. D'Ateno:

I have received your letter of January 9, which reached this office on January 19. In your capacities as Co-Presidents of the District 25 Presidents' Council, you have sought interpretations of the Freedom of Information Law and the Open Meetings Law.

The initial issue pertains to rights of access to "statistical data, budget information, or factual tabulations that are not yet finalized but are draft copies only" and which are discussed at Community School Board meetings.

From my perspective, based on the language of the Freedom of Information Law and its judicial interpretation, the documentation in question must be disclosed in great measure, if not in toto. In this regard, I offer the following remarks.

First, 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."

Based on the foregoing, when information is maintained by an agency in some physical form (i.e., drafts, worksheets, computer disks, etc.), I believe that it would constitute a "record" subject to rights of access. In short, the characterization of documents as "draft" or "not finalized" does not remove them from the scope of rights of access, for they are, nonetheless, "records" that fall within the coverage of 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. In my view, two of the grounds for denial are relevant to an analysis of rights of access.

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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 a case involving "budget worksheets", it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state

agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the State Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, §88(1)(d)]. Currently, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

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

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

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

Based upon the language of the determination quoted above, which was affirmed by the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible, unless a provision other than §87(2)(g) could be asserted as a basis for denial.

Further, another decision highlighted that the contents of materials falling within the scope of §87(2)(g) represent the factors in determining the extent to which inter-agency or intra-

agency materials must be disclosed or may be withheld. For example, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

The remaining provision of possible significance, §87(2)(c), states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations. If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, it would appear that those portions of the records could be withheld.

The remaining area of inquiry involves the Open Meetings Law "as it pertains to the appointment of a person to fill a vacancy on the local community School Board." You wrote that the School Board determined that a discussion "of candidates and subsequent appointment must be made, during an Executive Session, based on the premise that people cannot be discussed publicly by name as to their qualification for such as appointment" and that the Board "agreed that the appointment of a new School Board Member be treated in the same fashion as the appointment for a Principal or for any other supervisory position..."

In this regard, I offer the following comments.

First, if it is indeed the belief of the Board "that people cannot be discussed publicly by name", I disagree. The Open Meetings Law is permissive; while it authorizes a public body to engage in an executive session, it does not require that an executive session be held. In conjunction with the foregoing, a public body cannot enter into an executive session without accomplishing the procedure described in §105(1) of the Open Meetings Law. That provision states in relevant part that:

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

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, a motion to enter into an executive session must be carried by a majority vote of a public body's total membership. If

such a motion does not carry, a public body could choose to discuss the issue in public, even though the matter could justifiably be discussed in executive session.

The only provision that appears to be relevant to the matter, §105(1)(f), permits a public body to conduct an executive session to discuss:

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

Insofar as the Board considers the criteria inherent in the position of board member or the attributes or qualifications of any person who might serve in that position, I do not believe that §105(1)(f) could be asserted. That kind of discussion would not focus on any "particular person" but rather on the functions associated with the position of board member and characteristics that any person who fulfills that role should or perhaps should not possess. However, if and when the discussion does pertain to a particular person, the language of §105(1)(f) may become applicable.

The first clause authorizes an executive session to consider the "medical, financial, credit or employment history of a particular person." There may be instances in which one or more of those subjects may be discussed regarding a candidate. For instance, the physical ability of an individual to hold the position could be an issue, particularly if that person has a history of health problems.

The second clause pertains to "matters leading to the appointment, employment, promotion" etc. "of a particular person". In my view, discussions concerning the choice of a Board member would not involve a matter concerning employment. I do not believe that a Board member could be characterized as an employee. Arguably, however, discussion of the issue might pertain to the "appointment...of a particular person".

In general, members of community school boards are elected by the residents. The only instance in which an election is not held involves the case in which a vacancy occurs. In that event, §2590-c(8)(b) of the Education Law states in part that a vacancy "shall be filled for the unexpired term by the community board after consultation with the presidents' council or other consultative body representing parents' associations and other educational groups within the district." Section 2590-c does not refer specifically to an "appointment" or an "election." If the term "appointment" is to be construed narrowly, the discussion of candidates under consideration would not constitute "a matter

leading to the appointment...of a particular person" that could validly be considered in executive session.

Perhaps more importantly, there is a recent judicial decision that focused directly on the ability of a public body to conduct an executive session to discuss candidates for a vacant elective position on a public body, and I note that it is the only judicial decision that deals with the issue. 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, subject to the qualification discussed with respect to the initial clause of §105(1)(f) [i.e., considerations of one's "medical history"), based on the judicial interpretation of the Open Meetings Law, the Board would not have the ability to discuss the candidates for a vacant elective position in executive session.

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. Those circumstances would not be present in this instance.

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be sent to the Board and others.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Community School Board 25
Arlene Fleishman, President
Ramon C. Cortines, Chancellor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8682
OML-AO-2463

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

February 15, 1995

Mr. Donny A. Sinkov
[redacted]

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. Sinkov:

I have received your letter of January 30 and the materials attached to it. You indicated that your correspondence was prepared on behalf of residents of the Putnam Valley Central School District.

You wrote that:

> "[Y]our school board has negotiated a tuitioning contract for our high school students to attend a neighboring district high school in the Lakeland Central School District. The two district's boards began negotiations at the end of the first year of an existing three year contract.
>
> "On September 22, 1994, at a regular school board meeting, our superintendent announced that an agreement had been reached and signed by the superintendents of both districts and that both boards had unanimously agreed on all points. The board president then explained why the board had decided the way it had. Within minutes, the board voted on the resolution. All negotiations were held in executive session. When questioned why the voters were not made aware of the negotiations, the board's response was that it would have compromised their bargaining position."

It is your view that the Board had no basis for entry into executive session to discuss the "tuitioning contract."

In this regard, I offer the following comments.

First, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be held. 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, the "tuitioning" issue should have been discussed in public. 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.

Second, it appears that the Board "agreed on all points" or reached a consensus during executive session and later ratified those agreements during an open meeting. There is only one decision of which I am aware that deals specifically with the notion of a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education in Westchester County, the issue pertained to access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining

to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

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

In contrast, a "straw vote", or something like it, that is not binding and does not represent members' action that could be construed as final, could in my view be taken in executive session when it represents a means of ascertaining whether additional discussion is warranted or necessary. If a "straw vote" does not represent a final action or final determination of the Board, I do not believe that minutes including the votes of the members would be required to be prepared.

In a related vein, 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."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must include reference to action taken by a public body.

It is noted 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.

You also referred to a vote on a proposition approved by District voters and wrote that "[t]he 'new contract' was the board's and administration's basis for asking the voters for approval of the proposition", and that District officials "advised that there would be dire consequences if the proposition was defeated." Having requested a copy of the new contract under the Freedom of Information Law, you indicated that:

> "...we were given a copy of the tentative agreement between the two superintendents and the 'old' (current) contract. We were also told there was a verbal agreement that one line of the old contract would be eliminated from the new contract, however, it would not

> be put in writing until the agreement was reduced to a written contract. We have only their 'word' that the item will be deleated [sic].
>
> "As of the writing of this letter, over two months, there is still no written contract, and we have been told that the attorney's are 'working on the wording'."

You expressed the view that the "voters have been railroaded" and sought my opinion on the matter. In this regard, my comments must be restricted to matters falling within the scope of the advisory jurisdiction of the Committee. With that in mind, I note that the Freedom of Information Law pertains to existing records. If there is no record, in this case, a "written contract", there is no record to be disclosed, and the Freedom of Information Law would not apply. As soon as a record exists, however, it falls within the coverage of the Freedom of Information Law. When an agreement is reduced to writing and becomes a contract, certainly it would be accessible under the law.

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be sent to District officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Donald McKenzie, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2464

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

February 15, 1995

Mr. Richard C. Wellman
[redacted]

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. Wellman:

I have received your letter, which reached this office on January 19.

According to your letter, at a meeting of the Phelps Town Board, an agenda item involved Ontario Pathways, an organization that apparently failed to obtain the proper permits relating to a right of way that it had purchased. Consequently, the Town initiated litigation, which "is still pending," against that organization. When representatives of Ontario Pathways arrived at the meeting, the Town Board entered into an executive session with them.

It is your view that the Board should not have conducted an executive session with its adversaries. I agree. In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except to the extent that a closed or executive session may be appropriately held. Further, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered behind closed doors.

Second, the provision that deals most closely with the issue 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, so as not to divulge its strategy to its adversary. Moreover, one of the decisions cited above, Concerned Citizens, supra, dealt with an executive session held by a public body with its adversary in litigation. As indicated above, the purpose of §105(1)(d) is to enable a public body to discuss its litigation strategy in private. In that decision, due to the presence of the adversary in litigation at the executive session, it was found that an executive session could not legally have been held. Similarly, in this instance, the presence of the Town's adversaries in litigation in my opinion would have resulted in an improper executive session.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2465

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

February 16, 1995

Ms. Betsy Leibu
[redacted]

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. Leibu:

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

You have questioned the means by which the Cold Spring Harbor School District Board of Education has implemented the Open Meetings Law. Specifically, you wrote that:

> "It has been [your] impression that they must hold open meetings with the time and date clearly posted, that they may not enter into an executive session unless it is an agenda item, with a majority vote of its total membership, and that the reason must adhere to the eight items stated in the Open Meetings Law."

Among the materials enclosed are copies of your local newspaper and the District calendar, both of which indicate that Board meetings are scheduled to begin at 8 p.m. However, the agendas and notices that are posted state that the meetings start at 6:30 "with the Board going into executive session if necessary."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that pertains to agendas, and I know of no law that requires that agendas be prepared or followed, or that executive sessions can only be held to consider an item referenced on an agenda. In short, I believe that an agenda is typically a guide rather than a binding legal instrument.

Second, 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. 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. 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.

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].

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. However, 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, 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 appropriate.

Lastly, §104 of the Open Meetings Law requires that a public body provide notice of the time and place of every meeting to the news media and by means of posting. Consequently, if a meeting is scheduled to begin at 6:30, I believe that the Board's notice should so indicate, perhaps with the caveat that the Board expects to enter into executive session for a certain time period.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Francis Roberts, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2466

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

February 16, 1995

Hon. June L. Smith
Town Clerk
Town of Mendon
16 West Main Street
Honeoye Falls, NY 14472-1199

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. Smith:

As you are aware, I have received your letter of January 20. You asked that I review a resolution before the Mendon Town Board concerning minutes of its meetings. In brief, the resolution would, if adopted, determine the form, content and availability of minutes that you prepare as Town Clerk.

In my opinion, as clerk, you have the responsibility and the authority to prepare minutes and to ensure their accuracy. While a town board may have a variety of powers, I do not believe that the alteration of minutes or specific direction regarding their content or format would be among them. From my perspective, two statutes are relevant to the matter.

Perhaps most importantly, §30(1) of the Town Law states in relevant part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate records of the proceedings of each meeting..." Second, the Open Meetings Law in §106 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, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Certainly if a clerk wants to include more information than is required by law, he or she may do so. Nevertheless, I do not believe that a town board could require that a town clerk prepare verbatim minutes.

In good faith, I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181). Despite that opinion, it is unclear from my perspective whether a board has the authority to compel a clerk to include information in minutes beyond the requirements of the Open Meetings Law.

Although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. In another opinion of the State Comptroller, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609). While it may be "advisable" if not proper for a board to review minutes, due to the clear authority conferred upon town clerks under §30 of the Town Law, I do not believe that a town board can require that minutes be approved prior to disclosure.

Similarly, I do not believe that a board could require that disclosure of minutes be delayed in a manner inconsistent wit the Open Meetings Law. In the event that minutes have not been reviewed or 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 be marked "unapproved", "draft" or "preliminary", for example. By so doing within the

requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

In sum, the responsibility to prepare minutes is conferred upon town clerks by §30 of the Town Law. In my opinion, neither a town supervisor, a member of the board, nor the board itself may require that minutes be prepared verbatim, altered, maintained in particular format, or disclosed only after they have been approved.

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 8695
OML-AO 2467

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

February 21, 1995

Mr. Joseph C. Peterson
[redacted]

Dear Mr. Peterson:

I have received your letter of February 11, which reached this office on February 17. You have requested records pertaining to the Open Meetings Law, as well as a particular executive session held by the Town Board of the Town of Phelps. In addition, you asked "what can be done" if a violation of the Open Meetings Law occurs and if a request made under the Freedom of Information Law is not answered in a timely manner or is ignored.

In this regard, enclosed are copies of the Open Meetings Law and the latest report of the Committee on Open Government to the Governor and the Legislature. The supplement to the report includes an index to written advisory opinions concerning the Open Meetings Law prepared by this office, which total more than 2,400, as well as summaries of every judicial decision pertaining to the Open Meetings Law of which we are aware. Copies of opinions can be obtained by identifying them by key phrase or number. Since the index is cumulative, higher numbers represent more recent opinions. The executive session to which you referred was the subject of an advisory opinion rendered recently, and a copy is enclosed. I note that a copy was also sent to the Town Board.

Since that opinion deals with the propriety of the executive session, I do not believe that it is necessary to reiterate commentary expressed there. However, you raised a question concerning what can be done. First, although opinions rendered by this office are purely advisory, it is my hope that they are educational and persuasive. While they cannot change what occurred in the past, I hope that they have a positive impact on future compliance. Second, §107(1) of the Open Meetings Law states in part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an

> action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

I point out that the Committee believes that the enforcement provisions of the Open Meetings Law are inadequate, and recommendations to strengthen the Law appear in the enclosed annual report.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8693
OML-AO 2468

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

February 22, 1995

Ms. Norma Chase
[redacted]

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. Chase:

As you are aware, your letter of January 10 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 Freedom of Information and Open Meetings Laws. Therefore, if, in the future, you have questions or complaints relating to those statutes, you may contact this office.

You referred initially to your unsuccessful efforts to inspect "building code permits that have been issued since the Local Law was enacted in 1990" by the Town of Tuscarora. In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, building permits must be disclosed, for none of the grounds for denial would apply.

With regard to procedure, the Freedom of Information Law requires that the governing body of a municipality, the Town Board in this instance, adopt rules and regulations to implement the Freedom of Information Law. One aspect of its rules and regulations must include the designation of one or more persons as "records access officer." The records access officer has the duty of coordinating the Town's responses to requests for records. In towns, the town clerk is most often designated as records access officer, for the clerk, by law, is the custodian of all town records and serves as the town's records management officer.

I point out 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)].

You also wrote that "there is usually 1 or more extra meetings each month without any special meetings notice published in any local newspapers." In order to avoid confusion, I point out that the phrase "special meeting" is found in §62(2) of the Town Law. That provision states in relevant part that:

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

The provision quoted above pertains to notice given to members of a town board, and the requirements of that provision are separate from those contained in the Open Meetings Law.

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."

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

Lastly, you questioned whether the Town Board must establish an ethics board. In this regard, while §808 of the General Municipal Law gives a town board the authority to establish an ethics board, the Town Board is not required to do so.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2469

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

February 22, 1995

Ms. Patricia Powers
[redacted]

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. Powers:

I have received your letter of January 22. You indicated that you are a "non-elected individual" recently appointed as Deputy Supervisor in the Town of Clarence.

Your initial area of inquiry involves the effect and interpretation of §105(2) of the Open Meetings Law. That provision states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body". As I view the foregoing, only the members of a public body have the right to attend an executive session. Any others, including yourself, may be "authorized" to attend. In your position, I believe that your ability to attend an executive session would be in the nature of a privilege rather than a right.

In my opinion, a town board could, as a matter of policy or by means of resolution, for example, authorize you, as Deputy Supervisor, to attend executive sessions. In that event, a separate authorization would be unnecessary for each executive session. If, however, the Board determines to choose the executive sessions that you may attend as they arise, it would appear that a vote should be taken in each such instance in accordance with §63 of the Town Law. That provision states in relevant part that:

> "The vote upon every question shall be taken by ayes and noes, and the names of the members present and their vote shall be entered in the minutes. Every act, motion or resolution shall require for its adoption the affirmative vote of all the members of the town board. The board may determine the rules of its procedure..."

Whether action is taken separately in each instance of an executive session or by means of the adoption of a policy or resolution, I believe that any such action must be recorded in minutes prepared pursuant to §106 of the Open Meetings Law. Subdivision (1) of §106 states that:

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

The other issue to which you referred involves a vacancy in the office of town supervisor. That question is largely unrelated to the Open Meetings Law and falls beyond the jurisdiction or expertise of this office. While it is suggested that you discuss the matter with your town attorney or a representative of the Association of Towns, I point out that §64(5) of the Town Law states that:

> "Whenever a vacancy shall occur or exist in any town office, the town board or a majority of the members thereof, may appoint a qualified person to fill the vacancy. If the appointment be made to fill a vacancy in an appointive office, the person so appointed shall hold office for the remainder of the unexpired term. If the appointment be made to fill a vacancy in an elective office, the person so appointed shall hold office until the commencement of the calendar year next succeeding the first annual election at which the vacancy may be filled. A person, otherwise qualified, who is a member of the town board at the time the vacancy occurs may be appointed to fill the vacancy provided that he shall have resigned prior to such appointment."

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 8695
OML-AO 2470

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

February 22, 1995

Ms. Barbara Green
[redacted]

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. Green:

I have received your letter dated January 19, which was faxed to this office on January 25. You have raised a series of issues relating to meetings of the Board of Trustees of the Village of East Rockaway as well as requests for records under the Freedom of Information Law.

While neither the Freedom of Information Law nor the Open Meetings Law deals directly with what you characterized as "political etiquette", I offer the following comments in relation to the issues raised in your correspondence.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except to the extent that a closed or executive session may be appropriately held. Further, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered behind closed doors.

Section §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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.

One of the issues involves the propriety of an executive session held to discuss "pending litigation" following the receipt of a letter from an attorney in which the Village was asked to drop its opposition to the issuance of a marina permit. The provision that deals most closely with the issue 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 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.

A different reference in the materials pertains to executive sessions held to discuss "personnel matters." 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.

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. That advice was recently confirmed in a decision rendered by the Appellate Division, Third Department, in which one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue." Specifically, it was held that:

> "...the public body must identify the subject matter to be discussed (see, Public Officers Law § 105 [1], and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsbrugh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear

> mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of 'a personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person' (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to 'a personnel issue' is the functional equivalent of identifying 'a particular person'" (Gordon v. Village of Monticello, ___ AD 2d ___, December 29, 1994).

Another proposed executive session concerned "purchasing the boat basin." It would appear that the only potentially relevant ground for entry into executive session would have been §105(1)(h). That provision permits a public body to conduct an executive session to discuss:

> "the proposed acquisition, sale or release 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 emphasized that not all issues involving real property transactions may be discussed in private. Only "when publicity would substantially affect the value" of the real property could §105(1)(h) be properly asserted. Typically, if the location of a parcel and likelihood of a transaction are known to the public, §105(1)(h) will not apply; in those circumstances, publicity usually has a minimal or insignificant impact on the value of the real property.

Second, you referred to a request for minutes and a response that no minutes were prepared. Here I direct your attention to §106) of the Open Meetings Law, which provides minimum requirements concerning the contents of minutes. Specifically, 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."

Since minutes must include reference to all "motions", I agree with your contention that a motion to enter into executive session must be memorialized in minutes of a meeting. With regard to minutes of executive sessions, if a public body merely engages in discussion but takes no action, there is no requirement that minutes of an executive session be prepared. If action is taken in an executive session, minutes must be prepare and made available in accordance with §106(2) and (3).

Third, in a manner analogous to the Open Meetings Law, 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 policy or practice that restricts the disclosure of records to those situations in which prior consent is given (i.e., as in this case, by the owner of the real property) is, based upon case law, inconsistent with the Freedom of Information Law. In a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference

concerning the agency's disclosure of the incident to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold the record based upon the "preference" of the person who reported the offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

> "There is no question that the 'releasable copies' of reports of offenses prepared and maintained by the Genesee County Sheriff's office on the forms currently in use are governmental records under the provisions of the Freedom of Information Law (Public Officers Law art 6) subject, however, to the provisions establishing exemptions (see, Public Officers Law section 87[2]). We reject the contrary contention of respondents and declare that disclosure of a 'releasable copy' of an offense report may not be denied, as a matter of law, pursuant to Public Officers Law section 87(2)(b) as constituting an 'unwarranted invasion of personal privacy' solely because the person reporting the offense initials a box on the form indicating his preference that 'the incident not be released to the media, except for police investigative purposes or following arrest'."

Similarly, although the issue did not involve law enforcement, the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557, 567 (1984)]. In short, insofar as records fall within the grounds for denial appearing in the Law, they may be withheld; otherwise, they must be disclosed, irrespective of the absence of consent by a property owner, for example.

Lastly, since you referred to inconsistency in the treatment of requests for records, I note that §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.

Potentially relevant to the matter 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 Village 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.

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 2471

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

February 22, 1995

Mr. Robert D. Fierro
The NEW YORK THOROUGHBRED Report
Box 570361
Whitestone, NY 11357-0361

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. Fierro:

I have received your letter of January 27. In your capacity as editor and publisher of The NEW YORK THOROUGHBRED Report, you asked whether you may use an audio tape recorder or need permission to use such a device at meetings of the New York State Thoroughbred Breeding and Development Fund Corporation.

In this regard, I offer the following comments.

First, because the Corporation is a public benefit corporation, its governing body is, in my view, clearly a public body required to comply with the Open Meetings Law.

Second, I believe that any person may use a tape recorder at an open meeting and that a member of the news media may report with respect to what he or she hears or observes. While I know of no requirement that permission to use a tape recorder must be obtained, as a matter of courtesy, it would be appropriate in my opinion to inform a public body that a meeting will be tape recorded.

Until 1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies, such as village boards of trustees. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings. There are no judicial determinations of which I am aware that pertain to the use of video recorders or similar equipment at meetings.

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

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

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgment annulling the resolution of the respondent board of education" (id. at 925).

In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

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

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

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

In an effort to enhance compliance with and understanding of the law on the issue, a copy of this opinion will be forwarded to the Board of the Corporation.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Directors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2472

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

February 23, 1995

Ms. Jo Ann Katzban
Associate Director
Permanent Citizens Advisory
Committee to the MTA
347 Madison Avenue
New York, NY 10017

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

Dear Ms. Katzban:

I have received your letter of January 23 in which you requested an advisory opinion "on the ability of committees or groups of MTA board members to meet in private for the purpose of briefings on topics concerning the business of the agency." You added that it "is apparently the belief of various MTA board members and committee chairpersons that if a quorum of the *full* MTA board is not present, the various committees or subcommittees are free to conduct private meetings..." (emphasis yours).

In this regard, when a committee consists solely of members of a public body, such as the MTA 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

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO 2473

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

March 2, 1995

Mr. Rudolph Meola
Town Board Member
Town of Hague - Town Hall
Hague, NY 12836

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. Meola:

I have received your letter of January 26 in which you requested advice concerning the Open Meetings Law.

In your capacity as a member of the Hague Town Board, you wrote that:

> "It is [your] understanding that the Open Meeting Law requires that all meetings of a public body be open to the public. 'Executive Sessions', 'workshops' can only be held after an open meeting is convened, a motion is made to go to executive session, the area to be discussed is identified and the motion is adopted by the majority vote in the open meeting.
>
> "It is the practice of the Town Supervisor to call 'executive sessions' at will with no public notice given, nor open session held first. Also meetings have been held to discuss public business where only certain Town Board Members are asked to attend while others are excluded."

Attached to your correspondence is an example of a "workshop", a letter from the Supervisor confirming that a workshop would be held with an attorney. The Supervisor wrote that it would be "a confidential meeting between client and lawyer regarding pending litigation".

Based on the foregoing, I offer the following comments.

First, in my view, there is no legal distinction between a "workshop and a meeting". 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).

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 that must be preceded by notice given in accordance with §104 of the Law.

Second, in order to constitute a valid meeting, I believe that all of the members of a public body must be given reasonable notice of a meeting. Relevant in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. The cited provision states that:

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

Based upon the language quoted above, a public body, such as a town board, cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. Therefore, if, for example, three of five members of a public body meet without informing the other two, even though the three represent a majority, I do not believe that they could vote or act as or on behalf of the body as a whole; unless all of the members of the body are given reasonable notice of a meeting, the body in my opinion is incapable of performing or exercising its power, authority or duty.

Third, there are two vehicles under which a public body may discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Moreover, 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 separate from a meeting or to discuss the subject of its choice.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

Relevant under the circumstances is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

Insofar as the Board sought legal advice from its attorney and the attorney was rendering legal advice, I believe that the attorney-client privilege could validly have been asserted and that communications made within the scope of the privilege would have been outside the coverage of the Open Meetings Law. Therefore, a private discussion might validly have been held based on the proper assertion of the attorney-client privilege pursuant to §108.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2474

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

March 6, 1995

Mr. David C. Woodward
[redacted]

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

Dear Mr. Woodward:

I have received your letter of February 2. In your capacity as a member of the Peekskill City School District Board of Education, you asked whether "proper public notice" was given concerning a certain meeting.

According to your letter, during an executive session on January 3, the Superintendent asked Board members if they could attend at meeting on January 5 at 5 p.m. "to adopt a new teacher contract, if the teachers approved on that date". An "official notice" was delivered to your home at approximately 11 a.m., apparently on January 5. You wrote that the Superintendent indicated that "the press and radio had been notified, they were sent a release, but they were not present". You also indicated that "[t]he public notice, on the official outdoor bulletin board did not carry out the date or hour of this special meeting" and that the "bulletin board still carried the date of the January 3rd meeting".

In this regard, the Committee on Open Government is authorized to offer opinions concerning the Open Meetings Law. While one of the issues may involve the adequacy of notice given to you as a member of the Board, that issue arises under the Education Law, which is beyond the jurisdiction of this office. The ensuing comments will be limited to the relevance of the Open Meetings Law on the situation that you described.

As you are aware, 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.

Although you wrote that the Superintendent "sent" notice to the news media, you did not specify how that was accomplished. If notice was sent by fax machine or delivered a reasonable time prior to the meeting, notice to the news media might satisfactorily have been accomplished. If notice was "sent" in some other way that did not provide the time and place of the meeting to the news media at a reasonable time prior to the meeting, that aspect of the Open Meetings Law might not have been adequately carried out. Further, the Open Meetings Law imposes a dual notice requirement. Notice must be given not only to the news media; it must be "conspicuously posted in one or more designated public locations" prior to every meeting.

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, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

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

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive

> relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

However, the same provision states further that:

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

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

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:pb
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8712
OML-AO-2475

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

March 7, 1995

Ms. Theresa C. Lonergan
[redacted]

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. Lonergan:

I have received your letter of February 5 in which you raised a series of questions.

By way of background, you wrote that a governing body of a municipality determined to sell "a publicly owned building they occupied." Thereafter, an announcement was made at an open meeting that the selling price would be $55,000. During the course of the ensuing year, the proposed developer of the property was indicted and after that, two new firms "announced they owned the company previously operated by the indicted developer." One of the developers indicated that he was assigned the option to purchase the property by the indicted developer's company. The governing body indicated that it received a Dun and Bradstreet report regarding the firm.

Having requested a copy of the Dun and Bradstreet report, the Deputy Supervisor denied access and you questioned the right of that person to engage in a decision to withhold such a record. You also asked whether the Dun and Bradstreet report "become[s] public once the developer enters the public arena with the intent to purchase public property." Finally, you asked whether negotiations involving the purchase and option prices should have been carried out in public.

In this regard, I offer the following comments.

First, §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 municipality 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 governing body has the obligation 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

(iii) 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, I believe that the records access officer has the duty of coordinating an agency's response to a request. Therefore, either the records access officer should make the initial determination to grant or deny access to records or ensure that agency personnel act appropriately in responding to a request.

I point out, too, that a denial of a request may be appealed pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

"any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government state that:

"(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.

> (2) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In sum, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

Second, from my perspective, a Dun and Bradstreet report would be accessible under the Freedom of Information Law as soon as it comes in to an agency's possession. As you are likely aware, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" broadly to include:

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

Pursuant to the definition, once the report in question is maintained by government, irrespective of its origin or use, it is a "record" subject to rights of access.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I do not believe that there would be any basis for withholding a Dun and Bradstreet report. In short, any person can order or purchase such a report.

The remaining issue involves the Open Meetings Law. Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public unless there is a basis for entry into an executive session. Section 105(1) of the Open Meetings Law specifies and limits the subjects that may properly be considered in executive session. In the context of the situation that you described, two of the grounds for entry into executive session may have been relevant. The extent to which they could properly have been asserted would have been dependent on the nature of the discussions by a public body and the effects of public disclosure.

Specifically, §105(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

Insofar as the public body in question discussed the financial or credit history of a particular person or corporation, I believe that §105(1)(f) would have applied.

The other provision of possible significance, §105(1)(h), permits a public body to conduct an executive session to discuss:

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

It is emphasized that not every discussion or aspect of a discussion pertaining to real property may be considered in executive session; only to the extent that "publicity would substantially affect the value" of the property could §105(1)(h) be properly asserted.

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 2476

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

March 8, 1995

Mr. Richard Shiels
[redacted]

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. Shiels:

I have received your letter of February 7. You wrote that the "Baldwin Senior High School site-based team operates with confidential subcommittees." You have asked whether subcommittees of school site-based teams are subject to the Open Meetings Law.

In this regard, 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". As such, an initial issue is whether "school-based" or "site-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.

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.

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.

When a subcommittee consists solely of members of a public body, such as a site-based committee, I believe that the Open Meetings Law is clearly applicable. In terms of legislative history, 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". Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" of a public body.

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

Further, when a committee or subcommittee 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 the primary body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

The provisions of the Open Meetings Law are relatively straightforward, and in my opinion compliance with that statute by school-based committees and subcommittees should not be difficult to accomplish. 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.

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.

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.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2477

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

March 9, 1995

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 information presented in your correspondence.

Dear Mr. Reninger:

I have received your transmittal of February 23 in which you referred to my response to your inquiry of January 16. You wrote that my reply does not seem to address certain issues, and you asked for further clarification concerning "the proper way to correct minutes."

You referred to a situation in which minutes of a meeting were amended by a committee by means of a motion "to remove five sentences from the minutes." Nevertheless, the minutes consist of more than twenty pages and you questioned how the public can know which sentences were deleted, particularly since the motion does "not state anywhere which specific five sentences are being deleted by the motion."

In this regard, I know of no judicial decision that deals directly with the manner in which minutes must be amended or the accuracy of minutes. As suggested in the earlier opinion, it is implicit in my view that minutes must be accurate and contain at least as much detail as is required by the Open Meetings Law or other applicable statute.

I believe, however, that a mere reference to the removal of five sentences, without indication of their substance or location, would be inadequate. The only decision of which I am aware that may be pertinent to the matter is Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993]. That case involved a series of complaints made by the petitioner that were reviewed by the School Board president, and the minutes of the Board meeting stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not

qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your question, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner which five sentences were removed in order that the public can know of the precise nature of the committee's action.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Fire District Advisory Committee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMG-AO 2478

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

March 14, 1995

Mr. Dana J. Peryea
[redacted]

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. Peryea:

I have received your correspondence and related materials concerning an executive session held by the Adirondack Park Agency's governing body.

You enclosed a newspaper article and highlighted a passage indicating that an executive session would be held to discuss "staffing matters in the wake of Gov. George Pataki's recent budget proposal to cut agency administrative positions". Your request to attend the executive session was rejected, even though you referred to an advisory opinion prepared by the office and a passage appearing in "Your Right to Know". That passage indicates that the Open Meetings Law "states that an executive session can be attended by members of the public body and any other persons authorized by the public body".

In this regard, I offer the following comments.

First, in an effort to clarify the passage that you cited, it paraphrases §105(2) of the Open Meetings Law, which provides that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body". As I interpret that provision, only the members of a public body have the right to attend an executive session. A public body is not required to permit others to attend an executive session, although it may choose to do so. When public bodies authorize others to attend executive sessions, generally those others are members of staff, legal counsel, or perhaps persons who have particular knowledge or expertise that contributes to public bodies' discussions. In short, I do not believe that a public body must grant your request to attend its executive session.

Second, with respect to the propriety of the executive session in question, since you have a copy of an opinion dealing with similar issues, it is unnecessary to fully restate the points made in that opinion. However, to briefly reiterate, only to the extent that a discussion relating to a budget or layoffs focuses on a "particular person" pursuant to §105(1)(f) of the Open Meetings Law would an executive session be proper. That provision permits a public body to conduct an executive session to discuss:

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

Therefore, insofar as a discussion of staff reductions due to budgetary concerns involves matters of policy, rather than the particular employees in conjunction with the language of §105(1)(f), I believe that the discussion must occur in public.

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-2479

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

March 21, 1995

Hon. Joan A. Maybury
Councilwoman
Town of Mt. Pleasant
One Town Hall Plaza
Valhalla, NY 10595

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 Councilwoman Maybury:

I have received your letter of February 20. In your capacity as a member of the Mt. Pleasant Town Board, you raised issues concerning action taken by the Board of Trustees of the Mt. Pleasant Public Library.

According to your letter, the Library director's salary was recently increased, and you asked the following questions:

> "Must the library board vote to increase the director's salary at a public meeting and must such a vote be reflected in the minutes of such meeting? Conversely, can a director's salary be increased in executive session and such action not be reflected in the minutes of such meeting?"

In good faith, I point out that a copy of a letter addressed to you by the Chairman of the Board was sent to me. The Chairman wrote in relevant part that:

> "The actual decision to change these and other salaries was made by the board during budget discussions which took place in August and September 1994 prior to the preparation of the library budget. These changes were incorporated into the Salaries line for 1995. The budget was reviewed in public session by the Library Board at its regular meeting on September 8, 1994. At that same meeting a

> resolution to approve the budget was passed unanimously."

From my perspective, accurate responses to your questions must be based on attendant facts. In my view, if action to increase an employee's salary is taken independently of any other action, the Open Meetings Law would require that minutes be prepared reflective of the action taken and the vote of each member (see Open Meetings Law, §106). Further, if that action represents an appropriation, i.e., a decision to expend monies not already budgeted, the action must in my view be taken in public to comply with the Open Meetings Law [see §105(1)].

However, if increasing the salary of the director represented one among a series of agreements reached in the process of preparing a budget, I do not believe that minutes would have to include reference to each agreement reached throughout that process.

The extent to which the Board of Trustees developed and discussed the budget in public is not clear on the basis of the correspondence. 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.

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).

Insofar as the director's performance was discussed, I believe that an executive session could properly have been held. If,

however, the discussion involved an increase for the director and others "across the board", without regard to performance, the matter would not have focused on any "particular person" and §105(1)(f) would not have applied. Similarly, if, for example, the discussion involved the salary that should be accorded to the position, irrespective of who might hold it (i.e., by comparing salaries of directors at other libraries), I do not believe that any ground for executive session could have been asserted.

In short, without more detailed information regarding the discussions concerning the matter and the extent to which they were conducted in public or in closed session, I cannot offer an unequivocal response. Nevertheless, I hope that my comments serve to clarify your understanding of the Open Meetings Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Pauline S. Eschweiler, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2480

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

March 27, 1995

Mr. John C. Crary
Deputy General Counsel
NYS Dept. of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

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. Crary:

I have received your letter in which you requested an advisory opinion under the Open Meetings Law.

The issue involves "the legality of conducting decisional meetings of the Commission in the City of Albany under circumstances in which four members of the Commission are present in Albany, but one member of the Commission desires to *participate* in the discussion and vote on matters considered at the meeting by means of a two-way telephone link from New York City" (emphasis yours). You added that the site from which the Commission seeks to participate is open to the public and that any discussion or vote could be heard by means of "a speakerphone hook-up by all persons present at both locations." You also specified that the Public Service Commission consists of five members, that a quorum is three, and that it is a public body subject to the Open Meetings Law.

In this regard, from my perspective, a gathering of the four Commissioners for the purpose of discussing public business and perhaps taking action at one location would clearly constitute a meeting that falls within the coverage of the Open Meetings Law. However, I do not believe that a Commissioner who seeks to participate by phone in the manner that you described could validly vote or be counted for purposes of a quorum.

As you are aware, §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 assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of the Commission. While nothing in the Open Meetings Law refers to the capacity of a member to participate or vote at a remote location by telephone, it has consistently been advised that a member of a public body cannot cast a vote unless he or she is physically present at a meeting of the body.

The Open Meetings Law does not preclude members of a public body from conferring individually or by telephone. However, a series of telephone calls among the members which results in a decision or a meeting held by means of a telephone conference would in my opinion be inconsistent with law. Similarly, I believe that the absence of a member from a meeting, a physical convening of a majority of a public body's membership, precludes that person from voting. In short, the absent person is not part of the "convening."

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 at meetings during which a majority of the total membership has convened.

In conjunction with the situation that you described, I believe that the Commission could choose to enable the absent member to participate by phone. Despite his participation, however, in view of quorum requirements and the definitions of "meeting" and "convene", he could not in my opinion vote or otherwise be counted as a member for the purpose of §41 of the General Construction Law or the Open Meetings Law. Therefore, if, for example, the vote of those present at the meeting in Albany is 2 to 2, the Commissioner who may be participating by phone at a remote location could not, in my opinion, validly cast a vote to break the tie or in any instance in which the Commission votes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8756
OML-AO-2481

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

March 29, 1995

Ms. Bonnie Gerace
Cheektowaga Times
[redacted]

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. Gerace:

I have received your letter of February 23, which reached this office on March 2. Your letter and the materials attached to it focus on the implementation of the Open Meetings Law by the Board of Education of the Cheektowaga-Sloan Union Free School District. It is your view that the Board conducts executive sessions with inordinate frequency and perhaps unnecessary length.

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.

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, 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.

Second, and perhaps most importantly, a public body cannot enter into executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may be considered in executive session.

It appears that executive sessions are held most frequently to discuss personnel matters. Although it is used often, I point out that 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 instance, when discussions involve positions, i.e., their creation or elimination, such issues in my opinion could not validly be considered in executive session. A discussion of a job description relates to a position and the duties or functions inherent in that position; it would not in my view involve any particular person. Similarly, a discussion pertaining to the creation of a position involves a matter of policy; it would not deal with any specific individual, but rather with the merits of establishing a new job title.

Moreover, 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 note that the minutes attached to your letter indicate that motions are made to enter into executive session. However, there is no description of the basis for entry into executive session. As indicated earlier, a motion to enter into executive session must indicate the subject or subjects to be considered. Additionally, I believe that the minutes of a meeting must include that kind of detail. Section 106(1) of the Open Meetings Law states that:

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

Lastly, following your request for "packets" prepared prior to a meeting, you were told that you could not have them "until after the meeting as some of these 'well-informed' board members sometimes don't get the opportunity to read the information until 2 hours before the meeting." In my view, whether Board members have the opportunity or desire to review the packet is largely irrelevant. I note that the Freedom of Information Law pertains to all agency records and that §86(4) of that 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."

As such, the kinds of communications to which you referred, even if they are drafts or worksheets, for example, would constitute records.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the contents of the records in question serve as the factors relevant to an analysis of the extent to which the records may be withheld or must be disclosed. In my view, several of the grounds for denial may be relevant to such an analysis.

Records prepared by District staff and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

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

It is emphasized that the Court of Appeals, the State's highest court has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

> tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as indicated earlier, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of teachers or other staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within an agenda packet might in some instances fall within that exception.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is the Family Educational Rights and Privacy Act (20 U.S.C. §1232g). In brief, that statute generally forbids a school district from disclosing personally identifiable information concerning students, unless the parents of students consent to disclosure.

In short, while a blanket denial of an agenda packet may be inconsistent with the Freedom of Information Law, there would likely be one or more grounds for denial that could appropriately be cited withhold portions of those records.

I point out that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Consequently, even if it is determined that a record may be withheld under §87(2)(g), for example, an agency would have the authority to disclose the record.

It is also 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. For instance, if an administrator transmits a memorandum to the Board suggesting a change in the curriculum, that record could be withheld. It would consist of intra-agency material reflective of an opinion or recommendation. Nevertheless, when the Board discusses the recommendation at a meeting, there would be no basis for conducting an executive session. Consequently, there may be no reason for withholding the record even though the Freedom of Information Law would so permit. Further, in a decision in which the issue was whether discussions occurring during an executive session by a school board could be considered 'privileged', it was held that 'there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

In an effort to enhance compliance with and understanding of the matter, a copy of this opinion will be sent to the Board and the Superintendent.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8764
OML-AO-2482

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

April 4, 1995

Ms. Rosalie Johnson
[redacted]

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

Dear Ms. Johnson:

I have received your letter of March 3 and the materials attached to it. You have raised a series of questions relating to requests for records directed to the Ichabod Crane Central School District. The requests focus on an agreement with Jerome Callahan and the District which ended the "active performance of his duties in December of 1994 and granted him a sabbatical leave through June 30, 1996.

The requests and the District's response are described in a letter to you by the District's records access officer in which she wrote that:

> "One request asked for an opportunity to review the 'most recent contract negotiated with Jerome Callahan' and 'all additional terms and conditions agreed to as part of the negotiated agreement, but which were not included in the actual contract.'
>
> "The modified employment agreement is on file with the District and will be made available for your review. Other documents not contained in the District's file are non-final intra-agency materials protected from disclosure by Public Officers Law §87(2)(g). Since such materials are private and confidential, your request should have been accompanied, in the first instance, by a release from Mr. Callahan. This response assumes, of course, that none of the documents you are seeking would not be protected by the attorney-client or other privileges.

> "You also requested an opportunity to review various bills and the audit report for the 1993-94 fiscal year. Items 2, 3 and 4 of your request will be made available to you for your review. However, in accordance with Public Officers Law §89(2), certain names may be deleted from the records to protect personal privacy. As to your request for bills received from Roemer and Featherstonhaugh, P.C., they will be made available for review but will have deleted names and also all references that reflect items within the attorney-client, attorney work product, or materials prepared for litigation privileges."

I will not reiterate the questions that you asked or necessarily respond to them in order. However, in the following comments, an attempt will be made to deal with them.

First, in my opinion, the physical possession by the District of the records sought, or the absence thereof, is not necessarily determinative of rights of access. The Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

Based upon the foregoing, the definition of "record" includes not only documents that are physically maintained by an agency; it refers to documents are that are "kept, held, filed, produced or reproduced by, with or for an agency." While the District may not have physical possession of some of the records sought, if they are maintained for the District, i.e., by a law firm, I believe that they are District records subject to rights conferred by the Freedom of Information Law.

Second, since the records access officer referred to materials as "private and confidential", I point out that 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 "private" or

"confidential", 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 enable an agency to withhold a record.

Third, the contents of records serve as the factors relevant to an analysis of the extent to which they may be withheld or must be disclosed. 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.

Relevant to the matter is §87(2)(g) of the Freedom of Information Law. Although that provision serves as a basis for denial of access, due to its structure, it 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 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.

It is emphasized that the Court of Appeals, the State's highest court has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as indicated earlier, inter-agency or intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Further, it has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

The records access officer's response refers to the need to obtain a "release" from Mr. Callahan. I am unaware of the records to which she has alluded. However, there are many records pertaining to public employees that are available under the Freedom of Information Law, notwithstanding the absence of consent to disclose by the subject of the records.

In my view, an agreement, a contract or similar record, irrespective of its characterization, 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 to records identifiable to public employees is §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 short, I believe that an agreement between a superintendent and a school district, 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 and the duties of the employer.

With regard to the billing statement from which various deletions were made, I point out that, in general, bills, vouchers, contracts, receipts and similar records reflective of payments made or expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable in most instances.

With specific respect to payments to attorneys, while the communications between an attorney and client are often privileged, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. If, however, portions of time sheets, bills or related records contain information that is confidential under the attorney-client privilege, those portions could in my view be withheld under §87(2)(a) of the Freedom of Information Law, which, again, permits an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute" (see Civil Practice Law and Rules, §4503). Therefore, some identifying details or descriptions of services rendered found in the records sought might justifiably be withheld.

There may be other grounds for denial that would apply with regard to attorneys' bills or similar records pertaining to legal

work performed for a school district. For instance, insofar as those kinds of records identify or could identify particular students, I believe that they must be withheld. Another statute that exempts records from disclosure is the Family Education Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality.

References to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law. Similarly, references to employees involved in disciplinary proceedings when such proceedings have not resulted in any final determination reflective of misconduct could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Herald Company v. School District of the City of Syracuse, 430 NY 2d 460 (1980)]. In addition, §87(2)(c) enables agencies to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." That provision may also be pertinent in determining access.

Whether the provisions or situations described above would be relevant with respect to the particular records at issue is unknown to me. In a decision dealing with payments to attorneys, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the case involved an applicant ("petitioner") who sought billing statements for legal services provided to the Board ("respondents") by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", petitioner contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally

> does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)...Therefore, Petitioner's request for disclosure of the fee, type of matter and names of parties to pending litigation on each billing statement must be granted."

In my view, disclosure of information analogous to that described in Knapp would be required.

In the context of your specific request, I do not believe that a bill or a description of services rendered could be characterized as attorney work product or material prepared for litigation. Further, although some of the deletions may have been appropriate, in other instances, the items likely should have been disclosed. Again, a reference to a student might properly be withheld. However, a reference to Mr. Callahan is not, in my opinion, secret or confidential. A description of strategy in litigation or collective bargaining might properly be withheld; a mere mention of or reference to the litigation or collective bargaining in my view

could not. Similarly, if, for instance, the name of the Superintendent was deleted following the item entitled "Review contract proposals regarding...", I believe that the deletion would have been improper. Disclosure of the fact of such review is distinguishable from a description of the nature of the review or legal advice that might have been rendered.

Lastly, you referred to an item on the billing statement concerning a conference with five Board members and asked whether such a conference should have been held in accordance with the Open Meetings Law.

In this regard, the definition of "meeting" that appears in the 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. 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)].

Based on the foregoing, if indeed a majority of the Board gathered to discuss public business, it would likely have been a meeting that should have been preceded by notice and conducted pursuant to the requirements of the Open Meetings Law. If less than a quorum gathered, the Open Meetings would not have applied.

I point out that there are two methods that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

Potentially relevant in relation to your question is §108(3), which exempts from the Open Meetings Law:

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

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

Insofar as the Board sought legal advice from its attorney and the attorney was rendering legal advice, I believe that the attorney-client privilege could validly have been asserted and that communications made within the scope of the privilege would have been outside the coverage of the Open Meetings Law. Therefore, if the sole purpose of the gathering was to seek the legal advice of an attorney, I do not believe that the Open Meetings Law would have applied, whether or not a majority of the Board was present.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Tamara N. Proniske, Records Access Officer
Board of Education

State of New York
Department of State
Committee on Open Government

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
http://www.dos.ny.gov/coog/

April 5, 1995

OML-AO-2483

ohlgemuth
[redacted]

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. Wohlgemuth:

I have received your letter of February 27, which reached this office on March 7. As in the case of previous correspondence, your inquiry deals with the status of the Great Neck Library Board of Trustees under the Open Meetings Law.

Most recently, the Library Director informed you that, according to the Library's counsel, the Board of Trustees is not a public body subject to the Open Meetings Law. I addressed that and other issues in a letter to you of December 29, 1993, and most points offered in that opinion need not be reiterated. With respect to the Library Director's statement, I note that I am unaware of the specific nature of the Great Neck Public Library, i.e., whether it is a school district library, a municipal library, a not-for-profit corporation, etc. Nevertheless, the law is clear.

As indicated in the earlier opinion, §260 of the Education Law states that:

"Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of

> any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law. Provided, however, and notwithstanding the provisions of subdivision one of section ninety-nine of the public officers law, public notice of the time and place of a meeting scheduled at least two weeks prior thereto shall be given to the public and news media at least one week prior to such meeting."

Since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of public libraries must be conducted in accordance with that statute.

With regard to the enforcement of the Open Meetings Law, §107(1) of the 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."

In an effort to enhance compliance with the Open Meetings Law and understanding of the matter, copies of this response and the opinion previously rendered will be sent to the Library Director.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth S. Weil, Library Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2484

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

April 7, 1995

John T. Fitzgerald, Chairman
Town of Richfield
Baker's Beach Commission
[redacted]

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. Fitzgerald:

I have received your recent letter in which you sought a "ruling" relating to the Open Meetings Law.

In your capacity as Chairman of the Baker's Beach Commission of the Town of Richfield, you wrote that the Town was awarded a grant by the Office of Parks, Recreation and Historic Preservation in October of 1994 and that the Town Supervisor signed a contract, sent it to the Attorney General, who approved it and returned it to the Town for "final signature" in January. Since that time, the Town Board has discussed the grant in public and in "executive meetings." Most recently, according to your letter, the Board met in executive session and voted 4 to 1 not to accept the grant. You added there was no published notice of the meeting, and you asked whether the vote should have been taken at a public meeting. In addition, at the same meeting a new resolution was passed "governing the duties of the Bakers Beach Commission." You have asked whether that was a "legal procedure."

In this regard, I offer the following comments.

First, it is emphasized at the outset that the term "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" 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, when a majority of a public body, such as a town board, gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Second, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. 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.

As I understand the facts, none of the grounds for entry into executive session would have applied. If that is so, the meeting should have been conducted in public and any vote taken at the meeting should have been taken in public.

Third, §104 of the Open Meetings Law pertains to notice of meetings and requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

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

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

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

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive

> relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

As such, if action is taken in violation of the Open Meetings Law, a court is authorized to nullify the action.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to the individuals that you identified, as well as the Town Board.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mildred Dibble, Clerk
David E. Tanney
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2485

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

April 7, 1995

Ms. Linda Cohen
[redacted]

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. Cohen:

As you are aware, your letter of March 1 addressed to Attorney General Vacco 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 Law.

You expressed concern with respect to a rule adopted by the Catskill Town Board under which the Board permits the public to speak only after a meeting is adjourned, thereby depriving the Board and the public "of the benefit of a record of such comments." The rule also requires that a detailed written request to speak must be submitted by the Friday prior to the meeting.

In this regard, I offer the following comments.

First, assuming that the Town Board remains present for the purpose of hearing and/or responding to comments made by members of the public, I do not believe that the meeting would be "adjourned." It is noted that the term "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 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, when a majority of the Board is present to conduct public business, including hearing the comments of Town residents, in their capacities as Board members, the gathering, in my opinion, is a "meeting" subject to 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 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 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.

Lastly, although §106 of the Open Meetings Law requires that public bodies prepare minutes of meetings, there is no requirement that the minutes consist of a verbatim account of what is said or that they include reference to every speaker's commentary at a meeting. Nevertheless, I believe that the comments of members of the public, as well as public officials, may be tape recorded by any person in attendance. As stated by the court in the Mitchell decision cited earlier:

> "[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 short, I believe that any person may use a tape recorder in a non-disruptive manner at an open meeting of a public body, and that the comments of public officials, as well as others, may be recorded.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8770
OML-AO 2486

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

April 7, 1995

Mr. Edward F. Dunleavy
[redacted]

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. Dunleavy:

I have received your letter of March 7 and the materials attached to it. The issue involves a claim made against the City of Schenectady, its dismissal of the claim, and your ensuing request made under the Freedom of Information Law.

As I understand the matter, you considered a new use of your real property and were advised to contact the City Planning Commissioner. Following several communications with that office, you were informed that you must submit a survey. Having paid more than $900 to have a survey prepared, you learned later that all of the information contained in the survey was already on file with the Planning Commission. When you asked why you were directed to obtain a survey, a City official "simply shrugged his shoulders, said he didn't know why, and left the office." That resulted in your "claim" before a "City Council Claims Committee" consisting of three Council members. You were informed that the Committee "would conduct a hearing with the zoning officer involved and get back to [you]." Although you asked to attend, you were informed that you could not do so. After your claim was rejected, being dissatisfied with the decision, you asked to speak to someone concerning the matter. However, you were told that you "couldn't speak to anyone because [your] file was confidential." When you requested the file under the Freedom of Information Law, the request was denied.

Based on the foregoing, I offer the following comments.

First, since you were told that the file is "confidential", I point out that 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 "private" or "confidential", 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 enable an agency to withhold a record.

In a related vein, the contents of records serve as the factors relevant to an analysis of the extent to which they may be withheld or must be disclosed. 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 potentially relevant.

As indicated above, §87(2)(a) deals with records that are exempted from disclosure by statute. One such statute is §4503 of the Civil Practice Law and Rules (CPLR), which pertains to the attorney-client privilege. In brief, when a client, including a municipal official, seeks the legal advice of his or her attorney, such as a municipal attorney, the communications are, in my view, privileged. Similarly, §3101(c) and (d) of the CPLR respectively permit the withholding of the work product of an attorney and material prepared solely for or in anticipation of litigation. Those provisions may be pertinent with respect to some of the contents of the file in question.

Also, relevant to the matter is §87(2)(g) of the Freedom of Information Law. Although that provision serves as a basis for denial of access, due to its structure, it 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 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.

It is emphasized that the Court of Appeals, the State's highest court has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as suggested earlier, inter-agency or intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Further, it has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective

> information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

Second, the City Council Claims Committee is, in my opinion, required to comply with the Open Meetings Law.

When a committee consists solely of members of a public body, such as a city council, I believe that the committee constitutes a public body required to comply with the Open Meetings Law. 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."

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 Council members in my view constitutes a public body subject to the Open Meetings Law. Further, as a general matter, 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.

When a committee intends to gather to discuss public business, I believe that it is required to provide notice in accordance with §104 of the Open Meetings Law.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that the subject matter may properly be considered during executive sessions. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

One of the grounds for entry into executive session is §105(1)(d), which permits a public body to conduct an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is 'to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meeting' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business

> in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840 841 (1983)].

Therefore, insofar as the Committee is involved in discussing litigation strategy, it §105(1)(d) could justifiably be cited to conduct an executive session.

Lastly, §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."

I believe that the Committee in question is required to prepare and disclose minutes in a manner consistent with the requirements of the Open Meetings Law. It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. However, even when a public body makes a final determination during an executive session, that determination must, in most instances, be public.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Notar, Chairman, City Council Claims Committee
Michael R. Cuevas, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2487

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

April 10, 1995

Ms. Faleasha Salvatore
[redacted]

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. Salvatore:

I have received your letter of March 2, which reached this office on March 9.

According to your letter, as part of a school assignment, you were supposed to attend a meeting of a board of education scheduled to start at 8 p.m. However, upon arriving at 7:55, you learned that the meeting began twenty minutes early and was already over.

You have asked whether it is "legal to start a Board of Education meeting early" and what is the "legal status of the business they conducted."

In this regard, I offer the following comments.

From my perspective, if notice was given indicating that the meeting would begin at 8 p.m., the Board should have waited until that time to begin conducting its business. Alternatively, if there was a need to convene earlier than the time specified in the original notice, I believe that the Board should have made additional notices to the news media and at the location where notice is posted to reflect the actual time when the meeting would begin. If no notice was given of the actual time that the meeting convened, it would appear that the meeting was held, in effect, in private. When action is taken in private in violation of the Open Meetings Law, a court is authorized to invalidate such action.

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. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

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

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

However, the same provision states further that:

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

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with

the notice requirements imposed by the Open Meetings Law was "unintentional".

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

OMG FO 2488

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

April 11, 1995

Mr. Gary Sazer
Meltzer, Lippe, Goldstein, Wolf,
Schlissel & Sazer, P.C.
The Chancery
90 Willis Avenue
Mineola, NY 11501

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

Dear Mr. Sazer:

I have received your letter of March 9 in which you sought an advisory opinion concerning the Open Meetings Law.

In your capacity as counsel to Douglas Koch, D.V.M., you wrote that Dr. Koch serves as a member of the Board of Directors of the New York State Thoroughbred Breeding and Development Fund Corporation ("the Fund"). The Fund is described in §245 of the Racing, Pari-Mutuel Wagering and Breeding Law as "a body corporate and politic constituting a public benefit corporation." That statute also prescribes the membership of its Board of Directors, one of whom is the Commissioner of Agriculture and Markets, and states that "a majority of the whole number of directors shall constitute a quorum", and that the Fund cannot transact business or otherwise carry out its powers "except pursuant to a favorable vote of at least a majority of the directors present at a meeting at which a quorum is in attendance."

Notwithstanding the foregoing, you indicated that:

> "It is the opinion of the Fund, supported by Fund Counsel its Executive Director that:
>
> (i) the Commissioner can delegate by proxy his duties as a Fund Director;
>
> (ii) that the Fund is not subject to the Open Meetings Laws (McKinney's Public Officers Law, Article 7, as amended)."

You have sought my opinion concerning those contentions. In brief, for reasons with which you are familiar based on your review of opinions previously rendered, I do not believe that the Fund's contentions are legally supportable. However, I offer the following comments.

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

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

In conjunction with the foregoing and §§244 to 250 of the Racing, Pari-Mutuel Wagering and Breeding Law, it is clear in my opinion that the Fund's Board of Directors is an entity consisting of more than two members that conducts public business and performs a governmental function for a public corporation, and, therefore, constitutes a "public body" required to comply with the Open Meetings Law. As you pointed out in your letter, §66(1) of the General Construction Law defines "public corporation" to include a "public benefit corporation", such as the Fund.

Second, with respect to the ability of a Director to delegate his or her authority by means of a proxy, I note by way of background 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". Based upon an ordinary dictionary definition of "convene", that term means:

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

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of the Fund. While nothing in the Open Meetings Law refers to the capacity of a member to delegate his or her authority by means of a proxy, it has consistently been advised that a member of a public body cannot participate unless he or she is physically present at a meeting of the body.

Similarly, I believe that the absence of a member from a meeting, a physical convening of a majority of a public body's

membership, precludes that person from voting. In short, the absent person is not part of the "convening."

Nothing in the Open Meetings Law or the statutes that pertain directly to the Fund refers to the capacity of a member to participate through a delegate or vote by "proxy". To reiterate, I do not believe that a member of a public body can cast a vote unless the member is physically present at a meeting of the body. Absent specific statutory authority to do so, I do not believe that members of the Board of Directors, ex officio or otherwise, may delegate their authority to serve on the Board or vote at meetings on their behalf to their representatives. The absence of such authority, is, in my view, significant, for there are situations in which members of public bodies have the ability to delegate their powers to others. When such authority exists, however, it exists by statute. For instance, §89(1) of the Public Officers Law pertains to the Committee on Open Government and specifies that certain members who serve on the Committee ex officio may designate "delegates" to act in their stead. The remaining members have no authority to do so.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Directors

State of New York
Department of State
Committee on Open Government

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
http://www.dos.ny.gov/coog/

April 11, 1995

OML-AO-2489

Hon. Ronnie M. Eldridge
Council Member
The Council of the City of New York
City Hall
New York, NY 10007

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

Dear Council Member Eldridge:

I have received your letter of March 7 in which you requested an advisory opinion concerning the Open Meetings Law. The matter involves what you characterized as the "troubling" process under which the Speaker of the City Council is conducting negotiations and discussions relating to the budget.

The Council consists of 51 members, and you wrote that the Speaker has held meetings regarding the budget with a "team" that includes "all the Chairs of Committees, Sub-Committees and Task Forces." Excluded from those meetings have been 16 Councilmembers including yourself. You added that the meetings are scheduled by the Speaker's staff, which contacts and invites Councilmembers to meetings by phone.

You and several of your colleagues on the Council suggested to the Speaker that the process "is inappropriate and disenfranchises voters." In a letter to the Speaker that you and three other members signed, reference was made to a meeting held on January 30 "to brief members on the Mayor's proposed Budget modification", and you specified that a majority of the Councilmembers were invited and both political parties were present." In response to the letter, you were informed by the Council's General Counsel and Director that the Open Meetings Law only applies when a quorum of a

public body is "actually present", that he had been advised that "at no time during the budget briefings held on January 30 for Committee and Subcommittee Chairs was a quorum present", and that, therefore, the Open Meetings Law was inapplicable.

In this regard, I offer the following comments.

The Open Meetings Law is clearly intended to open the deliberative process to the public and provide the right to know how public bodies reach their decisions. As stated in §100 of the Law, its Legislative Declaration:

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

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

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" 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.).

As you are aware, it was held more recently that "a planned informal conference" or a "briefing session" held by a quorum of a public body would constitute a "meeting" subject to the requirements of the Open Meetings Law [see Goodson-Todman v. Kingston, 153 Ad 2d 103, 105 (1990)].

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of Councilmembers gathers at the call of the Speaker to conduct public business, any such gathering would, in my opinion, constitute a "meeting" subject to the Open Meetings Law. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

As a general matter, I do not believe that the Open Meetings Law applies unless a quorum is present. Even when a meeting is

scheduled and reasonable notice is given to all the members in a manner consistent with the requirements of §41 of the General Construction Law, but less than a majority attends, the gathering would not constitute a "meeting" and the public would have no right to attend. Section 41 of the General Construction Law, entitled "Quorum and majority", states in relevant part 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."

The issue in the context of your inquiry involves the application of the Open Meetings Law to a situation in which the Speaker (or perhaps a different person or body) invites a majority of Councilmembers to conduct public business and less than a quorum is present, at any given moment, as in the case of the gathering of January 30.

When a majority of members of a public body is invited to convene for the purpose of conducting public business, it can be assumed, in my opinion, that if indeed a majority is present, the gathering is a "meeting" subject to the Open Meetings Law. An exception to that general principle would involve a political caucus that is exempt from the Open Meetings Law pursuant to §108(2) of that statute. The exemption would not apply in this instance because Councilmembers from more than one political party were invited. If a majority of a public body is invited to conduct public business, and the gathering is not a political caucus exempt from the Open Meetings Law, is it reasonable, in view of the overall intent of the Open Meetings Law and §41 of the General Construction Law, not to provide notice the public and the news media or to all the members in a manner consistent with those statutes? When a public body intends to conduct a meeting, to comply with the Open Meetings Law, it would provide notice to the public and the news media, even if, for any number of possible reasons (i.e., weather, illness, traffic), less than a quorum arrives. The point is that if there is an invitation to a majority of members of a public body

to convene at a particular time and place to conduct the business of that body, and the gathering is not a political caucus, it should be assumed in my opinion that there is an intent to conduct a meeting. In that circumstance, I believe that it would be unreasonable not to give notice to all the members; further, there may be a failure to comply with law if notice is not given pursuant to §104 of the Open Meetings Law.

Considering the situation from a different perspective, if there is an intent to ensure the presence of less than a quorum at any given time in order to evade the Open Meetings Law, there is a judicial decision that infers that such activity would contravene that statute. As stated in Tri-Village Publishers v. St. Johnsville Board of Education:

> "It has been held that, in order for a gathering of members of a public body to constitute a 'meeting' for purposes of the Open Meetings Law, a quorum must be present (*Matter of Britt v County of Niagara*, 82 AD2d 65, 68-69). In the instant case, there was never a quorum present at any of the private meetings prior to the regular meetings. Thus, none of these constituted a 'meeting' which was required to be conducted in public pursuant to the Open Meetings Law.
>
> "We recognize that a series of less-than-quorum meetings on a particular subject which together involve at least a quorum of the public body could be used by a public body to thwart the purposes of the Open Meetings Law...However, as noted by Special Term, the record in this case contains no evidence to indicate that the members of respondent engaged in any attempt to evade the requirements of the Open Meetings Law" [110 AD 2d 932, 933-934 (1985)].

In Tri-Village, the Court found no evidence indicating an intent to circumvent the Open Meetings Law when a series of meetings were held, each involving less than a quorum of a board of education. However, as I interpret the passage quoted above, when there is an intent to evade the Law by ensuring that less than a quorum is present, such an intent would violate the Open Meetings Law. If there is or has been an intent to circumvent the Open Meetings Law in the context of the situation of your concern, it is likely in my view that it would be found that the Open Meetings Law has been infringed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Peter F. Vallone, Speaker
Richard Weinberg
Hon. Sal Albanese
Hon. Joan Griffin McCabe
Hon. Guillermo Linares
Hon. Adam C. Powell

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2490

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

April 14, 1995

Ms. Lynn Bianchi, Town Clerk
Town of Ogden - County of Monroe
269 Ogden Center Road
Spencerport, NY 14559-2024

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. Bianchi:

I have received your letter of March 13 as well as the materials attached to it. In brief, two members of the public who spoke at meetings of the Ogden Town Board expressed the view that you did not include in the minutes all comments that they believed to be pertinent and you asked that I review the minutes in order to advise as to their adequacy.

In this regard, the Open Meetings Law offers direction on the subject and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute states that:

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

> information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear that minutes need not consist of a verbatim account of every comment that was made.

From my perspective, of greatest importance is that minutes be accurate. Additionally, I believe that they should be prepared in a manner that is consistent and fair. If, for example, a person makes a statement in favor of a certain action and another offers a statement in opposition, if the statements are referenced in the minutes, they should in my view be presented in a balanced way; i.e., if one statement is recorded verbatim, an opposing statement of similar length should be so recorded. In some instances, many speakers may repeat essentially the same point of view. In that event, I do not believe that the minutes would have to repetitively include each.

Although I reviewed the minutes, without having been present, I cannot know whether statements may have been given equivalent or proper weight, or whether comments made, significant or otherwise, may have been omitted. However, the minutes are lengthy and detailed and include information that far exceeds the requirements of the Open Meetings Law.

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 2491

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

April 14, 1995

Hon. Stephen T. Auburn
[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 Mr. Auburn:

I have received your letter of March 14, which reached this office on March 20. In your capacity as a member of the Mendon Town Board, you asked that I review my letter to the Town Clerk, June Smith, concerning what was then a proposed resolution focusing on the contents of Town Board meetings. You enclosed a copy of the resolution to amend the Board's Rules of Procedure that was later approved.

In order to provide background concerning the resolution, you referred to minutes in which some statements were "nearly verbatim", while others were briefly summarized, and you suggested that the length of the statements appears to have been based upon political party affiliation. You also stressed that the Board's resolution was not "politically motivated" but rather is based on the belief that minutes of meetings "should be balanced in their treatment of statements by the public and Town Board members and the political affiliation of the speaker shouldn't be a factor in how their statements are reflected".

I have read the resolution and reviewed the opinion addressed to the Clerk. In addition, in an effort to gain perspective, the matter has been discussed with others. While several statutes may be relevant to an analysis of the matter, I know of no judicial decision that deals squarely with the relationship between a town clerk and a town board concerning the contents of minutes. I recognize that the Comptroller has prepared several opinions over the course of years that touch upon the issue. I have prepared many opinions as well. What a court would determine is, in my opinion, conjectural and would likely be dependent on attendant facts.

As I view the situation, four provisions are relevant. First, §106 of the Open Meetings Law deals with minutes and was quoted in full in the opinion addressed to Ms. Smith. Under that statute, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. Second, subdivision (1) of §30 of the Town Law states in relevant part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting". Third, subdivision (1) of §30 of the Town Law provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". And fourth, §63 of the Town Law states in part that a town board "may determine the rules of its procedure".

In my opinion, inherent in each of the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate. If indeed the Town Clerk prepares an essentially verbatim account of statements made by members of a particular political party and merely summarizes the statements of others, minutes of that nature would, in my view, be inconsistently and unfairly prepared, and I believe that such practice would merit correction. While the Town Board's resolution may be intended to ensure that appropriate minutes are prepared, there is no guarantee of the result. Similarly, although the opinions of the Comptroller cited in the "WHEREAS" clauses of the resolution and which serve as the basis for the resolution ostensibly appear to be reasonable, they could be implemented in ways that are unreasonable.

The first clause states that "what questions or statements are included [in the minutes] is in the discretion of the Town Board". What if the Board has a lop-sided majority of political party membership, or, irrespective of party membership, it includes a gadfly with whom the other members disagree, and the Board by a vote 4 to 1 chooses to exclude the questions or statements of the minority party member or gadfly? While there may be no intent to do so, the Board's descretionary authority could lead to unfair or inconsistent results.

The second states that "under its power to determine its rules of procedure, the Town Board may require some or all of particular discussions to be recorded verbatim". In the same hypothetical situation as posited in relation to the first "WHEREAS", the result could be the same as the situation that you are trying to correct. I note that part 2 of the new rule states that a majority of the Town Board could require that a question or statement by a member of the public or the Board "be included in the minutes verbatim". While your intent may be to be reasonable, the Board could, on the basis of partisan politics, or perhaps favor or disfavor with a person or board member, pick and choose which statements should be

recorded verbatim. I am not suggesting that the Mendon Town Board would necessarily act in a partisan or personal manner; nevertheless, having dealt with the Open Meetings Law since its enactment, I can report that other boards have done so.

The third "WHEREAS" enables the Board to require that minutes be submitted to the Board "for correction of errors and omissions and approval". The intent is obvious -- that minutes be accurate. Nevertheless, numerous situations have arisen in which public bodies and their members have sought to amend minutes in a way in which their contents would be unbalanced or would not reflect what actually occurred. Again, I am not suggesting that the Board in this instance intends to act unreasonably; I am suggesting, however, that even a rule that is most reasonable on its face may be subject to interpretation or abuse in ways that may be unintended by those who adopted it.

I am not sure that perfect rules could be drafted to deal with minutes and the relationship between a town board and a town clerk. Even rules that appear to be most reasonable may be subject to a variety of interpretations or to methods of implementation inconsistent with their original intent. The Board's rules regarding minutes may be fully appropriate if they are carried out in a manner consistent with their apparent intent; on the other hand, if that does not occur, it is possible, in my view, that they could be found to be invalid. I believe that the suggestion offered earlier should serve as the general guide for both the Board and the Clerk, that the minutes be prepared in a manner that is reasonable, fair, consistent and accurate.

I recognize that the foregoing may not provide a solution to the matter. It is my hope, however, that my comments will be considered to be helpful and constructive.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: June L. Smith, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2492

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

April 21, 1995

Ms. Nancy West
[redacted]

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. West:

I have received your letter of March 21 and the materials attached to it, including a sketch of the meeting room used by the Town Board of the Town of Lake Luzerne.

You referred to a request to place a tape recorder "on or around" the Board's table, which is apparently 23 feet from the public's seating area and specified that the recording would be made for your husband. He cannot attend because the building is not "handicapped accessible". The Board prohibited you from placing the tape recorder in a location in which it could be used effectively and you were precluded from moving your seat closer to the Board.

In this regard, I offer the following comments.

First, 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.

Second, as you are aware, there are judicial decisions dealing with use of audio recording devices at open meetings of public bodies. In the leading case dealing with tape recorders, it was found by the Appellate Division that "a prohibition against the use of unobtrusive devices is inconsistent with the goal of a fully informed citizenry" and annulled a resolution banning the use of tape recorders [Mitchell v. Board of Education, 113 AD 2d 924, 925 (1985)]. Despite the rule making authority of the Board of Education, it was determined that the rule prohibiting the use of tape recorders was unreasonable. In this instance, a Town Board under §63 of the Town Law also has the authority to adopt reasonable rules to govern its proceedings. However, if your tape recorder can be placed in a location that is "unobtrusive" where it can be used effectively, a prohibition against doing so would, in my opinion, be unreasonable.

In an effort to enhance compliance with and understanding of the matter, a copy of this opinion will be sent to the Town Board.

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 2493

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

April 21, 1995

Mr. John E. Driscoll Jr.
[redacted]

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

Dear Mr. Driscoll:

I have received your letter of March 21, as well as the materials attached to it. You expressed the belief that when a meeting of a public body "affects the public in some way, some sort of records or minutes should be kept as a record of this meeting". In addition, you referred to situations involving the Village of Northville in which you were told that it was unnecessary to prepare minutes and in which a transcript of a meeting was "falsified and slanted".

Having questioned whether "there are laws that govern these situations", I offer the following comments.

First, 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, it is clear that minutes need not consist of a verbatim account of every comment that was made.

From my perspective, of greatest importance is that minutes be accurate. Additionally, I believe that they should be prepared in a manner that is consistent and fair. If, for example, a person makes a statement in favor of a certain action and another offers a statement in opposition, if the statements are referenced in minutes or a "transcript", they should in my view be presented in a balanced way; i.e., if one statement is recorded verbatim, an opposing statement of similar length should be so recorded.

Second, a letter addressed to you of March 20 refers to "an informal meeting", during which no minutes were prepared but during which the Zoning Board of Appeals set a date for a public hearing. In my opinion, a decision to set a date for a hearing is clearly reflective of action taken and should have been memorialized in the form of minutes.

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

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" 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 a public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Third, meetings are frequently tape recorded, and while a tape recording would likely contain the elements of minutes, I believe that minutes should be nonetheless reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. I point out, too, that in an opinion rendered by the State Comptroller, it was found that although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" of a meeting (1978 Op. St. Compt. File @280).

Lastly, so long as it is used in a non-disruptive manner, any person may, according to judicial decisions, use a tape recorder at an open meeting of a public body [see Mitchell v. Board of Education, 113 AD 2d 924 (1985)]. In a related vein, it has been held that pubic body's tape recording of an open meeting must be disclosed pursuant to the Freedom of Information Law (Taleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978).

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. James K. Groff, Mayor
Susan Wilson, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2494

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

April 27, 1995

Mr. Brandon M. Stickney
Union-Sun & Journal
P.O. Box 503
Lockport, NY 14095

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. Stickney:

I have received your letter of March 23 and your news articles concerning a gathering held at the home of the Lockport City Attorney.

According to the articles, the gathering, which was attended by aldermen, was "unannounced" and was characterized as an "informal get-together." The City Attorney indicated it was called "to discuss team-building and how to move ahead with the council."

You have sought my opinion concerning the propriety of the gathering in terms of the Open Meetings Law. In this regard, I offer the following comments.

First, it is emphasized that the definition of "meeting" in the 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.

I point out that in an appellate court 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)]. In the same decision, it was held that a "briefing session" held at the home of the city attorney was a meeting that should have been held in accordance with the Open Meetings Law. Therefore, even though the gathering in question might have been held at the request of the City Attorney, I believe that it was a meeting,

particularly in view of the similarity to the Goodson-Todman case, assuming that a quorum of the City Council was present for the purpose of discussing or conducting public business.

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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Ottaviano, City Attorney
City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8805
OML-AO 2495

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

May 1, 1995

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 unsigned letter of March 24 addressed to Assemblywoman Deborah Glick, Robert Boehlert, Acting Director of the Office of the Advocate for the Disabled and to me. You have sought assistance in relation to a variety of issues that relate directly or tangentially to the New York City Mayor's Office for People with Disabilities (MOPD).

In this regard, the Committee on Open Government is authorized to advise with respect to the Open Meetings and Freedom of Information Laws. As such, the following remarks will be limited to issues pertaining to those statutes.

You referred to the New York City Americans with Disabilities Act Task Force Community Advisory Committee, and a claim by the MOPD that the Committee is not subject to the Open Meetings Law. You have questioned the status of the Committee under the Open Meetings Law and 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 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 point out that several decisions indicate generally that entities consisting of persons other than members of public bodies having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, an advisory body such as a citizens' advisory committee would not in my opinion be subject to the Open Meetings Law.

This is not to suggest that meetings of the Committee in question must be closed. Even if the Open Meetings Law does not apply, the Committee or the Mayor, for example, could choose to authorize the public to attend. Often advisory bodies, particularly citizens advisory bodies, conduct their meetings in public, even though they are not required by law to do so.

The Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" broadly to include:

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

From my perspective, any documentation of the Committee would be kept or produced for the City of New York, which is an agency. Therefore, I believe that any such documents would constitute agency records subject to rights conferred by the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Deborah Glick
Hon. Robert Boehlert
Mayor's Office for People with Disabilities

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2496

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

May 11, 1995

Mr. John Goetschius
Greenburgh Eleven Federation of Teachers
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 Mr. Goetschius:

I have received your letter of March 28 in which you requested an advisory opinion concerning the Open Meetings Law.

As indicated in prior correspondence, certain members of Greenburgh Eleven Federation of Teachers who were suspended have been "prohibited from entering its [District] grounds", even to attend meetings of the Board of Education. You wrote that a meeting was scheduled to be held on March 20 at 7:30 a.m. and indicated that:

> "The notice of the meeting was posted on Friday March 17, 1995 within the school building in a single isolated area within the superintendents outer office. The building was inaccessible during the weekend to the general public and not accessible at any time to suspended staff members who had previously indicated a desire to attend all Board meetings and who had been denied admittance to the cancelled March 10 meeting.
>
> "The Board reportedly went into executive session five minutes after convening at approximately 7:30. The Board did not reconvene until approximately 8:40 and remained in public session for about 10 minutes. From the reports following the meeting, it appears the superintendent's contract was extended at this meeting."

You have sought my views on the matter.

In my opinion, the fact that you and others might have been prohibited from entering school grounds is ancillary to the matter. If indeed a single notice was posted in an "isolated area" on a Friday concerning a meeting to be held on Monday, and if the building was closed to the public during the weekend, I believe that the Board failed to comply with the Open Meetings Law.

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 specific 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.

It is emphasized that notice must be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public. As I understand the situation, notice was not posted conspicuously in a location visible to the public.

Moreover, 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 would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

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

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 2497

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

May 16, 1995

Mr. Troy Gustavson
Times/Review Newspapers
PO Box 1500
Mattituck, NY 11952

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 Gustavson:

I have received your letter of April 19 in which you sought an advisory opinion concerning the propriety of an executive session.

According to an article that you enclosed, significant opposition to the construction of a McDonald's restaurant was expressed at a meeting of the Southold Town Board. Opponents of the McDonald's referred to the possibility of litigation, and one Board member said: "If there's a danger of litigation against the town, we have to go into executive session." In response to a statement that no litigation had been commenced, the same member said that "Anyone here can take anything I say and use it against the Town."

As I understand the facts, there was no basis for entry into executive session. Further, the issue, in substance, has been considered by the Appellate Division, Second Department, whose jurisdiction includes Suffolk County.

By way of background, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except when 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 validly be considered during 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 threat of litigation.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of the 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 Board
Laury Dowd, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2498

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

May 22, 1995

Mr. John W. Kane
[redacted]

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. Kane:

I have received your letter of April 13 in which you requested an advisory opinion concerning the propriety of an executive session held by the City of Johnstown Common Council to discuss "possible litigation."

In this regard, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except to the extent that a closed or executive session may be appropriately held. Further, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered behind closed doors.

Relevant to the matter 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, or because it involves a legal matter.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8849
OML-AO-2499

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

May 23, 1995

Mr. Ralph Ratto
Vice President
Waterbill Watchdogs, 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 information presented in your correspondence.

Dear Mr. Ratto:

I have received your letter of April 27 in which you raised a series of questions involving the implementation of the Freedom of Information and Open Meetings Laws by the Water Authority of Western Nassau County ("the Authority").

The first issue involves access to a feasibility study prepared for the Authority by engineering and accounting firms concerning the economic viability of a "takeover" of the Jamaica Water Supply Company. Having requested copies of the study and drafts presented to the Authority, you wrote that:

> "The Authority has taken the position that they may withhold the report in full or selected parts. When questioned, the Authority makes the statement that disclosure could affect the position of the Authority in negotiating a **possible** takeover. (emphasis added) [You] advised the Authority that their position could be correct if a pending, proposed or actual takeover was underway. Furthermore, the Authority's counsel specifically amended the minutes of their meeting to add the word possible as an adjective in '...negotiating a **possible** takeover' (emphasis added), they have not crossed the threshold that would allow them the opportunity of Executive Session or non-disclosure."

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

It is assumed that the records in question were prepared by persons or firms retained as consultants. Based upon the judicial interpretation of the Freedom of Information Law, records prepared for an agency by a consultant may be treated as "intra-agency" materials that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

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

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely

> to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents. It appears that, at the very least, those portions of the report prepared by the accountant consisting of statistical or factual information must be disclosed.

The other provision of potential relevance is §87(2)(c), which enables an agency to withhold records insofar as disclosure would "impair present or imminent contract awards..." It does not appear that the attainment of a contractual agreement is "present or imminent." If that is so, §87(2)(c) would not be applicable.

With respect to the Open Meetings Law, like the Freedom of Information Law, that statute is based on a presumption of openness. Meetings of public bodies must be conducted in public, except to the extent that the subject matter may properly be considered during an executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed in executive session.

While I cannot suggest with certainty that they do or do not apply, two of the grounds for entry into executive session may be pertinent concerning the issue. Section 105(1)(f) permits a public body to enter into executive session to discuss, among other matters, the financial or credit history of a particular corporation. Section 105(1)(h) authorizes 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."

Under the circumstances, if the purchase of real property is involved at all, it does not appear at this juncture that publicity would "substantially affect the value" of such real property.

Secondly, you wrote that:

> "The Authority continues to enter into Executive session on motions that are typically stated as '...discuss a personnel matter' or '...litigation strategy.' It is [your] understanding that the proper motion should be more specific and litigation strategy should be used only when a case is pending, proposed, actual, but not on the basis of they may have possible litigation in the future."

In this regard, as you are aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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.

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).

Based on 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.

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" or as a "specific personnel matter" 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving employment, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1)(f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of

Monticello, 620 NYS 2d 573, ___ AD 2d ___ (1994)].

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 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. I do not believe, however, that §105(1)(d) is restricted to matters involving litigation that has already been commenced. A public body might discuss its litigation strategy in relation to a suit that it intends to initiate or to its defense in anticipation of litigation.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

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

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

The third issue pertains to an executive session:

> "held with their legal counsel to address and negotiate the terms of their current contract with said counsel. The catalyst for this Executive Session was a discovery by a member of [your] organization that counsel was not abiding by the terms of his agreement. After negotiations during Executive Session with counsel, the Authority voted to allow counsel to modify and removes the obligations in question."

Without having been present, I cannot advise with certainty. It is possible that some elements of §105(1)(f) might have been considered.

Next, you wrote that the Authority recently held an executive session "to discuss a pre-decisional feasibility study which is underway at the present time with the consultants and the entire Authority Board" and that "[y]our research indicates that the purpose of this meeting was to provide feedback to the consultants so that revisions may be incorporated to produce a final feasibility report." As you have described the matter, there appears to have been no basis for entry into executive session.

Lastly, you asked what action a civic association can take to "ensure [y]our rights, under the Open Meetings Law, are protected." First, it is my hope that opinions prepared by this office are educational and persuasive, and that they serve to enhance compliance with and understanding of the laws within the Committee's advisory jurisdiction. With those goals in mind, a copy of this opinion will be forwarded to the Authority. In addition, §107 of the Open Meetings Law pertains to the enforcement of that statute and 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

cc: Water Authority of Western Nassau County

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8855
OML-AO-2500

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

May 24, 1995

Ms. Rita A. Liggio
Director
Brewster Public Library
79 Main Street
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 information presented in your correspondence.

Dear Ms. Liggio:

I have received your letter of April 24, which reached this office on May 1. As you requested, enclosed are copies of the Freedom of Information Law and the Open Meetings Law.

In conjunction with your questions, I offer the following comments.

First, the Freedom of Information Law applies to agency records, and §86(3) 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, the Freedom of Information Law applies to entities of state and local government. If a library is a governmental entity, I believe that it would be required to comply with the Freedom of Information Law.

In terms of the duty of disclose 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.

While most library records, including bills, must be disclosed, I point out that a statute dealing directly with records pertaining to library users requires that those records be confidential. Specifically, §4509 of the Civil Practice Law and Rules states that:

> "Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute."

You questioned the "standard procedure in paying bills, or withholding payment of bills." Although I would like to offer a response, the question falls beyond the jurisdiction of the Committee. It is suggested that you confer with your fiscal officer or perhaps an auditor, or that you contact the Office of the State Comptroller.

Lastly, you asked whether residents have the right to ask questions during open meetings of the Library's Board of Trustees. Although the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §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, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2501

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

May 25, 1995

Mr. Claude Phillips
[redacted]

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. Phillips:

I have received your letter concerning a meeting of the Board of Education of the Troy Enlarged City School District, upon which you serve.

You wrote that a "special meeting" of the Board was held on April 28. Although notice of the meeting was given to Board members "a couple of weeks in advance", you expressed uncertainty as to whether notice had been given to the public. Soon after the meeting began, a motion was made and carried to enter into executive session to discuss litigation, but you indicated that "[i]t was then mentioned that other matters might be discussed in this executive session. No specifics were stated. Nothing else was said." The beginning of the ensuing discussion involved a notice of claim filed against the District that was "intertwined" with a personnel matter. Thereafter, a second personnel matter was discussed that included a formal vote to authorize the District's attorney to offer an employee a range of money to settle a case. The Board voted 5-2 to make such an offer. A third issue involved a vote of 5-2 to grant tenure to two teachers.

You have raised a series of questions concerning the matter. In this regard, I offer the following comments.

First, 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).

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, §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.

Third, 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, and 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. Therefore, if a public body intends to discuss more than one

subject during an executive session, the motion to enter into executive session should so indicate.

You asked whether an issue relating to a bus contract could properly have been discussed in executive session. As I understand the matter, the discussion involved litigation intertwined with a so-called personnel matter. It appears, based on your remarks, that an executive session might have been properly conducted under §105(1)(d) or (f). The former pertains to litigation, and it has been held that the intent of that exception is to enable a public body to discuss its litigation strategy in private so as not to divulge that strategy to its adversary, who may be present at the meeting [see Weatherwax v. Town of Stony Point, 97 AD 2d 840 (1983)]. The latter authorizes a public body to enter into executive session to discuss:

> "the medical, financial, credit or employment 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..."

Fourth, 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."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must include reference to action taken by a public body.

It is noted 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.

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 the Board votes or reaches a consensus that is reflective of its final determination of an issue, I believe that minutes must be prepared and that they must 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.

Lastly, since you questioned the validity of action taken, I note that §107(1) of the Open Meetings Law states in part that:

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

However, the same provision states further that:

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

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional". Further, from my perspective, action taken by a public body remains valid unless and until a court finds to the contrary.

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-2502

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

May 30, 1995

Ms. Liane Turk
Deputy Director/Counsel
New York City Equal Employment
Practices Commission
253 Broadway - Suite 300
New York, NY 10007

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

Dear Ms. Turk:

I have received your letter of May 1 and appreciate your kind comments.

You referred to a conversation during which we discussed procedures relating to the adoption of resolutions by the Equal Employment Practices Commission. Based on that discussion, you indicated that you "informed the Commissioners that determining the signatories to a resolution is a matter of internal policy, and that the Commission would violate no law if it designated the authority for signing resolutions to one or more of its members."

The members of the Commission have requested an opinion on the matter.

In this regard, as you are aware, the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. Neither of those statutes deals specifically with the issue, and I know of no other statute that would provide direction on the matter. Therefore, unless a provision of law applicable solely to the Commission or its members addresses the issue, I would agree with your contention that it is a matter of internal policy. I note, too, that administrative functions are, from my perspective, routinely carried out in conjunction with some sort of delegation of authority. For instance, as suggested at the beginning of this response, the Committee on Open Government, by resolution, has authorized its staff to prepare advisory opinions on its behalf. I believe that a similar designation or delegation of authority could be made in

the circumstances that you described, so long as there is no law to the contrary pertaining specifically to the Commission.

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-2503

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

June 1, 1995

Mr. Claude Phillips
[redacted]

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. Phillips:

I have received your letter in which you sought my views concerning a meeting of the Board of Education of he Enlarged City School District of Troy, upon which you serve, held on May 3.

The meeting was scheduled to begin at 8 p.m. Nevertheless, because a quorum was present earlier, you wrote that the Board President opened the meeting at 7:30 and that an executive session was held immediately thereafter for a reason "unknown" to you.

From my perspective, if notice was given indicating that the meeting would begin at 8 p.m., the Board should have waited until that time to begin conducting its business. Alternatively, if there was a need to convene earlier than the time specified in the original notice, I believe that the Board should have given additional notices to the news media and at the locations where notice is posted to reflect the actual time when the meeting would begin. If no notice was given of the actual time that the meeting convened, it would appear that the meeting was held, in effect, in private. When action is taken in private in violation of the Open Meetings Law, a court is authorized to invalidate such action.

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. 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 note that §107(1) of the Law states in part that:

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

However, the same provision states further that:

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

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

A second issue involves consideration of a retirement incentive program under which positions may be "targeted" for elimination through the retirement of the incumbents of the

positions. Laster in the meeting, during an executive session, the matter was discussed and a list of targeted positions was distributed. Another topic discussed during the executive session concerned what appears to have been a request by the Troy Strategy Group seeking personal contributions to the City by Board members.

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. 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 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 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).

Based on 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.

With respect to the retirement incentive issue, as I understand the program, the focus would involve positions that may be targeted for elimination, not the performance of the individuals who hold those positions. If that is so, I do not believe that the matter could properly be considered in executive session.

Moreover, 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" or as a "specific personnel matter" 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the creation of a position and the fiscal consequences of so doing, the Court held that there was no basis for holding an executive session and added that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session

> must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NYS 2d 573, 575, ___ AD 2d ___ (1994)].

Lastly, consideration of the request for contributions in my view would not have been a proper subject for consideration in private, for none of the grounds for entry into executive session would have applied.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent Hepp
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2504

Committee Members

William Bookman, Chairman
Peter Delaney
Walter W. Grunfeld
Elizabeth McCaughey
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Gilbert P. Smith
Alexander F. Treadwell
Patricia Woodworth
Robert Zimmerman

Executive Director

Robert J. Freeman

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

June 1, 1995

Mr. Michael D. Lesick
Superintendent of Schools
Fonda-Fultonville Central School
P.O. Box 1501
Fonda, NY 12068-1501

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 May 4 in which you raised issues relating to executive sessions.

Specifically, you raised the following questions:

> "When a board votes to go into executive session, is it necessary to specifically name the individuals, other than board members who will be asked to attend the session? Second, once in an executive session, can a board invite others into the session who may have information relative to the topic being discussed? Third, must the board excuse someone from the session prior to allowing an individual to leave an executive session, or can an individual leave on their own volition?"

In this regard, §105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Based on the foregoing, the only persons who have the right to attend an executive session are the members of a public body. However, a public body has the authority to permit others to be present.

I am unaware of any judicial decision indicating that persons other than the members of a public body who are authorized to attend must be identified. In the context of a school board's business, there may be instances in which it would be inappropriate

to identify those who attend, as in situations in which parents of students confer in executive session with the Board concerning matters involving their children.

Once in an executive session, pursuant to §105(2), I believe that a board clearly would have the authority to invite non-members to share information relevant to the topic of discussion. Typically, those permitted to join public bodies in executive session are invited for the purpose to which you alluded, i.e., to provide information, knowledge, expertise or advice.

Lastly, I do not believe that a public body could compel an individual to remain at an executive session. As in the case of a meeting during which a person may leave at any time, I know of no provision of law that would authorize a board of education to preclude any person from leaving an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8869
OML-AO-2505

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

June 2, 1995

Mr. Charles E. Bartgis
Cedarvale Tech
[redacted]

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. Bartgis:

I have received your letter of May 8 in which you indicated that you would "like to know the current rules regarding videotaping public meetings, including county governments and especially schools boards". Additionally, you forwarded a copy of a request dated April 24 made under the Freedom of Information Law to the Essex County Data Processing Department. As of the date of your letter to this office, you had received no response, and you sought advice on "how to proceed". The request involved the County's voter and real property tax lists on floppy disks in a particular format.

With respect to the use of video equipment, it is assumed that your inquiry pertains to meetings of public bodies, such as a board of education or a county legislature, and my comments will be based on that assumption.

It is noted at the outset that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. As you inferred, there is a recent judicial decision pertaining to the use of video equipment, and there are several concerning the use of audio tape recorders at open meetings. From my perspective, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the

court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, Second Department, unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of

the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While 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 judgement annulling the resolution of the respondent board of education" (id. at 925).

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.

The same conclusion was reached in Peloquin v. Arsenault [616 NYS 2d 716 (1994)], which cited Mitchell, as well as opinions rendered by this office. In that case, a village board of trustees, by resolution, banned the use of video recording devices at its meetings. In its determination, the court held that:

> "Hand held audio recorders *are* unobtrusive (*Mitchell*, supra); camcorders may or may not be depending, as we have seen, on the circumstances. Suffice it to say, however, in the fact of *Mitchell*, the Committee on Open Government's (Robert Freeman's) well-reasoned opinions supra and the court system's pooled video coverage rules/options, a blanket ban on

> all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is unreasonable. While 'distraction' and 'unobtrusive' are subjective terms, in the face of the virtual presumption of openness contained in Article 7 of the Public Officers Law and the insufficient justification offered by the Village, the 'Recording Policy' in issue here must fall" (id., 718).

With regard to your request made under the Freedom of Information Law, since your request was made to an official of the Essex County Data Processing Department, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be directed to that person. I am unaware of whether the official to whom your request was made is designated as a records access officer. Nevertheless, to comply with law, I believe that he should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person.

I note 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)].

A second issue relating to your request involves information maintained electronically. Here I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. It is emphasized, however, that §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."

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than ten years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. As stated earlier, since section 89(3) does not require an agency to create a record,

I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

In Brownstone Publishers Inc. v. New York City Department of Buildings, the question involved an agency's obligation to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division, First Department:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

Further, in a more recent decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

In short, assuming that the data sought is available under the Freedom of Information Law, and that the data can be transferred from the format in which it is maintained to a format in which you request it, I believe that an agency would be obliged to do so.

Under those conditions, it does not appear that production would involve creating a new record or reprogramming, but rather merely a transfer of information into a format usable to you.

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

Long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969). Assessment rolls and related documents have been found judicially to be available to the public, whether they are maintained in paper or computer tape format, and irrespective of the purpose for which a request is made. One of the grounds for denial in the Freedom of Information Law, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2)(b) describes a series of unwarranted invasions of personal privacy, including subparagraph (iii), which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes. .. "

Therefore, if a list of names and addresses is requested for commercial or fund-raising purposes, an agency may, under most circumstances, withhold such a list. Nevertheless, §89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.

Consequently, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In a decision rendered in 1981, the issue was whether county assessment rolls were accessible in computer tape format. In holding that they are, the court found that assessment rolls or equivalent records are public records and were public before the enactment of the Freedom of Information Law. Specifically, in Szikszay v. Buelow (436 NYS 2d 558), it was found that:

> "An assessment roll is a public record (Real Property Tax Law [section] 516 subd. 2; General Municipal Law [section] 51; County Law [section] 208 subd. 4). It must contain the name and mailing or billing address of the

> owner of the parcel (Real Property Tax Law [sections] 502, 504, 9 NYCRR [section] 190-1(6)(1)). Such records are open to public inspection and copying except as otherwise provided by law (General Municipal Law [section] 51; County Law [section] 208 subd. 4). Even prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law [section] 66, repealed L.1974, c. 578, assessment rolls and related records were treated as public records, open to public inspection and copying (Sanchez v. Papontas, 32 A.D.2d 948, 303 N.Y.S.2d 711, Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 N.Y.S.2d 756; Ops. State Comptroller 1967, p. 596)" (id. at 562, 563).

Further, in discussing the issue of privacy and citing the provision dealing with lists of names and addresses, it was held that:

> "The Freedom of Information Law limits access to records where disclosure would constitute 'an unwarranted invasion of personal privacy' (Public Officers Law [section] 87 subd. 2(b), [section] 89 subd. 2(b)iii). In view of the history of public access to assessment records, and the continued availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.R.L.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted' (cf. Advisory Opns. of Committee on Public Access to Records, June 12, 1979, FOIL-AO-1164). In addition, considering the legislative purpose behind the Freedom of Information Law, it would be anomalous to permit the statute to be used as a shield by government to prevent disclosure. In this regard, Public Officers Law [section] 89 subd. 5 specifically provides: 'Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.'" [id. at 563; now section 89(6)].

The court stated further that:

> "...the records in question can be viewed by any person and presumably copies of portions obtained, simply by walking into the appropriate county, city, or town office. It appears that petitioner could obtain the information he seeks if he wanted to spend the time to go through the records manually and

> copy the necessary information. Therefore, the balancing of interests, otherwise required, between the right of individual privacy on the one hand and the public interest in dissemination of information on the other...need not be undertaken...
>
> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner' s purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy" (id.).

Based upon the foregoing, I believe that an assessment roll or its equivalent should be disclosed. I point out that the same conclusion was reached by Supreme Court in Nassau County in an unreported decision [Real Estate Data, Inc. v. County of Nassau, Supreme Court, Nassau County, September 18, 1981].

The same analysis would be applicable concerning voter registration lists. Since §5-602 of the Election Law confers unrestricted public rights of access to voter registration lists, in my opinion, nothing in the Freedom of Information Law could be cited to restrict those rights. Further, as a general matter, I believe that a statute pertaining to a specific subject prevails over a statute pertaining to a general subject. In the context of your inquiry, a statute in the Election Law that pertains to particular records would in my view supersede a statute pertaining to records generally, such as the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Mike Brenish
Peter Mends

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2506

Committee Members

William Bookman, Chairman
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Warren Mitofsky
Wade S. Norwood
David A. Schulz
Gilbert P. Smith
Alexander F. Treadwell
Patricia Woodworth
Robert Zimmerman

Executive Director

Robert J. Freeman

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

June 5, 1995

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 information presented in your correspondence.

Dear Ms. Meisenburg:

I have received your letter of April 18, which, for reasons unknown, did not reach this office until May 15. Please accept my apologies for the delay in response.

As a member of the Board of Starpoint Central School, you wrote that "we seem to meet in closed sessions for reasons other than are outlined in the NYS School Law Manual." By means of example, you referred to "a closed meeting to discuss whether a student will be permitted to attend Starpoint after moving from the district." You questioned the District's attorney on the matter, and he indicated that the meeting could be closed in conjunction with provisions of law that are attached to your letter. You have asked whether I believe that the attorney's position is correct.

In this regard, I offer the following comments.

First, since the School Law manual is not the law itself, I have enclosed a copy of the Open Meetings Law for your review.

Second, I point out that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Moreover, 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 the context of your inquiry, there appears to have been no basis for entry into an executive session.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not applicable. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

Relevant under the circumstances is §108(3), which exempts from the Open Meetings Law:

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

The provisions to which the attorney referred are the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and the regulations promulgated pursuant to FERPA by the U.S. Department of Education. In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;

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

Based upon the foregoing, disclosure of students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

I note that the term disclosure is defined in the regulations 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."

In consideration of FERPA, if the Board discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law. If my assumptions are accurate, I would agree with the position taken by the District's attorney.

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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2507

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

June 5, 1995

Hon. Betty A. Fasulo
Trustee
[redacted]

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 Trustee Fasulo:

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

In your capacity as a member of the Board of Trustees of the Village of Fishkill, you complained that recent meetings have been held on an unscheduled basis on short notice, and that you and another member have been unable to attend. It is your view that there has essentially been a "purposeful exclusion of two trustees" by holding such "irregularly scheduled" meetings, and you contend that there was "no imperative reason" for conducting the meetings at the times they were held. In a letter to the Mayor and the Board of Trustees, you wrote that:

> "As the May 1 minutes will reflect, when it became apparent that the full Board could not be present for the Friday night meeting, that the Mayor was determined to have the meeting as long as a quorum was available, and that the protest to this action would be ignored, it became apparent that this meeting was pre-arranged and designed to exclude two trustees. It is pertinent to note here that contained in the minutes of the April 26, 1995 meeting the Mayor states:
>
> > 'The Board doesn't run the Village. The Mayor is the chief fiscal officer in the municipality. Remember that, don't forget that.'

> "Arranging a meeting to preclude two (minority) voices from being heard on issues of such great consequence for this Village violates the spirit and intent of democracy. Under these circumstances, I am preempted from representing my constituents; I am excluded from the process of government and from fulfilling my responsibilities as trustee."

In this regard, I offer the following comments.

First, while the Mayor may have a variety of duties, §4-412 of the Village Law indicates that a board of trustees has general authority with respect to the conduct of governmental affairs. Subdivision (1) of that provision states that:

> "In addition to any other powers conferred upon villages, the board of trustees of a village shall have management of village property and finances, may take all measures and do all acts, by local law, not inconsistent with the provisions of the constitution, and not inconsistent with a general law except as authorized by the municipal home rule law, which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of its property, the safety, health, comfort, and general welfare of its inhabitants, the protection of their property, the preservation of peace and good order, the suppression of vice, the benefit of trade, and the preservation and protection of public works. The board of trustees may create or abolish by resolution offices, boards, agencies and commissions and delegate to said offices, boards agencies and commissions so much of its powers, duties and functions as it shall deem necessary for effectuating or administering the board of trustees duties and functions."

Further, although subdivision (2) of §4-412 authorizes a mayor to preside at meetings of a board of trustees, it also provides that "[t]he board may determine the rules of its procedure." If you believe that it would be appropriate to do so, you might propose rules concerning the scheduling of meetings or perhaps the assent of a certain number of members relative to holding unscheduled meetings.

Second, while it is not necessarily inappropriate to do so, conducting unscheduled meetings may diminish the effectiveness of the Open Meetings Law. When unscheduled meetings are held, members

of the public who might otherwise have an interest in attending may be unable to do so.

By way of background, 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. Although, the Open Meetings Law does not make reference to "unscheduled", "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.

However, 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 would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

In an effort to provide guidance and enhance understanding of the Open Meetings Law, copies of this opinion will be forwarded to the Mayor and the Board of Trustees.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. George Carter, Mayor
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2508

Committee Members

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

William Bookman, Chairman
Peter Delaney
Walter W. Grunfeld
Elizabeth McCaughey
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Gilbert P. Smith
Alexander F. Treadwell
Patricia Woodworth
Robert Zimmerman

Executive Director

Robert J. Freeman

June 8, 1995

Ms. Patricia E. Bidlock
Town Clerk
PO Box 327
Cohocton, NY 14826

<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 Ms. Bidlock:

As you are aware, I have received your correspondence in which questioned "how much must be in the minutes" prepared by a town clerk in relation to a town board meeting. You also asked whether the contents of minutes should be presented in chronological order.

In this regard, the Open Meetings Law offers direction on the subject and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute states that:

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

> pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, although minutes must be prepared and made available within two weeks, it is clear that minutes need not consist of a verbatim account of every comment that was made. It is also noted that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his or her statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement or whether the board member should submit the statement in writing, which would then be entered as part of the minutes (1980 Op. St. Compt. File #82-181).

It is also noted that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that 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, while the Open Meetings Law does not deal with the order in which items referenced in minutes are recorded, I believe that a basic requirement concerning minutes is they be accurate. Consequently, in my opinion, items appearing in minutes should be referenced in the chronological order in which they arose at a meeting.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Neena Nagell, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2509

Committee Members

William Bookman, Chairman
Peter Delaney
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David A. Schulz
Gilbert P. Smith
Alexander F. Treadwell
Patricia Woodworth
Robert Zimmerman

Executive Director

Robert J. Freeman

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

June 9, 1995

Hon. Larry G. Mack
Cattaraugus County Legislature
[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.</u>

Dear Legislator Mack:

I have received your letter of May 18. In your capacity as a member of the Cattaraugus County Legislature, you have requested an advisory opinion concerning your exclusion from an executive session held by the Public Works Committee of the Legislature, as well as the propriety of the executive session.

In this regard, I offer the following comments.

First, the Open Meetings Law applies to meetings of public bodies, and §102(2) of 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 County Legislature is clearly a public body. When the Legislature creates or designates committees or subcommittees consisting of members of the Legislature, those committees and subcommittees are, based on the last clause of §102(2), public bodies separate and distinct from the County Legislature for purposes of the Open Meetings Law.

With respect to your exclusion from the executive session, I direct your attention to §105(2) of the Open Meetings Law. That

provision states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." As such, only the members of a public body have the right to attend an executive session of that body. In the context of your question, unless authorized to attend by the Public Works Committee, I do not believe that members of the County Legislature who are not members of that Committee would have the right to attend an executive session of the Committee. Therefore, assuming that there was a proper basis for conducting an executive session, it appears that the Committee could justifiably have excluded you from its executive session.

As suggested in previous correspondence, if you believe that every County Legislator should have the right to attend every executive session of every committee, even though a member of the Legislature is not a member of a committee, you could recommend the adoption of a rule to that effect in accordance with §153(8) of the County Law.

Second, as I understand the matter, the executive session was held to discuss the selection of a consultant. If that is so, it appears that there may have been a basis for conducting an executive session. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

Therefore, insofar as the Committee considered the employment history of a particular consultant or consulting firm, for example, or discussed a matter leading to the appointment or employment of a particular consultant or consulting firm, I believe that it would have validly held an executive session.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2510

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

June 13, 1995

Hon. Alice Hussie
Member of the Town Board
Town of Southold
Southold, NY

Dear Ms. Hussie:

I have received the materials that you transmitted to me on May 23. You have sought a clarification concerning the assertion of the attorney-client privilege in relation to the Open Meetings Law.

One of the documents that you sent is a memorandum to the Town Board from the Town Attorney in which the attorney referred to an advisory opinion that I prepared on May 16 at the request of the Troy Gustavson of the Times/Review Newspapers (see attached). The attorney indicated that the opinion was based on a newspaper article and that the opinion was "correct" but was "based on incomplete information." The opinion focused on the "litigation" exception for entry into executive session. The attorney wrote that "[i]n fact, the Board closed the meeting pursuant to the attorney-client privilege to discuss various legal issues."

In this regard, I point out that there are two methods that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

Relevant to your inquiry is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the

> purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

Insofar as the Board seeks legal advice from its attorney and the attorney renders legal advice, I believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. Therefore, even though there may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to §108. For example, legal advice may be requested even though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, often at some point in a discussion, the attorney has stopped giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting.

Lastly, although it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies, and I believe that the advice offered in the opinion of May 16 would be pertinent. In the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. Nevertheless, it is suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2511

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

June 14, 1995

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 information presented in your correspondence.

Dear Mr. Reninger:

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

According to your letter, the Greenburgh Town Board held a special meeting on March 22 with commissioners of fire districts located in the Town. The Town Clerk indicated that no minutes were kept because the Town Board "did not vote on any action." You have expressed the belief, however, "that minutes must still be published, including such facts as time and place of meeting, who attended, motions to go into executive session etc." In this regard, I offer the following comments.

First, it is noted that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. I point out that the decision rendered by the Court of Appeals rejected contentions made by public bodies that so-called "work sessions", "agenda sessions" and similar informal gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law.

Second, with respect to minutes of meetings, whether they are formal or otherwise, 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 attended or 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 meetings, technically, I do not believe that minutes must be prepared. However, if a motion is made to enter into an executive session, for example, reference to the motion must in my opinion be memorialized by means of the preparation of minutes.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Alfreda A. Williams, Town Clerk

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 8896
OMC-AO 2512

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

June 15, 1995

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 May 22 in which you referred to a conversation that we had in the middle of May, and you asked that I confirm in writing your understanding of requirements relating to the Open Meetings Law. You offered three statements for my review.

The first is as follows:

> "1. Minutes are governed by Section 106 of the Public Officers Law. Pursuant to subsection (3) thereof, they shall be made available to the public within ten (10) days of the meeting. When asked, you stated a violation of this provision does not per se invalidate any decision made at a meeting when the minutes are not filed in a timely basis."

In this regard, subdivision (3) of §106 of the Open Meetings Law states that:

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

As such, a public body has two weeks from a meeting to prepare minutes and make them available, not ten days as you suggested in your letter. I know of no provision of law or judicial decision indicating that a failure to prepare appropriate minutes within the requisite time serves to invalidate a decision made at a meeting of a public body.

You second statement is:

> "2. Official minutes of a meeting of a body governed by the Open Meetings Law do not, under State law, need to be approved by that body to become valid."

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.

The remaining statement is as follows:

> "3. The notes of a meeting do not constitute official minutes of that meeting. It is understood that they reflect the secretary's draft of what occurred in a meeting and serve as a basis for the drafting of the formal minutes for that meeting. It is understood that the notes of the meeting can, however, be obtained under the Freedom of Information Law."

From my perspective, notes of a meeting do not constitute the minutes of meeting but rather serve as a basis for preparing minutes. I point out for purposes of analogy that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" of a meeting (1978 Op. St. Compt. File 280).

With respect to access to the notes, I believe that they constitute "records" as defined by the Freedom of Information Law [see §86(4)]. As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all

records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, notes could be characterized as intra-agency materials that fall within the scope of §87(2)(g). That provision 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..."

I point out 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.

Assuming that minutes consist merely of a factual rendition of what transpired at a meeting, I believe that they would be available. Further, it was held years ago that notes of a meeting consisting of factual information were required to be disclosed [Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2513

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

June 20, 1995

Mr. Peter W. Sluys
Managing Editor
Community Media Inc.
25 W. Central Avenue
Box 93
Pearl River, NY 10956

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 June 6 in which you requested an advisory opinion concerning the Open Meetings Law.

By way of background, you referred to four news media organizations whose coverage area includes the Village of Haverstraw. You identified them as the Rockland Journal-News, a daily newspaper with a circulation of approximately 4,000 in the Town of Haverstraw; the Rockland Independent, a weekly newspaper with a circulation in the Town of about 5,000; WRKL, a local radio station; and the Rockland County Times, a weekly designated as the Town's official newspaper with "a circulation in the Town of Haverstraw of approximately 800 copies, if that."

According to your letter:

> "On May 26, 1995 the acting Village Justice Arthur Moskoff submitted his resignation to the town clerk. On Memorial Day, May 29th, the Mayor asked the town clerk to notice a meeting for the 31st of May, even though no declaration of emergency was made by the village.
>
> "On May 30th the village clerk called the other members of the town board, and also called the Rockland County Times to tell them that a meeting was going to be held to appoint a replacement to Moskoff, which meeting was held on May 31, 1995.

> "The Journal-News, the Rockland Independent, and WRKL Radio were concededly not given notice of this meeting, and the Rockland County Times [a weekly] would only publish any notice of this meeting after the meeting was held [i.e., the meeting was held on the 31st, the Times was published next on June 1st].
>
> "In addition, no public notice of the meeting was posted at Village Hall or anywhere else in the Town of Haverstraw, and no written notice of the meeting was given at any time and at any place to any individual.
>
> "In short, the only notice of the meeting given herein was given to a media that was friendly with the local Mayor and had the smallest circulation of any newspaper in Rockland County in the Village and Town of Haverstraw. The public had no knowledge whatsoever of the meeting, and had no opportunity to gain that knowledge by review of any posted material in the Village Clerk's office."

You have asked whether, in my view, the meeting was held in violation of the Open Meetings Law.

In this regard, I offer the following remarks, some of which may be repetitive of those offered to you in an advisory opinion dated May 4, 1992.

Before reaching the issues, I note that you referred to both the Town and Village of Haverstraw. Unless Haverstraw is a "town/village", it is likely that the Town and Village would be separate public corporations with distinct governments and governing bodies. That point, however, is not crucial with respect to the Open Meetings Law.

The focal point of the matter involves the extent to which the Haverstraw Village Board of Trustees complied with §104 of the Open Meetings Law. That provision requires that notice of the time and place of every meeting of a public body be given to the news media and posted. Specifically, §104 states that:

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

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

Based upon the foregoing, it is clear that notice must be posted and given to the news media prior to every meeting. However, §104 does not specify which news media organizations must be given notice. In many instances, there are may be several news media organizations, i.e., newspapers, radio and television stations, that operate in the vicinity of a public body. So long as notice of a meeting is given to at least one news media organization prior to a meeting, I believe that a public body would be acting in compliance with the requirement that notice be given to the news media.

Nevertheless, in my opinion, every law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to the intent of the law. It would be unreasonable in my view for the Village Board to transmit notice to the Washington Post or a New York City radio or television station, for those outlets would not likely reach residents of the Village, nor would they assign a reporter to attend a meeting of the Board. If notice is posted and given to a newspaper that has a significant circulation in the Village or to a radio station situated in or near the Village, I believe that the Board would be in compliance with the Open Meetings Law. In short, there is nothing in the Open Meetings Law that would require that notice of meetings be given to a particular newspaper. However, if a newspaper has a significant circulation in a municipality, it might be considered to be unreasonable to avoid providing notice to that newspaper.

In addition to giving notice to the news media, it is emphasized that the Open Meetings Law requires that notice be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public. The failure to post notice in the context of the facts that you presented would in my opinion have constituted a failure to comply with the Open Meetings Law.

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 decision cited above, 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. Similarly, for reasons described earlier and the clear direction provided in §104 of the statute, providing notice to a single weekly newspaper and failing to post notice at all, is

in my view inconsistent with the requirements of the Open Meetings Law. Further, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

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 of Trustees.

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

FOIL-AO-8918
OML-AO-2514

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

June 23, 1995

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 information presented in your correspondence.

Dear Ms. Adams:

I have received your letter of June 7 which is addressed to Laurie Dowd, Southold Town Attorney, the Southold Town Board, and to me.

The initial issue to which you referred involves fees imposed by the Town of $15 for a copy of a certificate of occupancy and $100 for copies of records relating to structures built before permits were required.

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

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

> an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. More recently, a section of the Suffolk County Code establishing a fee of $20 for a copy of an accident report was declared to be void (Gancin, Schotzky & Rappaport, P.C. v. Suffolk County, Supreme Court, Suffolk County, NYLJ, December 30, 1994).

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and 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 availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;

> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute.

Lastly with regard to the issue of fees, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

A second issue to which you referred involves an attorney consulting with a client, i.e., a town board, and "maybe litigation" in private.

I note that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1)

that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

Relevant under the circumstances is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

Insofar as the Board seeks legal advice from its attorney and the attorney renders legal advice, I believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. Therefore, even though there

may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to §108.

With respect to litigation, one of the grounds for entry into executive session is §105(1)(d), which permits a public body to conduct an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

Therefore, unless a public body discusses litigation strategy, §105(1)(d) cannot justifiably be cited to conduct an executive session. Further, as indicated in the passage quoted above, the possibility that litigation might ensue would not constitute a valid basis for entry into executive session.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981), emphasis added by court].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Laurie Dowd, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2515

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

June 26, 1995

Mr. Anthony Ferrante
[redacted]

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. Ferranti:

I have received your letter of June 14. You have asked whether "school board members on special committees" can "meet in private sessions and exclude the public from attending."

In this regard, I offer the following comments.

First, it is noted that judicial 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 [see Glens Falls Newspaper, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993); also Goodson-Todman Enterprises, Ltd. v. City of Kingston, 153 AD 2d 103 (1990)]. 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."

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

In view of the definition of "public body", I believe that any entity consisting of two or more members of a public body would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total members of a body (see e.g., General Construction Law, section 41). As such, in the case of a committee consisting of three, for example, a quorum would be two.

If a committee consists of Board members, it would in my view constitute a public body that is required to provide notice prior to its meetings pursuant to section 104 of the Open Meetings Law and conduct its meetings in accordance with law.

Lastly, depending upon its purpose, an event held on school property might be required to be conducted in public, even though the event does not involve a public body or the Open Meetings Law. The Education Law enables a board of education to authorize that school property be used for various purposes, including:

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

Therefore, if an entity, such as a PTA, or perhaps a citizens' committee meets on school property for a "civic" purpose, or for a purpose "pertaining to the welfare of the community", those meetings would appear to be open to the public, even if the Open Meetings Law does not apply.

As you requested, enclosed is a copy of "Your Right to Know", which describes the Open Meetings Law and the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 8927
OML-AO-2516

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

June 26, 1995

Ms. Barbara L. Edwards
[redacted]

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. Edwards:

I have received your letter of June 12 and the news article attached to it. As a member-elect of the Salamanca School District Board of Education, you expressed concern with respect to executive sessions routinely held in relation to the budget process, closed meetings of a committee, and records pertaining to the budget and its development.

In this regard, I offer the following comments.

First, with respect to discussions involving the budget, by way of background, every meeting of a public body 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" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering the Open Meetings Law, it was stated that:

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

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the funding or elimination of positions or programs, could appropriately be discussed during an executive session.

In addition, due to the insertion of the term "particular" in §105(1)(f), it has been advised and held judicially 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) [Gordon v. Village of Monticello, 620 NYS 2d 573, ___ AD 2d ___ (1994)]. 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.

Second, with regard to the Finance Committee and others, 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, including a committee of a board of education, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively

as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. 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, 195 AD 2d 898 (1993)].

Third, in consideration of access to materials developed in the budget process, I direct your attention to the Freedom of Information Law. That statute pertains to 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."

Based on the foregoing, when information is maintained by an agency in some physical form (i.e., drafts, worksheets, computer disks, etc.), I believe that it would constitute a "record" subject to rights of access.

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. In my opinion, two of the grounds for denial would be relevant to an analysis of District records relating to the budget.

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

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

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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 a case involving "budget worksheets", it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, §88(1)(d)]. Currently, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

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

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

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

Based upon the language of the determination quoted above, which was affirmed by the state's highest court, it is my view that the kinds of records used in the development of a budget, to the extent that they consist of "statistical or factual tabulations or data", are accessible, unless a provision other than §87(2)(g) could be asserted as a basis for denial.

Further, another decision highlighted that the contents of materials falling within the scope of §87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find

> these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

The remaining provision of possible significance, §87(2)(c), states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations. If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, it would appear that those portions of the records could be withheld.

Lastly, §84 of the Freedom of Information Law contains that statute's statement of intent. That provision states in part that:

> "As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.
>
> "The people's right to know the process of governmental decision-making and to review the documents and statistics leading to

> determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality."

As you requested, copies of this opinion will be sent to the individuals identified in your letter, and 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
Kevin Burleson, Salamanca Press
Tom Donahue, Olean Times Herald
Cas Myers, Finance Chairman
John Hogan, Business Manager
John Hogle, Superintendent
Thomas Brady, Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2517

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

June 30, 1995

Mr. Ralph J. Blasting
[redacted]

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. Blasting:

I have received your letter of June 26 in which you sought assistance in relation to matters pertaining to the Open Meetings Law. The issues involve the propriety of executive sessions held by the Board of Trustees of the Village of Herkimer.

You focused on two events, which you described as follows:

> "A discussion on whether to change a traffic control signal light to four-way stop signs was taken to Executive session. Upon being questioned as to the appropriateness of this action, the response was that the change could cause future litigation. Therefore, Executive session was appropriate.
>
> "The other issue was the audit of the Village bills and HUD Program. Although the response to [your] question was that it may not be appropriate, they then proceeded to take the item to Executive session."

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, the ground for entry into executive session relevant to the first situation to which you referred 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 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 considered at a meeting, an executive session could not in my view be held to discuss an issue merely because there is a potential for litigation.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981), emphasis added by court].

Lastly, with respect to the second issue involving an audit of Village bills and the HUD program, there does not appear to have been any basis for conducting an executive session. Further, it does not appear that the Board carried out the procedure required by §105(1) prior to entering into the closed session.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Rocco Losito, Mayor
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8961
OML-AO-2518

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

July 13, 1995

Ms. Nancy M. Sills
Attorney at law
126 State Street
Albany, NY 12207-1606

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. Sills:

I have received your letter of June 30 and the materials attached to it. You have described a series of difficulties in relation to the implementation of the Freedom of Information Law and the Open Meetings Law by the Lake George Park Commission (LGPC). Following a lengthy account of the matter, you requested that the Committee conduct an investigation and prepare an advisory opinion with respect to:

> "1. Whether the Lake George Park Commission is required to have a Public Records Officer, or designee, available during regularly scheduled business hours to provide access to public records.
>
> 2. Whether the Lake George Park Commission is required to prepare, and make available, minutes of meetings within two weeks after the meetings occur.
>
> 3. Whether the Lake George Park Commission is required to provide agendas of upcoming meetings, in advance, when a request for the same has been made and pre-addressed, stamped envelopes have been provided for mailing the same.
>
> 4. Whether the Lake George Park Commission is required to make copies of documents requested, and to which access has been granted, available to an applicant by mail.

> 5. Whether the Lake George Park Commission, if it regularly tape records its meetings, is required to take such steps as reasonably necessary to assure that the tapes will be protected and preserved.
>
> 6. Whether the Lake George Park Commission is required to promptly provide an applicant with access to a regularly maintained computer list that will make requested records readily identifiable."

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the statutes at issue. It has neither the resources nor the jurisdiction, however, to conduct an investigation. It is my hope that opinions rendered by this office serve to educate and enhance compliance with and understanding of open government laws, and I offer the following comments in an effort to achieve those ends.

By way of background, based on Article 43 of the Environmental Conservation Law, the LGPC is clearly an "agency" for purposes of the Freedom of Information Law, and a "public body" as defined by the Open Meetings Law [see respectively Public Officers Law, §§86(3) and 102(2)].

The LGPC is in my view required to designate one or more persons as "records access officer." 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 agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Relevant to the matter 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. In conjunction with your remarks, I do not believe that the physical presence of a records access officer at an agency's offices is necessary. In the absence of the records access officer and as part of his or her duty to coordinate the agency's response to requests, others should be provided with the authority to give effect to the Freedom of Information Law.

It is also noted that §1401.4 of the regulations entitled "Hours for public inspection" states in part that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Moreover, in a recent decision, it was held that insofar as an agency's rule or practice serves "to limit the hours during which public documents can be inspected to a time less than the business hours of the clerk's office, it is violative of the Freedom of Information Law" [Murtha v. Leonard, 620 NSY 2d 101, 102, ___ AD 2d ___ (1994)].

With regard to the timely compilation of minutes, §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.

Further, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that 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."

With respect to agendas, while many public bodies routinely or perhaps by rule prepare agendas, there is nothing in the Open Meetings Law or any other statute of which I am aware that would require that agendas be prepared. If agendas are prepared prior to meetings, I believe that the constitute "records" subject to rights conferred by the Freedom of Information Law. If an agenda briefly identifies the subjects to be considered at a meeting, in my opinion, it should be disclosed.

Similarly, while §104 of the Open Meetings Law requires that notice of a meeting be given to the news media and by means of posting, there is no requirement in that statute that notice be sent to individuals on request. Certainly the LGPC may as a matter of courtesy send agendas to you in "pre-addressed, stamped envelopes" that you have provided. Nevertheless, there is no requirement of which I am aware that it must do so.

With regard to requests by mail, nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government specifically deals with requests made and responses

given by mail. However, due to the size of the state, the inability of some people to physically travel to locations where records are kept, the reality that many people work and cannot travel to those locations, and in view of the intent of the Law, I believe that is implicit that agencies must respond to requests by mail. However, in addition to the fee for photocopying, an agency could in my view also charge for the cost of postage.

The Freedom of Information Law does not deal directly with the preservation and protection of records. However, provisions of the Arts and Cultural Affairs Law pertain to the preservation, retention and disposal of agency records. If the LGPC is considered to be a state agency, it appears that §57.05 of the Arts and Cultural Affairs Law would be applicable; if the LGPC is considered a local agency, I believe that §57.25 would apply.

Your remaining question involves any requirement that the LGPC grant access to a "computer list that will make requested records readily identifiable." I point out that §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."

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than ten years ago that " [i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, in a computer, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion,

be the equivalent of creating a new record. Since §89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

Having reviewed materials sent by the LGPC in conjunction with your appeal, I offer the following additional comments.

As suggested earlier, minutes of meetings, whether approved or otherwise, must be prepared and made available within two weeks of the meetings to which they pertain. Reference is made in response to your appeal to unapproved minutes, as well as notes, memoranda and other documentation. Those kinds of records were withheld on the ground that they constitute "intra-agency material which does not constitute a final agency determination or policy." While final agency policies or determinations found within inter-agency or intra-agency materials must be disclosed, other categories of information within those materials must also be made available. Based upon the definition of "record" quoted earlier, drafts, notes and any other documentation would in my view clearly constitute "records" subject to rights conferred by the Freedom of Information Law. As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision pertaining to inter-agency and intra-agency materials, §87(2)(g), serves as a potential basis for withholding. However, due to its structure, it often requires disclosure of certain aspects of records. Section 87(2)(g) permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that

affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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. As such, the specific contents of inter-agency or intra-agency materials determine the extent to which they are available or deniable under §87(2)(g).

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in

> fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, even though records do not consist of final agency policies or determinations, I believe that those portions consisting of statistical or factual information or instructions to staff that affect the public would be available, unless a different ground for denial could properly be asserted.

Lastly, since the utility of tape recordings prepared by the LGPC has been an issue, I point out that it has been determined judicially that any person in attendance at an open meeting of a public body may use a portable tape recorder, so long as it is used in a non-disruptive manner [see 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael P. White, Executive Director
Kathleen Ledingham, Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2519

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

July 17, 1995

Ms. Patricia Abramo
News of the Highlands, Inc.
[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.</u>

Dear Ms. Abramo:

I have received your recent correspondence in which you questioned the propriety of an executive session held at a meeting of the Cornwall Town Board on June 28.

By way of background, the materials indicate that the gathering was "advertised as a meeting to discuss the recently completed audit report." Soon after convening, the Board entered into an executive session to discuss "specific items of personnel." According to your editorial on the matter, "[t]here was no discussion of the audit in any way, shape or form. Not in public, at least." Having asked those who attended the closed session about the nature of the discussion, some contended that "specific personnel issues" were indeed discussed. One member of the Board, however, said that the discussion involved the processes of the Town accounting system and stated that "they are not up to par with modern accounting procedures. There weren't any accusations regarding how the procedures were conducted. Just recommendations about those practices."

In this regard, without having been present, I cannot advise with certainty as to the extent to which the Board complied or perhaps failed to comply with the Open Meetings Law. Nevertheless, in an effort to enhance compliance with and understanding of the Law, I offer the following comments, copies of which will be sent Town officials.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of

public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the 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.

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question 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 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 at least one of the topics listed in §105(1)(f) is considered.

In the context of the situation at issue, insofar as the discussion involved a particular person in relation to one or more of the subjects described in §105(1)(f), I would agree that the executive session was justifiably held. On the other hand, to the extent that it involved consideration or review of accounting procedures, Town policies or practices, or the functions of an office or certain positions, irrespective of who might hold those positions, I do not believe that there would have been a basis for discussion in executive session. Even though those kinds of subjects might be reflective of "specific personnel" issues, they would not have focused on any particular person and, therefore, in my opinion, should have been discussed in public.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

"...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

"Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; AD 2d ___ (December 29, 1994)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Town Board
James Loeb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-8979
OML-AO-2520

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

July 19, 1995

Mr. Bruce S. Paskoff
Ms. Edna K. Paskoff
[redacted]

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. and Ms. Paskoff:

I have received your letter of July 8 and a variety of related materials. You have raised a series of issues pertaining the implementation of the Open Meetings and Freedom of Information Laws by the Elmont Union Free School District and its Board of Education. Rather than reiterating the facts and circumstances that precipitated your expressions of concern, in the following commentary, I will attempt to deal with the issues by means of discussing applicable provisions of law and their judicial interpretation.

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

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

> "We believe that the Legislature intended to include more than the mere formal act of

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

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

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

Based upon the direction given by the courts, if a majority of a board of education gathers to discuss school district business, in their capacities as board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, if the Board intends to gather to discuss public business prior to its scheduled meeting, and if a majority of its members is present, such a gathering in my view would be a "meeting" that falls within the requirements of the Law that should be preceded by notice.

Second, §104 of the Open Meetings Law pertains to notice of meetings and states that:

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

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

Based on the foregoing, a public body is not required to pay to place an advertisement prior to a meeting. However, it is clear that notice must be given to the news media prior to every meeting and include reference to the "time and place" of a meeting. Further, any such notice must be "conspicuously posted in one or more designated public locations," and I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

Third, 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.

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. 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.

Fourth, 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.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited

in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question 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 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 at least one of the topics listed in §105(1)(f) is considered.

Insofar as a discussion involves a particular person in relation to one or more of the subjects described in §105(1)(f), an executive session may in my opinion be justifiably held. On the other hand, to the extent that a discussion involves consideration or review of procedures, policies or practices, or the creation, elimination or functions of an office or certain positions,

irrespective of who might hold those positions, I do not believe that there would be a basis for discussion in executive session. Even though those kinds of subjects might be reflective of "specific personnel" issues, they would not focus on any particular person and, therefore, in my opinion, should be discussed in public.

The language of a motion to enter into executive session pursuant to §105(1)(f) should be based on the specific terms of that provision. 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a

> 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; AD 2d ___ (December 29, 1994)].

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 "contractual matters" or "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].

It is unclear on the basis of the minutes whether the Board took action during executive sessions. In this regard, 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.

Lastly, one of the issues concerns access to records involving expenditures and reimbursements, particularly to Board members. Here I direct your attention to the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, only of the grounds for denial is pertinent to an analysis of rights of access to those kinds of documents. While that provision might permit that certain aspects of the records in question may be withheld, I believe that the remainder must be disclosed.

Specifically, §87(2)(b) of the Freedom of Information Law 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 subject to a variety of interpretations, the courts have provided direction through their review of challenges to agencies' denials of access. In brief, 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, it has been held 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, supra; 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 the context of the records at issue, I believe that they are clearly relevant to the performance of the official duties of Board members and other District officials. Consequently, with the exception of personal details, they must in my view be disclosed. Examples of the kinds of personal details that could be deleted prior to disclosure of the remainder of the records would be such items as home addresses, social security numbers and personal credit card numbers. It also noted that although the front side of cancelled checks have been found to be public, it has been held that the back of the checks may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. The court found, in essence, that inspection of the back of a check could indicate how an individual chooses to spend his or her money, which is irrelevant to the performance of that person's duties(see Minerva v. Village of Valley Stream, Supreme Court, Nassau County, May 20, 1981).

In conjunction with the preceding remarks concerning access to records, I direct you to a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals, the State's highest court, 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).

Based on the foregoing, I believe that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse can be balanced against the possible infringement upon the privacy of present or former public officers or employees in a manner consistent with the preceding commentary.

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, a copy of this opinion will be sent 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

FOIL-AO 2521

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

July 21, 1995

Mr. David P. Henry
[redacted]

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. Henry:

I have received your letter of July 12 in which you sought my views concerning the provisions of a resolution that was apparently adopted by the Village of West Haverstraw pertaining to the use of tape recorders and other recording devices at meetings of the Board of Trustees and other Village public bodies.

Having reviewed the provisions in question, I offer the following comments.

By way of background, it is noted that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. There are, however, several judicial decisions concerning the use of those devices at open meetings. From my perspective, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would

not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

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

> "While 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 judgement annulling the resolution of the respondent board of education" (id. at 925).

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.

The resolution that you presented generally permits the use of recording devices at open meetings. However, it requires that:

> "Any person wishing to record a public meeting of the Village Board of Trustees, or any other Village Board, or any portion of such meeting, shall inform the Village Clerk prior to commencement of the meeting, so as to enable the Village Clerk to inform those in attendance of the fact that the meeting is to be recorded."

In this regard, I know of no judicial decision that has dealt with such a requirement, and the question in my view, as it will be with respect to my remarks concerning other aspects of the resolution, is whether the requirement is reasonable. From my perspective, since the requirement does not diminish the privilege of using a recording device at a meeting, but rather appears to be intended to enable those in attendance to know that their comments will be

recorded, it represents a valid exercise of authority by the Board of Trustees.

Nevertheless, other requirements imposed by the resolution are, in my view, beyond the scope of that authority. One such provision states that:

> "Any recording device, once activated, should remain activated at least until such time as all discussion concerning a particular agenda item is complete, so as to capture the full discussion thereof..."

In my opinion, the provision quoted above is unenforceable and, therefore, unreasonable. If the cassette used by a person in attendance runs out and he or she has no other cassette, that person simply cannot tape the entirety of a discussion. The same would be so if a battery runs out and a recorder can no longer be used. Further, while members of the public the right to attend meetings of public bodies, I do not believe that public bodies have the right to require that those in attendance remain at the meeting for the entirety of a discussion of an agenda item or a meeting.

The other provision of questionable validity states that:

> "No more than two recording devices may be in operation at any one time, and any person undertaking to record a meeting, or a portion thereof, shall be deemed to have consented to make the recording, or a copy thereof available to any other person, including the Board, upon request, at the requesting person's sole cost and expense..."

Other aspects of the resolution deal with the placement of recording devices and requirements that they be used in a manner that is neither distracting nor obtrusive. That being so, I question whether a limitation on the number of recording devices permitted can be valid. If people place the devices under their seats or on their laps, it is unlikely that the devices would be distracting or obtrusive, and the number of devices used inconspicuously should in my opinion be unlimited.

Perhaps more importantly, if a member of the public records a meeting, I believe that the tape is the property of that individual. I cannot envision how the Village could enforce the requirement that an individual who tape records a meeting provide a copy "to any other person." Moreover, while the Village and other municipalities are required by law to maintain records for certain periods of time (see Arts and Cultural Affairs Law, Article 57-A), a member of the public could erase, reuse or destroy a tape that he or she owns at any time.

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

FOIL-AO 8441
OML-AO 2522

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

July 27, 1995

Mr. Jeff P. Janiszewski
[redacted]

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. Janiszewski:

I have received your letter of July 17 in which you raised a series of issues concerning the obligation, if any, of the Schenectady School District and its Board of Education to disclose information, respond to questions or publicly discuss a matter involving a stabbing that occurred at the High School in May. You indicated that both the victim and the alleged assailant have been identified by the police and that the District's investigation has ended. Nevertheless, District officials contend that "there are legal obstacles to full disclosure."

In conjunction with the questions that you raised, I offer the following comments.

First, as you are aware, in general, the Freedom of Information Law requires that agency records be disclosed, unless there is a basis for denial appearing in the Law that can be properly asserted. Similarly, the Open Meetings Law generally requires that meetings of public bodies be conducted in public, unless there is a basis for closing the meeting. I point out that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not applicable. Pertinent to the issues you raised is §108(3), which exempts from the Open Meetings Law:

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

Second, 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.

In like manner, although the Open Meetings Law provides the public with the right to attend meetings of public bodies, the Law is silent with respect to public participation at meetings. In short, while members of a public body may choose to answer questions, there is no obligation to do so under the Open Meetings Law or any other law of which I am aware.

Third, relevant with respect to both records and meetings concerning the incident that you described and similar or related matters are the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and the regulations promulgated pursuant to FERPA by the U.S. Department of Education. In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

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

> "the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution."

Further, relevant to the issue is the commentary appearing in the Federal Register pertaining the regulations (Federal Register, Vol. 60, No. 10, January 17, 1995) in which it was stated that the United States Department of Education:

> "...remains legally constrained to conclude that records of an institution's disciplinary action or proceeding are 'education records' under FERPA, not law enforcement unit records, and that excluding these records from definition of 'education records' can be accomplished only through a statutory amendment of FERPA by Congress."

As such, even though the matter at hand relates to law enforcement, because the records involve student discipline, I believe that they are exempted from disclosure insofar as they are personally identifiable to a student or students. Assuming that the names of the students are known to the public, the deletion of identifying details would not to protect their privacy under FERPA. However, when such deletions can be made with a reasonable certainty that the remainder of the record would not make a student's identity easily traceable, the remainder would in my view be available to the extent provided by the Freedom of Information Law.

Lastly, I believe that the protection of privacy accorded by FERPA remains in effect until the parent of a minor student or the student upon reaching majority consents to disclosure, or until it can be demonstrated that the student to whom the record pertains is deceased.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance. Should any further questions arise, pleas feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education

Based upon the foregoing, disclosure of students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

I note that the term disclosure is defined in the regulations 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."

In consideration of FERPA, if the Board discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Notwithstanding the FERPA, I believe that the Board would have the ability to discuss the discipline of specific students in executive session. Section 105(1)(f) of the Open Meetings Law permits a public 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..."

Therefore, when the Board discusses a disciplinary matter that focuses upon a particular student or students, the discussion could in my opinion validly be held in an executive session.

With respect to the Freedom of Information Law, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the FERPA, and insofar as education records would if disclosed identify a particular student or students, I believe that they would be exempted from disclosure.

In short, in my view, because it is a federal statute, FERPA supersedes state laws.

It is also noted that the federal regulations promulgated under FERPA, 34 CFR Part 99, were recently amended. The phrase "education records" has always excluded records of a "law enforcement unit", a term defined in §99.8 of the regulations. In addition, for the first time, the regulations refer specifically to student discipline. In §99.3, "disciplinary action or proceeding" is defined to mean:

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2523

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

August 1, 1995

Ms. Anne Magnuson
[redacted]

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. Magnuson:

I have received your letter of July 26 in which you raised a series of issues concerning the Open Meetings Law.

According to your letter, the Stillwater Town Board "has included a guest at two private sessions with a quorum present," and when you questioned the legality of those gatherings, you were apparently informed that such meetings may be validly held "when the guest is in an adversative position to the town and the attorney is helping the town board as a client." You also wrote that the Village Board of Trustees has held at least one similar session, "calling it an informal meeting." Further, you indicated that the "divergent subjects of all of these meetings have been controversial topics of the type [you] believe the public has a right to know."

In this regard, I offer the following comments.

First, the Open Meetings Law is clearly intended to open the deliberative process to the public and provide the right to know how public bodies reach their decisions. As stated in §100 of the Law, its Legislative Declaration:

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

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

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

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

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

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social

> transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

It has held more recently that "a planned informal conference" or a "briefing session" held by a quorum of a public body would constitute a "meeting" subject to the requirements of the Open Meetings Law [see Goodson-Todman v. Kingston, 153 Ad 2d 103, 105 (1990)].

In short, based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of the members of a public body gathers to conduct public business, any such gathering would, in my opinion, constitute a "meeting" subject to the Open Meetings Law. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Law.

Second, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into an executive session. It is noted, too, that §102(3) of the Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, it is clear that an executive session is not separate from a meeting, but rather is a part of an open meeting. In addition, 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.

Third, a public body may invite a "guest" to attend an executive session. Section 105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any

member of the public body and any other persons authorized by the public body." Based on the foregoing, the only persons who have the right to attend an executive session are than members of a public body. However, a public body has the authority to permit others to attend. Typically, those who attend executive sessions other than the members of a public body are persons with special knowledge or expertise concerning the issue under consideration, such as a staff person or consultant, for example.

With respect to the situation to which you specifically referred, it appears that the matter might have involved litigation. The provision 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 by the Appellate Division, Second, Department, 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, so as not to disclose its strategy to its adversary. Further, in one of the decisions cited above, Matter of Concerned Citizens, it was held that a public body could not conduct an executive session to discuss litigation with its adversary present. Therefore, if the private session that you described was held to discuss litigation with the Town's adversary in litigation, that session, according to the courts, would have been improperly held.

Lastly, with regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co. , Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

The Daily Gazette decision was recently cited by the Appellate Division, Third Department, in which one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue." Specifically, it was held that:

> "...the public body must identify the subject matter to be discussed (see, Public Officers Law § 105 [1], and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsbrugh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of 'a personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the

> discussion involve the 'employment history of a particular person' (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to 'a personnel issue' is the functional equivalent of identifying 'a particular person'."

Based upon the foregoing, I believe that there is judicial authority indicating that motions for entry into executive session must be sufficiently detailed to enable the public to know that the issues to be considered in private clearly fall within the grounds for entry into executive session that appear in §105(1) of the Open Meetings Law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Town Board
Village Board of Trustees

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2524

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

August 3, 1995

Ms. Lori A. Kline
[redacted]

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. Kline:

I have received your letter of August 1 and the correspondence attached to it. The issue involves your unsuccessful efforts in obtaining minutes of a meeting of the Town of Guilderland Planning Board held on July 12. It appears that the minutes had not been prepared as of the date of your letter, and you have sought guidance on the matter.

In this regard, §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."

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

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

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Jan Weston, Town Planner
Planning Board
Town Board

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2525

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

August 10, 1995

Ms. Sylvia B. Rozzelle
Town Clerk
Town of Olive
Town Office Bldg.
PO Box 596
West Shokan, NY 12494

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. Rozzelle:

I have received your letter of August 3 and appreciate your kind comments. As Town Clerk of the Town of Olive, you have raised the following questions:

> "After Minutes have been prepared by the Town Clerk and presented to Town Board Members, what requirement is there that Town Boards approve Minutes? What authority does the Town Board have to change Town Board Minutes as submitted by the Town Clerk? Additionally, can a Town Board or an individual Town Board member compel the Town Clerk to alter Minutes?"

In this regard, I believe that four provisions are relevant. First, §30(1) of the Town Law states in relevant part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate records of the proceedings of each meeting..." Second, the Open Meetings Law in §106 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, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Third, subdivision (11) of §30 of the Town Law provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". And fourth, §63 of the Town Law states in part that a town board "may determine the rules of its procedure".

In my opinion, inherent in each of the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate.

With respect to the approval of minutes, although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. I point out that in an opinion of the State Comptroller issued some fifty years ago, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609). While it may be "advisable" if not proper for a board to review minutes, due to the clear authority conferred upon town clerks under §30 of the Town Law, I do not believe that a town board can require that minutes be approved prior to their disclosure, for example.

With regard to the amendment of minutes, in a different opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File

#82-181). As such, I do not believe that an individual can independently change minutes or compel the town clerk to do so. Further, despite the opinion of the Comptroller cited above, I believe that the ability of a town board to require that minutes be altered must be based upon the reasonableness of its intended action. Certainly an attempt to amend minutes would be reasonable when an error is found or greater clarity can be accomplished. Nevertheless, situations have arisen in which public bodies and their members have sought to amend minutes in a way in which their contents would be unbalanced or would not reflect what actually occurred. In those kinds of cases, I believe that deference should be given to the town clerk, for the clerk is the person designated by statute to prepare the minutes.

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

As you requested, a copy of this opinion will be forwarded to the Town Supervisor.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Berndt Leifeld, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9035
OML-AO-2526

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

August 16, 1995

Mr. Mario Bonafede
Secretary/Treasurer
Teamsters Local Union No. 375
656 Englewood Avenue
Buffalo, NY 14223-2432

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. Bonafede:

I have received your letter of August 10, as well as the correspondence attached to it. You have sought assistance and guidance in your efforts in obtaining records from the Buffalo and Fort Erie Public Bridge Authority. As I understand the matter, there appear to be questions concerning access to minutes of meetings of a labor management committee and records identifying the members of that committee.

You referred to a conversation with me and wrote that I advised "that if members of committees were comprised exclusively of Board members, that [you] would have the right to request and receive the minutes of such committees; if the committee were comprised of outside individuals making recommendations, the minutes would not be available." While I do not recall the specifics of our discussion, I do not believe that we focused on minutes of meetings, but rather on whether the committee in question is a public body subject to the Open Meetings Law. For purposes of clarification, I offer the following comments.

Recent decisions indicate generally that entities having no power to take final action consisting in whole or in part of persons other than 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)]. Therefore, many advisory bodies would not in my opinion be subject to the Open Meetings Law.

However, when a committee consists solely of members of a public body, such as the Board of the Authority, 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 includes specific reference to "committee, 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 would in my view constitute a public body subject to the Open Meetings Law that is separate and distinct from the Board. 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 three, for example, a quorum would be two.

Based upon the foregoing, the committee in question would not be subject to the Open Meetings Law. Nevertheless, the Freedom of Information Law pertains to all records of an agency, such as the Authority. While the definition of "public body" is somewhat narrow, the definition of the term "agency" appearing in §86(3) of the Freedom of Information Law specifically includes reference to public authorities, and §86(4) defines the term "record" expansively to include:

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

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

Therefore, the committee may not be subject to the Open Meetings Law, but minutes of its meetings are in my view clearly "records" that fall within the coverage of the Freedom of Information Law; they consist of information kept by and produced for the Authority and are, therefore, subject to rights of access.

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

The minutes appear to constitute "intra-agency materials" subject to §87(2)(g). That provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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. Insofar as the minutes consist of recommendations to the Board of the Authority, I would agree that they may be withheld. On the other hand, to the extent that they consist of statistical or factual information, I believe that they would be available under §87(2)(g)(i).

With respect to the names of committee members, the only provision of relevance in my view is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." The

existence of the committee is not secret, and disclosure of the names of its members would reveal nothing intimate about them. Therefore, I do not believe that there would be any justifiable basis for withholding the names of the members.

Lastly, when a request for records is denied, a denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. To reiterate commentary offered earlier, that provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an

> appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

Therefore, when a request is denied, the person issuing the denial is required to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ronald H. Lampman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9059
OML-AO-2527

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

September 15, 1995

Mr. Paul Fiondella
[redacted]

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. Fiondella:

As you are aware, I have received your letter of August 29. Please accept my apologies for the delay in response.

According to your letter, on August 24, you requested minutes of meetings of the East Hampton Town Planning Board "for the purpose of examining the attendance and voting records of two of [your] opponents for political office, both of whom are Planning Board members." You encountered a series of delays and contend that, "being a candidate for political office, [you were] subjected to a different procedure" than that generally followed. You indicated that "[i]n the past people wishing to examine Planning Board records have always been able to do so simply by calling the Planning Board and checking that the records could be located in time to be examined by them." It is your view that you have been constructively denied access and you suggested that the matter be "investigated" by this office.

In this regard, the Committee on Open Government has neither the authority nor the resources to conduct what might be characterized as an investigation. As indicated above, however, this office is authorized to provide advisory opinions concerning the Freedom of Information and Open Meetings Laws. While such opinions are not binding, it is my hope that they are educational and persuasive, and that they serve to enhance compliance with the statutes within the Committee's advisory jurisdiction. With those goals, I offer the following comments, and copies will be sent to Town officials.

First, as a general matter, the reasons for which a request is made and an applicant's potential use of records are irrelevant. It has been held that if records are accessible under the Freedom of Information Law, they should be made equally available to any

person, without regard to status or interest [see M.Farbman & Sons v. New York City, 62 NY 2d 75 (1984); also Burke v. Yudelson, 51 AD 2d 673 (1976)]. Therefore, if indeed your request has been accorded treatment different from established procedure or practice or different from the manner in which other members of the public are treated when seeking the same records, I believe that the Town would have acted in a manner inconsistent with the Freedom of Information Law and its judicial interpretation.

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."

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

In general, 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 §87(2)(g)(iii). 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.

Lastly, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although that statutue 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..."

Stated differently, when a final vote is taken by members of an agency, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Further, 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 Law 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)].

To comply with the Freedom of Information Law, I believe that a record must be prepared and maintained indicating how each member cast his or her vote. From my perspective, disclosure of the record of votes of members of public bodies, such as the Planning Board in this instance, represents a means by which the public can know how their representatives asserted their authority. Ordinarily, a record of votes of the members appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board
Mr. Jilnicki, Deputy Town Attorney
Frederick W. Yardley, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2528

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

September 21, 1995

Ms. Mary D. Lamphear
[redacted]

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. Lamphear:

I have received your letter of September 6 in which you questioned the propriety of executive sessions frequently held by the Raquette Lake Union Free School District Board of Education to discuss personnel matters.

You described three such executive sessions as follows:

> "At the May 22, 1995 meeting an Executive Session was called with no specific reason. When the Board returned after 30 minutes two motions were passed. The first one was that if the need arises the new District Clerk may call on two previous Clerks for assistance and the cost of each consultation fee that would be paid. The second motion was that in consideration of raises new personnel must be employed for one full year before they become eligible for a raise.
>
> "At the July 24, 1995 meeting an Executive Session was called for Personnel reasons. When the Board returned after a 45 minute session the motion passed was that the District Clerk job would be 20 hours a week.
>
> "At the recent August 28, 1995 meeting an Executive Session was called for once again Personnel reasons. I asked who this was regarding and was told 'we will let you know if any motions are made'. When the Board returned after a 30 minute session a motion was passed to hire Mary Gerhardt as a teacher

> assistant for [redacted]. Ms. Gerhardt was originally hired by R.L.U.F.S. to be an assistant for a Special Ed student six years ago. The position became full time last year, and this year the Special Ed student did not return to R.L.U.F.S."

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the 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, 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. Therefore, a public body cannot conduct an executive session to discuss the subject of its choice.

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question 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 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 at least one of the topics listed in §105(1)(f) is considered.

In the context of the situations that you described, insofar as the discussions involved a particular person in relation to one or more of the subjects described in §105(1)(f), I believe that an executive session would justifiably have been held. From my perspective, only the last executive session, which involved a matter leading to the appointment of a particular person, was properly held. The other two executive sessions involved consideration or review of procedures, policies or practices, or the functions of an office or certain position, and I do not believe that there would have been a basis for discussion in executive session. Even though those kinds of subjects might be reflective of "specific personnel" issues, they would not have focused on any particular person and, therefore, in my opinion, should have been discussed in public.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a

particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; AD 2d ___ (December 29, 1994)].

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

I hope that I have been of some assistance.

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-9063
OML-AO-2529

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

September 21, 1995

Hon. Gail M. Willis
Clerk
Schuyler County Legislature
Box 6
105 Ninth Street
Watkins Glen, NY 14891

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. Willis:

I have received your letter of September 4 in which you sought guidance concerning the contents of and disclosure of minutes of an executive session.

According to your letter, during a meeting of a committee of the Schuyler County Legislature, a motion was made to enter into executive session to discuss the employment history of a particular employee, and during the executive session, the Committee "made a motion 'to recommend to the full Legislature that the county contact the labor counsel and proceed towards dismissal" of the employee. You have asked whether you can "edit" the minutes of the executive session to indicate, for example, that the Committee moved "'to refer to the full Legislature the Planning Committee's recommendation regarding an employee's employment', or something that is more vague than the original motion." Presumably the original motion identifies the employee in question and contains some detail concerning the rationale for the motion.

In my opinion, based on the following analysis, you may do so.

First, it is clear in my view that the Committee properly entered into executive session. As you are likely aware, §105(1)(f) of the Open Meetings Law permits a public 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..."

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

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

Based on the foregoing, the minutes of executive session need not include reference either to the name of the person who is the subject of the motion or the nature of the Committee's recommendation, for I believe that the Freedom of Information Law enables an agency to withhold those aspects of the 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.

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of

personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Additionally, §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. The minutes would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld, and, therefore, need not be included in minutes of the executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2530

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

September 28, 1995

Ms. Cathy Filippelli
[redacted]

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. Filippelli:

As you are aware, I have received your letter of August 29. Once again, I apologize for the delay in response. In conjunction with our conversation of this morning, the following commentary will focus on the status of "work sessions" and the procedure for entry into executive sessions.

First, in my view, there is no legal distinction between a work session and a meeting. 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).

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. Therefore, even though a gathering may be characterized as a work session, the requirements imposed by the Open Meetings Law apply with respect to notice, the taking of minutes, the ability to enter into executive session when appropriate, and the need to conduct public business in public.

With regard 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 work sessions, I do not believe that minutes must be prepared.

I note that since the Open Meetings Law does not require the preparation of detailed or expansive minutes, it has been held that a member of the public may use a tape recorder in a non-disruptive manner at open meetings.

Lastly, you questioned whether a public body may conduct an executive session without giving prior notice to the public. In this regard, assuming that there is a proper basis for entry into an executive session, a public body may hold an executive session at any time during a meeting, so long as the procedure prescribed by the Open Meetings Law is followed. Further, as indicated during our conversation, in a technical sense, a public body cannot schedule an executive session in advance of a meeting.

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

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. If, for example, an agenda indicates that an executive session may be held "if necessary", that statement 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.

I hope that 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-9098
OML-AO-2531

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

October 16, 1995

Dr. Angela M. Elefante
Attorney at Law
1601 Gibson Road
Utica, NY 13501-5325

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 Dr. Elefante:

I have received your letter of September 25 and the materials attached to it. In brief, you directed a series of requests in July and August to the Utica City School District. As of the date of your letter to this office, the District had not yet disclosed the records sought. Further, in addition to the records requested, you asked whether you are entitled to the following records:

"1) The Superintendent of Schools work contract with amendments as Superintendent,
2) A copy of any internal and external audits since the inception of his Superintendency in 1990,
3) Copies of New York State Teachers Retirement System Report, which would contain Dr. Herbowy's total wages earned and reported to the retirement program,
4) Copies of his W-2 Forms,
5) Copies of any and all vouchers of the Superintendent, approved and disapproved, by the Board of Education that pertain to meals, entertainment, and travel."

In this regard, I offer the following comments.

First, with respect to your pending requests, I note 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, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create or maintain a record, except in specified circumstances. In your request of August 23, you sought "a complete typed (written) transcript" of a meeting held by the Board of Education on the preceding day. I am unaware of whether it is the Board's practice or policy to prepare transcripts of meetings. If such a transcript exists and pertains to an open meeting, I believe that it must be disclosed. Nevertheless, if no transcript has been prepared, the District would not be obliged to create such a record on your behalf.

In a related vein, you requested minutes of that meeting on August 30 and were informed that the minutes would be approved at the Board's regular meeting on September 19 and made available. In this regard, §106 of the Open Meetings Law pertains to minutes of meetings, and subdivision (3) of that provision states that:

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the 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.

Third, with respect to the records sought to which specific reference was made earlier, 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 under the circumstances 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 short, I believe that a superintendent'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.

Similarly, records pertaining to billing or payments made to officers, employees or others are accessible, except to the extent that disclosure would result in an unwarranted invasion of personal privacy. If, for example, records include social security numbers or home addresses, those details could be deleted to protect privacy, while the remainder would be accessible.

Although travel vouchers and similar or related records might identify specific officers or employees, the courts have made it clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been determined in various contexts that they are required to be accountable than others. Again, as a general rule, it has been found that records that are relevant to the performance of public officers' or employees' duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy.

With certain qualifications, I believe that W-2 forms must be disclosed. Although tangential to your request, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

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

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed for the following reasons.

Although intimate details of peoples' lives may be withheld, 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. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational 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.

It has been contended that W-2 forms are specifically exempted from disclosure by statute on the basis of 26 USC 6103 (the Internal Revenue Code) and §697(e) of the Tax Law. In my opinion, those statutes are not applicable in this instance. In an effort to obtain expert advice on the matter, I contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by the Internal Revenue Service; those statutes do not pertain to records kept by an individual taxpayer [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)], nor are they applicable to records maintained by an employer, such as a school district. In short, the attorney for the Internal Revenue Service said that the statutes in question require confidentiality only with respect to records that it receives from the taxpayer.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. Moreover, in a recent decision, the same conclusion was reached, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

With respect to a New York State Teachers' Retirement System Report, it is my understanding that reports include employees' names, titles, member and retirement numbers, and the amounts paid for retirement incentives, unused sick leave and unused vacation time. If my understanding of their contents is accurate, with the exception of the member and retirement numbers, they include information which is either publicly available in other records or which is derived from public records. That being so, it is likely in my view that the names and titles and of the employees should have been disclosed.

Of significance is §87(2)(g), which permits an agency to withhold records that:

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

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

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.

Reports transmitted between the District and the Teachers' Retirement System would constitute "inter-agency materials". However, they consist of "statistical or factual" information accessible under §87(2)(g)(i). While the reports differ from the payroll record, I believe that other records reflective of payments made to public employees are available. For instance, for reasons discussed earlier, portions of records indicating a public employee's gross wages must be disclosed. Similarly, the reports include information apparently derived from attendance records. In a decision dealing with attendance records indicating the dates and dates of sick leave claimed by a particular employee that was affirmed by 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.

While the reports are not attendance records, figures indicating payments are based on or derived from attendance records coupled with salary records, both of which are public. For that reason, those figures, as well as the name and title of an employee would, in my opinion, be available under the Freedom of Information Law.

The member and retirement numbers are unique identifiers and could in my view be withheld based on considerations of privacy. It is possible that those numbers could be used to gain unauthorized access to information pertaining to members.

Lastly, external audits are clearly accessible pursuant to §87(2)(g)(iv). Internal audits would constitute "intra-agency materials." Therefore, their contents would serve as the means of determining the extent to which they would be accessible or deniable. For instance, insofar as they consist of opinions or recommendations, I believe that they could be withheld. On the other hand, insofar as they consist of "statistical or factual tabulations or data, they must be disclosed under §87(2)(g)(i), unless an independent ground for denial may be asserted.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David F. Bruno, Clerk of the Board
David Schmidt, Assistant Superintendent
Philip Vanno, President of the Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9095
OMC-AO 2532

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

October 16, 1995

Mr. John Goetschius
President
Greenburgh Eleven Federation of Teachers
PO 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 Mr. Goetschius:

I have received your letter of September 12 in which you sought an advisory opinion concerning issues relating to the Greenburgh Eleven Union Free School District.

You indicated that on September 7, you informed the District's Board of Education that you intended to attend the Board's next meeting. On the following day, you sent a letter to the Superintendent informing her that sixteen others intended to attend, and you asked to be informed of the date. In response, you were told that notice of the meeting would be posted at Greenburgh Town Hall. However, you wrote that your "check of the four bulletin boards at the Greenburgh Town Hall on September 11, 1995 at 3:20 p.m. revealed that no such notice was posted...despite the fact that [you] had learned from the district clerk that a Board meeting was scheduled for 7:30 a.m. on September 12, 1995". Further, you received a letter from the Superintendent stating that you and others "who are prohibited from being on the campus due to disciplinary reasons may not attend meetings which are held on the campus" (emphasis hers). Lastly, you wrote that you requested minutes of meetings of the Board held since April 25, as well as financial reports. As of September 11, the request has "had not been acknowledged or fulfilled".

In this regard, I offer the following comments.

First, for reasons described in an opinion of December 12, 1994, I do not believe that the Superintendent can bar you or others from attending meetings that are subject to the Open Meetings Law. However, to reiterate the substance of my earlier remarks, it was advised that:

> "...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."

Second, the Open Meetings Law does not require that notice of a meeting be given to a particular individual. However, it does require that notice be given to the news media and to the public by means of posting prior to every meeting. Specifically, §104 of that statute provides in relevant part that:

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

Based on the foregoing, it is clear that notice must be posted in one or more designated, conspicuous public locations prior to a meeting.

With respect to your request for records, 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)].

Lastly, it is noted that §106(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks of the meetings to which they pertain.

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be sent to the Superintendent and the District's records access officer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Sandra G. Mallah, Superintendent
Marsha Maddox, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2533

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

October 17, 1995

Ms. Maria J. Kubus
[redacted]

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. Kubus:

I have received your letter of September 22, which reached this office on September 28.

According to your letter and the minutes of a meeting that you enclosed, the Town of Wheatfield Planning and Zoning Board conducted a meeting and a public hearing on August 16. The hearing involved an application for a temporary special permit. As I understand the matter, at the conclusion of the hearing a motion was approved to have the Board inspect the site on the following day, August 17. You wrote that on August 18, the permit was granted, even though no meeting was held to do so. When you expressed the view that a meeting should have been held, you were apparently told that the decision did not have to made during an open meeting. You have asked that I advise the Town if it is "in error."

In this regard, while no law would preclude one member of the Board from conferring with another, 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 the Board clearly constitutes a "public body" that is subject to the requirements of the Open Meetings Law.

Relevant to the issue raised 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 public body 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 public body, that a majority of a board would constitute a quorum, and that an affirmative majority of votes would be needed for a board to take action or to carry out its duties.

In a related vein, 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.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning and Zoning Board
T. Kuehn, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2534

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

October 20, 1995

Hon. Dorothy O'Dell
Town Clerk
Town of Georgetown
Georgetown, NY 13072

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. O'Dell:

I have received your letter of October 19 in which you sought advice concerning an issue that arose at a recent meeting of the Town Board of the Town of Georgetown.

According to your letter, at the meeting, a person in attendance questioned the Board's practice of not reading the minutes of the preceding meeting aloud. You expressed the view that you were not required to do so and offered to permit the individual to read the minutes. Nevertheless, he insisted that you read the minutes aloud, and you did so. You have sought guidance on the matter.

In this regard, there is nothing in the Open Meetings Law or any other provision of law of which I am aware that requires that minutes of a meeting of a public body be read aloud. As such, I agree with your contention that you are not required to read minutes aloud at a meeting.

I point out that §63 of the Town Law provides in part that a town board has the authority to adopt rules governing its proceedings. It might be worthwhile to raise the matter with the Board with the goal of adopting a rule or resolution pertaining to the matter. Perhaps such a rule could state that there is no requirement that minutes of meetings be read aloud at meetings, but that portions of minutes shall be read, if necessary, pursuant to direction to do so by the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9106
OML-AO 2535

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

October 20, 1995

Mr. and Mrs. Robert J. Brignola
[redacted]

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. and Mrs. Brignola:

I have received your letter of September 19, as well as a variety of materials relating to it.

You have raised a number of issues pertaining to your attempts to acquire information from the Town of Westport, and I will attempt to address them in an effort to provide guidance and assistance.

The initial area of concern involves a request for a transcript of a meeting conducted by the Town Board. In this regard, I know of no requirement that a public body, such as a town board, prepare a transcript of its meetings. It is noted that 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 transcript of a meeting or include reference to every comment that was made.

If the Town has prepared a transcript of a meeting, I believe that it would be available under the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, since any member of the public may attend a meeting, there would be no basis for withholding a transcript. Nevertheless, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if no transcript exists, the Town would not be obliged to prepare a transcript on your behalf.

It is possible, too, that the Town tape records its meetings. If a tape recording of the meeting in which you are interested exists, I believe that it would be accessible [see Zaleski v. Hicksville Union Free School District, Board of Education, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978]. Upon receipt of a tape recording of an open meeting, you could prepare a transcript on your own initiative or perhaps retain a person to do so.

In a related vein, for future reference, I point out that the courts have determined that any person may use a portable, audio cassette recorder at an open meeting of a public body, so long as the device is used in a non-disruptive manner [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)]. Should you choose to tape record a meeting, your own recording could be replayed or transcribed.

A second issue involves a request to have an interpreter for the deaf present at a Town Board meeting. In conjunction with your request, it appears that the Town arranged for an interpreter to be present at its meeting of August 8. You alleged, however, that you were not informed that the interpreter would be present. There is nothing in the Open Meetings Law, nor is there any other statute of which I am aware, that would require a public body to ensure that an interpreter is present at a meeting. Consequently, while a member of the public may request that a public body gain the services of an interpreter, I know of no requirement that a public

body would be obliged to do so. As suggested earlier, if there is no interpreter present, by means of a tape recording, the substance of a meeting can be made known by preparing a transcript or by means of other methods.

It is suggested that you employ the Freedom of Information Law as a means of acquiring information from the Town. I point out, however, that the title of the statute may be somewhat misleading, for it does not require government officials to provide information by answering questions, for example. Certainly they may do so; nevertheless, the Freedom of Information Law is a vehicle under which members of the public may request records and inspect and copy those that are accessible in accordance with the Law's provisions. As stated earlier, the Freedom of Information Law pertains to existing records. Again, §89(3) of that statute provides in part that an agency is not required to create a record in response to a request.

For purposes of illustration and to relate the preceding remarks to your letter of September 19 addressed to the Town Supervisor, rather than seeking answers to questions, it is recommended that you request existing records. For instance, instead of asking "what testing has been done of our water system", you might request records reflective of tests conducted pertaining to your water during a certain period.

Section 89(3) also states that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of your interest.

Lastly, pursuant to regulations promulgated by the Committee on Open Government, each agency is required to designate one or more persons as "records access officer" (21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records, and a request should ordinarily be directed to that person. While I am unaware of the identity of the records access officer in the Town of Westport, in most towns, the town clerk is so designated. The clerk, by law, is the custodian of town records and a town's records management officer.

Enclosed is "Your Right to Know", which describes the Freedom of Information and Open Meetings Laws and may be useful to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Donald L. McIntyre, Supervisor
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2536

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

October 24, 1995

Ms. Ellen L. Kilbourn
[redacted]

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. Kilbourn:

I have received your letter of October 4 and the news article attached to it. You have sought an advisory opinion concerning the legality of meetings described in the article.

One of the meetings was scheduled to be held by the Seneca Nation of Indians Tribal Council and officials of the City of Salamanca. In brief, the article indicates that the policies of the Seneca Nation restrict attendance of "non-Senecas" at those meetings. The City Attorney indicated that there would likely be a quorum of the City Council present at a particular meeting, and the article states that the City Clerk "has issued a public meeting notice", even though the public cannot attend Tribal Council meetings. The article also referred to a recent City Council executive session during which the Council met with a developer and representatives of the Industrial Development Agency and the Local Development Corporation to discuss what was characterized as a "personnel matter." The session was reportedly called "to assure the SIDA that it would be included in any small cities grant application process."

With respect to meetings with the Seneca Nation, I note that the issue has arisen in the past. Enclosed for purposes of providing perspective on the matter is a copy of an advisory opinion written in 1979 at the request of the Salamanca Republican-Press. Notwithstanding that opinion, it is reiterated 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, such as the City Council, gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, it has been held that joint meetings held by two or more public bodies are subject to the Open Meetings Law [Oneonta

Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)], and that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the council was asked to attend by a person who was not a member of that body [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the kind of gathering described in the article might be held at the request of the Seneca Nation, I believe that it would constitute a meeting, assuming that a quorum of the Board is present for the purpose of conducting public business.

It is noted that the Open Meetings Law does not specify where meetings must be held. However, I believe that that law, like any other, should be carried out in a manner consistent with its intent. In the context of the issue, while I am somewhat sympathetic to the problems faced by City officials, to comply with the Open Meetings Law, meetings must in my opinion be held at a location where those interested in attending could reasonably do so. Further, under that statute, any person has the right to attend a meeting of a public body, irrespective of status, interest, residence or citizenship (see Open Meetings Law, §103).

With regard to the meeting allegedly held to discuss the small cities grant application process, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the 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.

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes

unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question 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 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 at least one of the topics listed in §105(1)(f) is considered. As the article described the substance of the discussion, it does not appear that there would have been a basis for conducting an executive session.

It has been advised that a motion describing the subject to be discussed as "personnel", for example, 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject

> respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 207 AD 2d 55, 58 (1994)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2537

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

October 25, 1995

Ms. Barbara L. Edwards
Salamanca School Board Member
[redacted]

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. Edwards:

I have received your letter of October 5. In your capacity as a member of the Board of Education of the Salamanca City Central School District, you suggested that the Superintendent could benefit from guidance concerning the notice requirements imposed by the Open Meetings Law. You referred to a recent meeting and indicated that neither of the local newspapers received notice of the meeting by mail or by phone.

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

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. 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.

I point out that 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 would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lyn Pryor, President
John E. Hogle, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9121
OML-AO 2538

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

October 26, 1995

Mr. Dione Goldin
[redacted]

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. Goldin:

I have received your letter of October 5, which reached this office on October 12. You described a series of events involving the implementation of the Open Meetings Law by the Wappingers Central School District Board of Education and asked "whether the public has the right to know under the Freedom of Information Law what lawsuits are pending against the District."

In this regard, rather than reiterating the facts and circumstances that you presented, I offer the following remarks in order to provide points of law in relation to the matter.

It is emphasized 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. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. 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. Although the Open Meetings Law does not make specific 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.

It is reiterated that notice must be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public. Moreover, 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 would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

Third, 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).

Based on 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.

If, for example, a discussion involves the creation of a position or, as you wrote, "the possibility of hiring an additional dean", I do not believe that there would be any basis for entry into executive session. That kind of issue would not focus on any "particular person", but rather on the District's needs and perhaps the manner in which public monies may be allocated. When the need to hire an additional dean is determined and the Board considers the relative merits of the applicants for that position, I believe that an executive could properly be held, for the discussion would then involve the discussion of one's employment history and a matter leading to the employment of a particular person.

Reference was also made to the discussion of a grievance in an executive session. Whether the executive session was properly held would in my view have been dependent on the nature of the grievance. If the grievance involved a particular employee in relation to one or more of subjects described in §105(1)(f), an

executive could properly have been held. On the other hand, if, for instance, the grievance pertained to a matter of policy, the physical condition of a school or classroom, or the inadequacy of parking spaces for teachers, I do not believe that there would have been a basis for conducting an executive session.

In a related vein, 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" or as a "specific personnel matter" 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving employment, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive

> session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 207 AD 2d 55 (1994)].

Another executive session to which you referred pertained to litigation that you initiated against the District. It is unclear whether you were present during the executive session. If you were, the executive was likely held improperly. The provision 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 by the Appellate Division, Second, Department, 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 so as to prevent disclosure of its strategy to its

adversary. I note that the Concerned Citizens case cited above dealt with a situation in which a public body met with its adversary in litigation to discuss a settlement. The court held that the public body lost its ability to conduct an executive session by inviting its adversary to attend. On the other hand, if you were not present at the executive session, it appears that the session was appropriately held.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

You made reference to private meetings between that apparently were held by the Board with its attorney. In this regard, the Open Meetings Law envisions two vehicles under which the public may be excluded from a meeting of a public body. One involves entry into an executive session. Again, 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. The other vehicle involves exemptions from the Open Meetings Law, which are delineated in §108. If a matter is exempt from the Open Meetings Law, the provisions of that statute do not apply. When an exemption applies, a public body may meet in private, and there is no requirement that the procedural steps necessary to conduct an executive session be followed.

When a public body seeks the legal advice of its attorney, relevant to an analysis of the matter is §108(3), which exempts from the Open Meetings Law:

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

When an attorney-client relationship has been invoked, 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.

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)].

Based on the foregoing, insofar as the Board seeks the legal advice of its attorneys and the attorneys are rendering legal advice, those communications would in my view be exempt from the coverage of the Open Meetings Law.

With respect to minutes of executive sessions, 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.

Lastly, I believe that the public has the ability to know of litigation in which an agency is a party. 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.

In a manner analogous to the Open Meetings Law, it is possible that some records pertaining to litigation fall within the scope of the attorney-client privilege. Here I point out that the first basis for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." As noted earlier, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, and Pennock v. Lane, supra, Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, material prepared for litigation may be confidential under §3101 of the Civil Practice Law and Rules.

Nevertheless, legal papers filed against the District would not have been prepared by the District, its officials or its agents. As such, in my opinion, those papers would not be subject to the attorney-client privilege. For similar reasons, the answers prepared by the District in response to a petition or legal papers, once served upon a plaintiff or legal adversary, would be outside the scope of the attorney-client privilege. In general, when those papers are made available to the District's adversary, I believe that they become a matter of public record. Moreover, although the Freedom of Information Law does not apply to the courts and court records, such records are generally available under other provisions of law [see e.g., Judiciary Law, §255]. From my perspective, if the records sought are publicly available from a court or another agency (i.e., the State Education Department), they would also be available under the Freedom of Information Law from the District.

The one kind of situation in which a school district could withhold portions of litigation papers otherwise available would pertain to records identifiable to students. Under the federal Family Educational Rights and Privacy Act (20 USC §1232g), and

educational agency generally cannot disclose records insofar as they identify students. As such, portions of the records in question might justifiably be deleted to protect the privacy of students and to comply with federal law. It is likely, however, that the same records would be available in their entirety in most instances from the court in which the proceeding is being litigated.

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, a copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education

Clerical

Error

No: #2539

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2540

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

October 31, 1995

Ms. June S. Carlson
Chairperson, Board of Trustees
The Smithtown Library
1 North Country Road
Smithtown, NY 11787-2143

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 Chairperson Carlson:

I have received your letter of October 11 in which you raised "a simple question regarding the New York State Open Meetings Law: What is a meeting?"

By way of background, the question arose in relation to a recent gathering at the Smithtown Library. You wrote that:

> "Local business leaders and service club representatives were invited to attend an informational breakfast program at the library. Its purpose was to inform this segment of the community about the services and resources which the library offers which would be of particular interest to them. Three members of the five member Board of Trustees attended the program. Their participation was limited to welcoming the attendees. The program itself was conducted by members of the library staff.
>
> "A local newspaper reporter has repeatedly declared that this program, by virtue of its having been attended by a quorum of the Board, constituted an illegal meeting since no legal notice of the meeting was published. The reporter maintains that the mere presence of a quorum of the Board constitutes an official Board meeting."

You have asked whether in my view "the breakfast informational program held for business and service club leaders [was] an official Board meeting covered under the Open Meetings Law." As I understand the nature of the gathering and the role of the Board members who attended, the gathering would not have constituted a meeting subject to the Open Meetings Law. In this regard, I offer the following comments.

It is noted at the outset 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 public body gathers for the purpose of discussing public business, any such gathering would constitute a "meeting" subject to the Open Meetings Law. However, inherent in the definition of the term "meeting" is the notion of intent, and the question is whether there was an intent on the part of the Board to convene for the purpose of conducting public business, collectively, as a body. Based on your description of the event, there was no such intent. While a majority of the Board might have been present, it appears that they were present essentially as part of an audience. Further, since the program was conducted by Library staff, it does not appear that the Board members acted as a body or conducted public business, collectively, as a body. If my interpretation of the facts is accurate, the gathering in my opinion would not have been a "meeting" as that term is used in the Open Meetings Law, and the "mere presence" of a majority of the Board would not have transformed the gathering into a "meeting."

Lastly, since you referred to a contention that "legal notice" should have been given, I point out that, even when the Open Meetings Law applies, there is no requirement that a public body pay to publish a legal notice prior to a meeting. Section 104 of that statute requires that notice of the time and place be given prior to every meeting of a public body. Nevertheless, subdivision (3) of that section specifies that: "The public notice provided for by this section shall not be construed to require publication as a legal notice."

I hope that I have been of 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 2541

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

October 31, 1995

Hon. Suzanne Putnam
Town Clerk
Town of Grafton
P.O. Box G
Grafton, NY 12082

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. Putnam:

As you are aware, I have received your letter and the accompanying material.

You referred to criticism of the Grafton Town Board and an allegation that the Board has been holding "back room meetings." However, you sent a copy of the Board's notice of meetings that is posted on the signboard at Town Hall and the bulletin board at the post office. The notice appears in relevant part as follows:

"REGULAR
GRAFTON TOWN BOARD MEETINGS WILL BE HELD ON
THE SECOND MONDAY OF THE MONTH (UNLESS OTHERWISE POSTED)
AT 7:30 p.m., with the auditing of bills at 7:00 P.M."

In addition, you wrote that the auditing occurs in a large office and that "[c]hairs are available for anyone who wants to sit in on the auditing."

In this regard, I offer the following comments.

First, the Open Meetings Law applies to meetings of public bodies, such as town boards, and 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 public body gathers for the purpose of discussing public business, any such gathering would constitute a "meeting" subject to the Open Meetings Law.

In the context of the situation that you described in your correspondence, if a majority of the Town Board engages in auditing

the bills collectively, as a body, the gatherings beginning at 7 p.m. would in my opinion constitute "meetings" that are subject to the Open Meetings Law. When a meeting is subject to that statute, a meeting must be preceded by notice given in accordance with §104 and convened open to the public.

As I understand the matter, the auditing meetings are preceded by notice, and any member of the public has the right to be present. If that is so, the Board appears to have complied with the Open Meetings Law.

It is suggested that a restatement of the notice might serve to clarify the situation. Perhaps the notice could state that meetings will begin at 7 p.m. in the Supervisor's office, to be followed at 7:30 in the meeting room with discussion of the Board's regular business.

I hope that I been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2542

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

October 31, 1995

Hon. Richard E. Slagle
Mayor
Village of Celoron
[redacted]

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 October 9 and appreciate your interest in compliance with the Open Meetings Law.

You wrote that the Village of Celoron tape records the meetings of its Board of Trustees, Planning Board and Zoning Board of Appeals in order to ensure that minutes of meetings are accurate. At a recent meeting of the Planning Board, one of the members raised a question concerning a section of the Village Code, and a member of the Board of Trustees in attendance stated that she had information on the subject but that she did not want to discuss it "with the recording on." At that point, a member of the Planning Board asked that the recorder be turned off while the Trustee shared the information with the Board. You expressed the view that this action "prevented an accurate record of the meeting from occurring", and you have sought my views on the matter.

In this regard, there is nothing in the Open Meetings Law or andy other statute of which I am aware that requires public bodies to tape record their meetings. Consequently, there is likely no law that would preclude a public body from choosing to record some portions of a meeting but not others. It appears that the Village of Celoron records the meetings of its public bodies as a matter of practice or perhaps tradition. To avoid the kind of situation that you described and to ensure that open meetings are recorded in their entirety, it is suggested that the Board of Trustees could, by resolution or other enactment, so require. By means of the adoption or enactment of such a provision, a public body within the Village would be precluded from stopping a recording due to a desire that certain comments or discussions not be preserved.

It is also noted that, in the situation that you described, any member of the public in attendance using a recording device could have continued to record the meeting, despite the request by the Trustee. While the Planning Board would have had discretion to use or turn off its tape recorder, I do not believe that it would have had the authority to prohibit a member of the public from continuing to use his or her tape recorder.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9166
OML-AO 2543

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

December 5, 1995

Ms. Martha Bennett
Bronxville League of Women Voters
[redacted]

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. Bennett:

I have received your letter of November 7 in which you requested an advisory opinion concerning the practices of the Eastchester Board of Fire Commissioners in relation to the Open Meetings Law. According to your letter, the Board consists of five members, with one elected each year for a term of five years.

Based on the information that you provided, I offer the following comments.

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

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

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], a board of commissioners of a fire district in my view is clearly a public body subject to the Open Meetings Law.

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

Third, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Since you referred to discussions involving the budget and labor negotiations, two of the grounds for entry into executive session are pertinent.

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 budgetary or personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision

was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs which can be accomplished by according to seniority, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

Relevant with respect to labor negotiations is §105(1)(e), which authorizes public bodies to conduct executive sessions 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", deals with the relationship between public employers and public employee unions. Consequently, a public body may discuss or engage in collective bargaining negotiations during an executive session. In the situation that you described in which one member of the Board engaged in negotiations, the Open Meetings Law would not have applied. In short, one member acting as the Board's representative in

negotiations would not have constituted a "meeting" of a public body.

Lastly, since you referred to "a little final report" issued following negotiations, I direct your attention to the Freedom of Information Law, which pertains to access to government records. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In my view, a contract, such as a collective bargaining agreement, would be available under the Freedom of Information Law in its entirety, for none of the grounds for denial would be applicable. Similarly, books of account, ledgers, and other records reflective of the receipt and disbursement of public monies would generally be available. I note that records might justifiably be withheld during the course of negotiations pursuant to §87(2)(c). That provision permits an agency to deny access to records insofar as disclosure would "impair present or imminent contract awards or collective bargaining negotiations."

In an effort to enhance compliance with and understanding of the statutes considered in the preceding commentary, a copy of this response will be sent to the Board of Fire Commissioners.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Fire Commissioners

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9165
OML-AO 2544

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

December 5, 1995

Mr. Marty Loftus
[redacted]

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. Loftus:

I have received your letter of November 4 and the materials attached to it. You have complained that the Adirondack Central School District has refused to provide information that you have requested and that "'by invitation only' meetings to discuss school affairs" are held.

As I understand the matter, in response to your request, Dr. Harry C. Fensom, Jr., Superintendent of Schools, either granted access to the information sought, indicated that the information was not maintained by the District, or offered to discuss portions of the request that were not clear. One aspect of the request, that dealing with "projected liability estimates", was denied.

In this regard, having reviewed the correspondence, I offer the following comments.

First, it is emphasized at the outset that the title of the Freedom of Information Law may be somewhat misleading. That statute does not deal with access to information per se; rather, it deals with records. Similarly, the Freedom of Information Law is not a vehicle that requires agency officials to provide information by answering questions. Certainly they may do so, and public officials frequently respond to questions posed by members of the public. However, as suggested in the response to your request, the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency, except in specified circumstances, is not required to create a record in response to a request. Therefore, insofar as the information that you requested is not maintained by the District or does not exist in the form of a record, the District would not in my opinion be required to create a new record on your behalf or attempt to acquire a record

from another source. For instance, in several aspects of the response, it was stated that the District did not maintain the records sought, but that the local BOCES might have them. Although the BOCES and the District have a relationship with one another, they are separate agencies. As such, it is suggested that, where appropriate, you submit a separate request to the BOCES.

Second, insofar as records exist and are maintained by an agency, 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, with repect to the meetings to which you referred, when a quorum or majority of the Board of Education gathers to conduct public business as a body, I believe that the Open Meetings Law would be applicable. It is emphasized that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

> enactment of this statute" (60 AD 2d 409, 415).

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

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

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

I point out that it has been 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 a gathering might be held at the request of persons other than Board members or District officials, I believe that it would be a meeting, assuming that a quorum of the Board is present for the purpose of conducting public business.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Dr. Harry C. Fensom, Jr., Superintendent
Michael Kramer, President, Board of Education

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9178
OML-AO-2545

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

December 8, 1995

Mr. Scott Wexler
New York Tavern & Restaurant
Association
25 Elk Street
Albany, NY 12207

Dear Mr. Wexler:

I have received your letter of November 14 in which you raised a series of questions concerning meetings of public bodies and access to records.

Your first area of inquiry involves the subjects that may be discussed during an executive session, and as I understand your commentary, a specific issue pertains to the propriety of reviewing a draft ordinance in an executive session. In this regard, the subjects that may appropriately be considered in executive are described in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. Rather than enumerating them, I have enclosed a copy of the statute. However, from my perspective, a discussion of draft ordinance would not fall within any of the grounds for entry into executive session.

In a related area, you asked "what public records of an executive session must be kept and made available for public inspection. Section 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.

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.

Next, you asked whether "a committee (standing or ad hoc) of a County Board of Health must provide public notice of a committee meeting (what type of notice required, how much notice)."

By way of background, judicial 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.

However, when a committee consists solely of members of a public body, such as a board of health, I believe that the Open Meetings Law would be applicable. 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."

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 public body, including a committee, intends to gather to discuss public business, I believe that it is required to provide notice in accordance with §104 of the Open Meetings Law. 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 noted that while notice of the time and place must be given prior to all meetings, there is no requirement that an agenda or notification of issues to be discussed be given, unless a public body has established rules or procedures requiring additional information in its notices of meetings.

With respect to access to records, you asked whether "a draft ordinance prepared for the Board of Health and discussed openly at a public meeting [is] deemed to be available to the public." Similarly, you questioned whether "reports prepared by staff and submitted to the Board" are accessible.

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

The records that you described would fall within the scope of one of the grounds for denial, §87(2)(g). However, due to the structure of that provision, it often requires disclosure. The cited provision 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 a case involving intra-agency materials, the Court of Appeals specified that the contents of those materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Notwithstanding the authority to withhold records or perhaps portions of records in appropriate circumstances, I point out that the Freedom of Information Law is permissive. While an agency may withhold records in appropriate circumstances, it is not required to do so. As stated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the exemption provision contains permissible

> rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

From my perspective, insofar as a record is disclosed at an open meeting, an agency would have waived any right to withhold it that might otherwise have existed. While it has been held that an erroneous or inadvertent disclosure does not create a right of access on the part of the public [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)], a disclosure at an open meeting would be purposeful and intentional rather than inadvertent. If that is so, even though there may have been a basis for withholding prior to a public disclosure of the record, that activity in my view would preclude an agency from withholding any portion of the document that was disclosed.

Lastly, you questioned the propriety of a charge of seventy-five cents per page for certain records. Unless a different fee is prescribed by statute, under §87(1)(b)(iii) of the Freedom of Information Law, an agency cannot charge in excess of twenty-five cents per photocopy up to nine by fourteen inches.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2546

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

December 11, 1995

Ms. M. Helene Hamlin
Village of Ilion
P.O. Box 270
Ilion, NY 13357

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 November 15. In your capacity as the attorney for the Village of Ilion, you wrote that the Board of Trustees recently held a meeting and invited all Village employees to attend in order to open communications and allow employees to air and seek responses to their concerns. Because some members of the public attended, you indicated that some employees "don't feel free to voice their concerns."

You have asked whether the Board can meet with its employees in the kind of gathering that you described, "with a quorum of the Board present, without making the meeting open to the public."

From my perspective, when a quorum of the Board gathers to conduct public business, collectively, as a body, the gathering would constitute a "meeting" subject to the Open Meetings Law. In this regard, I offer the following comments.

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 it has been 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)].

Assuming that the kind of gathering that you described is a meeting for the purposes of the Open Meetings Law, the Board could enter into executive session in appropriate circumstances in accordance with paragraphs (a) through (h) of §105(1). Further, pursuant to §105(2), the Board could authorize others, such as employees with unique information or knowledge, to join the Trustees at the executive session.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2547

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

December 11, 1995

Ms. Virginia Stujenske
[redacted]

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. Stujenske:

As you are aware, I have received your letter of November 16. You have raised a series of issues in relation to the "Shared Decision Making Meetings" conducted in the Floral Park Bellerose Union Free School District. As you requested, enclosed are copies of the Open Meetings Law and an explanatory brochure that may be useful to you. I note that paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered in executive session.

With regard to your questions, I offer the following comments.

First, I believe that the "shared decision-making" committees created pursuant to regulations promulgated by the Commissioner of Education are required to comply with the Open Meetings Law.

By way of background, §100.11(b) of the regulations states in relevant part that:

> "By February 1, 1994, each public school district board of education and each board of cooperative educational services (BOCES) shall develop and adopt a district plan for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking. Such district plan shall be developed in collaboration with a committee composed of the superintendent of schools, administrators selected by the district's administrative bargaining organization(s), teachers selected by the teachers' collective

> bargaining organization(s), and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by their peers in the manner prescribed by the board of education or BOCES, provided that those portions of the district plan that provide for participation of teachers or administrators in school-based planning and shared decisionmaking may be developed through collective negotiations between the board of education or BOCES and local collective bargaining organizations representing administrators and teachers."

Section 100.11(d) provides in part that:

> "The district's plan shall be adopted by the board of education or BOCES at a public meeting after consultation with and full participation by the designated representatives of the administrators, teachers, and parents, and after seeking endorsement of the plan by such designated representatives."
>
> "Each board of education or BOCES shall submit its district plan to the commissioner for approval within 30 days of adoption of the plan. The commissioner shall approve such district plan upon a finding that it complies with the requirements of this section..."

Additionally, §100.11(e)(1) states that:

> "In the event that the board of education or BOCES fails to provide for consultation with, and full participation of, all parties in the development of the plan as required by subdivisions (b) and (d) of this section, the aggrieved party or parties may commence an appeal to the commissioner pursuant to section 310 of the Education Law. Such an appeal may be instituted prior to final adoption of the district plan and shall be instituted no later that 30 days after final adoption of the district plan by the board of education or BOCES."

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 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)].

In this instance, however, although the committees in question may or may 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 decision making plans. As stated earlier, the regulations specify that a district plan "shall be developed in collaboration with a committee." As such, a committee must, by law, be involved in the development of a plan. 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" a 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 decision-making 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).

Again, according to the Commissioner's regulations, which have the force and effect of law, a plan cannot be adopted absent "collaboration" and participation by the committees that are the subject of your inquiry. Since they carry out necessary functions in the development of shared decision making plans, I believe that they perform a governmental function and, therefore, are public bodies subject to the Open Meetings Law.

In my opinion, the same conclusion can be reached by viewing the definition of "public body" in terms of its components. A committee is an entity consisting of more than two members; it is required in my view to conduct its business subject to quorum requirements (see General Construction Law, §41); and, based upon the preceding commentary, a committee conducts public business and performs a governmental function for a public corporation, such as a school district or a BOCES.

While the Commissioner's 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 the committees in question perform pursuant to the Commissioner's regulations and the plans adopted in accordance with those regulations, I believe that they constitute "public bodies" subject to the requirements of 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.

Third, 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 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).

Based on 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.

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" or as a "specific personnel matter" 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving employment, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see,

> Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 207 AD 2d 55 (1994)].

Lastly, it is noted that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. There are, however, several judicial decisions concerning the use of those devices at open meetings. From my perspective, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

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

> "While 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 judgement annulling the resolution of the respondent board of education" (id. at 925).

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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2548

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

December 14, 1995

Mr. Steven R. Trimboli
[redacted]

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. Trimboli:

I have received your letter of November 28 in which you questioned the status of meetings of a "District Cabinet" under the Open Meetings Law.

In this regard, having discussed the issue with a representative of the Office of the New York City Corporation Counsel, a district cabinet, which is characterized in the New York City Charter as a "district service cabinet", does not appear to be a public body. If that is so, its meetings would not be subject to the Open Meetings Law.

The Open Meetings Law is applicable to public bodies, and the phrase "public body" is defined in §102(2) of that statute 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, in my view, an entity that carries out its duties collectively, as a body. It is my understanding that no motions are made and that no votes or actions are taken at meetings of a district service cabinet. The information shared by the Office of Corporation Counsel indicated that various reports and comments are made concerning a given community within New York City during meetings of a district service cabinet, but that it does not function as a body.

By way of background, district service cabinets were created by §2705 of the New York City Charter. Although that provision states that certain officials serve as members of the cabinet, others are representatives of City agencies who might participate, comment or provide information on an as needed basis. For instance, if an issue arises that might be dealt with by the Department of Sanitation, that agency might send one or more representatives. Those same representatives, however, might not attend future meetings. Stated differently, the "membership" is flexible and dependent upon the nature of the issues that might arise in a community.

If my assumptions are accurate, a district service cabinet does not have a specific membership, nor would those in attendance function collectively as a body. If that is so, it would not constitute a "public body" subject to the Open Meetings Law.

In contrast, as you are aware, community boards have a specific membership, they have clear responsibilities described in §2800 of the City Charter, and the members function by voting and taking collective action as a body. Issues pertaining to community boards have been discussed with various officials of New York City government over the course of years, and, in view of their legal characteristics, their functions and their duties, there has been no dispute concerning their inclusion under the Open Meetings Law.

I hope that the foregoing serves to enhance your understanding of the matter. If you have any questions, 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

OMC-AO 2549

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

December 19, 1995

Ms. Stephannie A. Andrews
[redacted]

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. Andrews:

I have received your letter dated November 7, which, for reasons unknown, reached this office on November 24.

According to your letter, at a recent meeting of the Republic Airport Commission, you and another person in attendance sought to use your personal tape recorders. You were informed, however, that the Commission had adopted a resolution in 1984 prohibiting the use of tape recorders. When you questioned the legality of the resolution and indicated that you discussed the matter with me, you were informed by the Chairman that "he had his own 'legal decision' in front of him telling him to the contrary."

In this regard, based on judicial decisions, including a unanimous decision rendered by the Appellate Division, Second Department, which includes Republic Airport in its jurisdiction and which will be discussed more fully later, the resolution adopted by the Board appears to be invalid and out of date.

It is noted that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. However, there are several judicial decisions concerning the use of those devices at open meetings. From my perspective, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White

Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

In the decision to which reference was made earlier, the Appellate Division unanimously affirmed a decision of Supreme Court, Nassau County, that annulled a resolution adopted by a board

of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While 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 judgement annulling the resolution of the respondent board of education" (id. at 925).

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.).

The same conclusion was reached most recently in Peloquin v. Arsenault [616 NYS 2d 716 (1994)], which cited Mitchell, as well as opinions rendered by this office. In that case, a village board of trustees, by resolution, banned the use of video recording devices at its meetings. In its determination, the court held that:

> "Hand held audio recorders *are* unobtrusive (*Mitchell*, supra); camcorders may or may not be depending, as we have seen, on the circumstances. Suffice it to say, however, in the fact of *Mitchell*, the Committee on Open Government's (Robert Freeman's) well-reasoned opinions supra and the court system's pooled video coverage rules/options, a blanket ban on all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is

> unreasonable. While 'distraction' and 'unobtrusive' are subjective terms, in the face of the virtual presumption of openness contained in Article 7 of the Public Officers Law and the insufficient justification offered by the Village, the 'Recording Policy' in issue here must fall" (id., 718).

In view of the judicial determinations on the subject, I believe that a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

As you requested, and in an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to the officials identified in your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alicia Grace
John K. Lussi
Hugh Jones
Stephen Williams
Frank Nocerino
Charlotte Geyer
Maurice Black
Margaret Castaldo
Gerard Toner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2550

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

December 26, 1995

Ms. Ellen L. Kilbourn
[redacted]

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. Kilbourn:

I have received your letter of November 29, which, as in the case of your previous correspondence, pertains to compliance with the Open Meetings Law by the Salamanca City Council. You have asked what you can do "as a private citizen...to prevent the City from violating the State Open Meetings Law."

In this regard, I offer the following comments and suggestions.

First, the primary impediment to compliance with the Open Meetings Law in my view involves the absence of sufficient knowledge concerning the Law on the part of members of public bodies. Consequently, one method of attempting to enhance compliance would pertain to efforts to educate those persons and others. As you may be aware, this office offers advice and opinions to anyone, including local government officials, and those persons are encouraged to contact the Committee if and when questions arise.

Second, public opinion and public pressure, often coupled with the work of an active and aggressive news media, serve to improve compliance with the Open Meetings Law. If a number of people within a community express their views on an issue, often their elected representatives will seek to accommodate them. Additionally, focus on an issue by the news media often serves to enhance compliance with law.

Third, any "aggrieved person" may initiate a lawsuit to attempt to compel a public body to comply with the Open Meetings Law. Section 107(1) of that statute states in relevant part that:

> "Any aggrieved person shall having 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."

Further, §107(2) 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."

Lastly, since you referred to a seminar held for newly elected officials, it is noted that I will be speaking at the Southern Tier Local Government Conference to be held at Houghton College on May 16. My presentation will pertain to the Open Meetings Law, as well as the Freedom of Information Law, and I will attempt to answer any and all questions regarding those statutes raised by those who attend.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council