STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2551

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 8, 1996

Ms. Kathy A. Ahearn
Counsel and Deputy Commissioner
for Legal Affairs
The State Education Department
Albany, NY 12234

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

Dear Ms. Ahearn:

I have received your letter of January 5 and the materials attached to it. In your capacity as the State Education Department's Counsel and Deputy Commissioner for Legal Affairs, you have requested "an advisory opinion concerning certain actions taken by the New York State Board of Regents (the 'Regents') early Wednesday morning, January 3, 1996, in connection with a hearing held pursuant to Chapter 145 of the Laws of 1995."

Citing certain provisions of that statute, you wrote that "the Board of Regents is authorized to terminate the offices of the members of the Board of Education of Roosevelt Union Free School District if, after providing the board of education with an opportunity to be heard, the Regents find that the board of education has significantly failed to meet the goals of a corrective action plan approved by the Regents." You added that the statute does not specify the means by which an opportunity to be heard may be conferred, but that the Regents sought "to extend the broadest possible measure of due process to the board of education" and held a public hearing on January 2 in conjunction with an order to show cause that you issued at the direction of the Regents on December 18.

In describing the hearing, you wrote that the board of education was represented by counsel at the hearing, "who made an opening statement and submitted documentary exhibits and witness testimony on behalf of the board." Similarly, the District Review Panel, an entity created by Chapter 145 that recommended that the terms of office of the members of the board of education be terminated by the Regents, also presented witnesses and introduced

documents into evidence. Further, a court reporter was present for the purpose of preparing a stenographic transcript of the proceeding.

Following testimony and closing arguments, which occurred in full view of the public and the news media and lasted some fourteen hours and into the morning of January 4, you indicated that "the Regents adjourned into private session to collectively weigh the evidence taken during the public hearing, apply the law, and reach a determination regarding the termination of the Roosevelt board members", and that as legal counsel, you joined the Regents to offer "legal advice on issues such as the weight to be accorded documents, standard of proof required in the statute, etc." At the conclusion of the deliberations, the Regents "decided unanimously, by a vote of 9 to 0, to terminate the offices of the members of the board of education", and you prepared an order to reflect that determination. Immediately thereafter, the Regents reconvened in the public hearing room, and the Chancellor informed those present that the Regents reached a determination, recounted the vote and read the order that you drafted.

You stated that the process of that evening was based on advice that you offered the Regents prior to the hearing that the Open Meetings Law did not apply to their deliberations. Specifically, you wrote that "[b]ased on the evidentiary nature of the hearing, the fact that the Regents were going to be called upon to apply the law to the facts that they had ascertained in public session and act much like a judge in a court of law, [you] opined that the proceeding was exempt from the coverage of the Open Meetings Law under Public Officers Law §108(1), as quasi-judicial in nature." Nevertheless, you wrote that some "are suggesting that the Board of Regents acted in violation of the Open Meetings Law by holding a secret meeting."

In this regard, based on your rendition of the facts as described in the preceding paragraphs, I offer the following comments.

It is noted initially that there are two vehicles that may authorize a public body, such as the Board of Regents, 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.

As I understand the matter, it is unlikely that there would have been a basis for conducting an executive session. The only ground for entry into executive session that appears to relate to the issue before the Regents, §105(1)(f), authorizes a public body to conduct such a session to discuss:

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

The language quoted above pertains to a variety of topics as they relate to a "particular person." In the instant case, it does not appear that the Regents focused on any specific member of the board of education. On the contrary, I believe that the issue involved the board as an entity, and the order to show cause that you enclosed referred repeatedly to failures of the board, rather than any individual member. If that is so, in my opinion, neither §105(1)(f) nor any other ground for entry into executive session could justifiably have been asserted.

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 the matter is §108(1) of the Open Meetings Law, which exempts from the coverage of that statute "judicial or quasi-judicial proceedings..." From my perspective, it is often difficult to determine exactly when public bodies are involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administrative functions. Similarly, often provisions require that public hearings be held; others permit discretion to hold a public hearing. Further, the holding of public hearings and providing an opportunity to be heard does not

in my opinion render a proceeding quasi-judicial in every instance. Those requirements may be present in a variety of contexts, many of which precede legislative action.

I believe that one of the elements of a quasi-judicial proceeding is the authority to take final action. While I am unaware of any judicial decision that specifically so states, there are various decisions that infer that a quasi-judicial proceeding must result in a final determination reviewable only by a court. For instance, in a decision rendered under the Open Meetings Law, it was found that:

> "The test may be stated to be that action is judicial or quasi-judicial, when and only when, the body or officer is authorized and required to take evidence and all the parties interested are entitled to notice and a hearing, and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only when there is an opportunity to be heard, evidence presented, and a decision had thereon" [Johnson Newspaper Corporation v. Howland, Sup. Ct., Jefferson Cty., July 27, 1982; see also City of Albany v. McMorran, 34 Misc. 2d 316 (1962)].

Another decision that described a particular body indicated that "[T]he Board is a quasi-judicial agency with authority to make decisions reviewable only in the Courts" [New York State Labor Relations Board v. Holland Laundry, 42 NYS 2d 183, 188 (1943)]. Further, in a discussion of quasi-judicial bodies and decisions pertaining to them, it was found that "[A]lthough these cases deal with differing statutes and rules and varying fact patterns they clearly recognize the need for finality in determinations of quasi-judicial bodies..." [200 West 79th St. Co. v. Galvin, 335 NYS 2d 715, 718 (1970)].

It is my opinion that the final determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

> "A term applied to the action, discretion, etc., of public administrative officials, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

In the situation at issue, it appears that the proceeding could be characterized as quasi-judicial and that, therefore, the Regents' deliberations could properly have been conducted in private, outside the coverage of the Open Meetings Law. Again, the statute upon which the proceeding was based required notice and an opportunity to be heard, the parties provided testimony and documentary material submitted into evidence, and the Regents were empowered to make a final and binding determination. In short, the proceeding had many of the trappings or elements of a judicial proceeding and the Regents appeared to have carried out their duties in a manner analogous to a court.

Another exemption may also have been relevant. Section 108(3) 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 government 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 government 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 Regents sought legal advice from you as its counsel and you rendered 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.

Lastly, for the reasons expressed in the preceding commentary, I believe that the Regents had the authority to deliberate and to seek your legal advice in private and in a manner outside the scope of the Open Meetings Law. While its vote was confirmed in public, that vote, according to one judicial decision, should have been taken during an open meeting. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409, 418 (1978)].

I note our discussion of this issue and that I referred to the fact 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. You asserted, however, that in this proceeding, there was indeed unanimity on the part of the Regents in its vote, and that its unanimous confirmation of the matter, in public, with all Regents present, merely reflected the reality of that vote. Accordingly, the public, as a practical matter, appears to have the ability to know how individual Regents voted.

I hope that I have been of assistance. If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9236
OML-AO-2552

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Executive Director

Robert J. Freeman

January 9, 1996

Mr. Robert E. Croissant
[redacted]

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. Croissant:

As you are aware, I have received your letter of December 19 and the materials attached to it.

You have requested an advisory opinion concerning your efforts to gain access to minutes of meetings of the Woodstock Public Access Cable Committee and the Town of Woodstock. Your inquiry was precipitated by action taken by the Committee to suspend your TV programming time during an executive session. Although minutes of some meetings have been made available, others have not yet been disclosed. Further, when you sought minutes of executive sessions, particularly the session in which action was taken pertaining to you, you were informed that those minutes consist of "privileged information." You also indicated that the members of the Committee "never mention at any of the public meetings their reasons for going into executive session."

In this regard, I offer the following comments.

First, based upon the "Plan for the Operation of the Woodstock Public Access Station", it is clear that the Woodstock Public Access Committee is a public body required to comply with the Open Meetings Law and that its records are subject to the Freedom of Information Law. In brief, the five members of the Committee are appointed by the Town Board, and the Chair of the Committee and the Station Manager are also appointed by the Town Board. Moreover, the Plan specifies that the Committee is obligated to conduct its meetings "under the requirements of the open meetings law..."

Second, in my view, the extent to which executive sessions under the circumstances described in the correspondence could justifiably have been held is questionable. As a general matter, the Open Meetings Law is based upon a presumption of openness. Meetings of public bodies must be conducted in public, except to

the extent that an executive session may be held in accordance with paragraphs (a) through (h) of §105(1) of the Law. Section 105(1) states in relevant part that:

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

Based on the foregoing, a public body must indicate, during an open meeting, by means of a motion, the subject or subjects it intends to consider in private. Further, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, the grounds for entry into executive session are specified and limited.

The only basis for entry into executive session that might have applied, §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 or corporation..."

On the basis of the materials that you provided, it is unclear whether any of the subjects described in §105(1)(f) were discussed. Only to the extent that the language of that provision applied could an executive session have properly been withheld. Any other aspect of the discussion in my view should have occurred during an open meeting.

Third, §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, minutes of open meetings must be prepared and made available within two weeks, and 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 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.

With regard to a record of how each member voted, I direct your attention to §87(3)(a) of the Freedom of Information Law. That provision states that:

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

Based upon the foregoing, when a final vote is taken by an "agency", which is defined to include a municipal committee [see §86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), I believe that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

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

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

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be sent to the Committee, the Town Supervisor and the Town Clerk.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Woodstock Public Access Committee
Hon. John Mower, Town Supervisor
Hon. Kathy Anderson, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2553

162 Washington Avenue, Albany, New York 12231
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January 9, 1996

Hon. Theresa C. Valada
Town Clerk
P.O. Box 308
Walton, NY 13856-0308

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. Valada:

I have received your note and the attached minutes of meetings of the Walton Town Board. As I understand the matter, the Town Board has sought to add certain items or words to the minutes that you prepared, and you "requested motions for these 'additions'". You were informed, however, that motions were not required to make those changes.

As I view the matter, 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.

In my view, it is typical for a public body to review minutes, offer corrections or changes, and then to vote, by motion, to adopt the minutes as revised. Whether that is necessary in every instance is, from my perspective, dependent upon reasonableness.

For instance, it would appear that in a reference to the Delaware County Historical Society without the word "Historical", the addition of that word would be made for obvious reasons, accuracy and clarity. A controversy over whether the word is added by motion or otherwise is in my opinion placing form over substance and unnecessary. Again, I believe that the primary interest should be accuracy.

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.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9247
OML-AO-2554

162 Washington Avenue, Albany, New York 12231
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January 12, 1996

Mr. George A. Mayes
[redacted]

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. Mayes:

I have received your letter of December 30 and the materials attached to it.

According to the correspondence, the Town of Warrensburg and a group of doctors known as the Hudson Headwaters Health Network (HHHN) entered into an agreement in 1992, and you have raised two questions in relation to the terms of the agreement.

One element of the agreement requires the establishment of a Health Advisory Committee by the Town Board. According to the agreement, the primary function of the Advisory Committee involves providing "the Town Board with recommendations regarding the scope and delivery of health services to the community." You have asked whether the Advisory Committee is subject to the Open Meetings Law.

In this regard, I offer the following comments.

As you are aware, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

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

Judicial decisions indicate generally that advisory bodies, other than committees consisting solely of members of public bodies, having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, it appears that the Health Advisory Committee would not constitute a public body subject to the Open Meetings Law.

You have also asked whether reports prepared by the HHHN that must be provided to the Advisory Committee constitute Town records subject to the Freedom of Information Law. Section IV.a. of the agreement states in relevant part that:

> "HHHN shall provide the Advisory Committee with a quarterly report as to the financial condition of the program including an operating statement indicating all operating revenues and expenditures for the quarter."

In my opinion, those reports are Town records that fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) 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."

The Court of Appeals, the state's highest court, has construed the language quoted above expansively on several occasions and most recently dealt with whether "material received by a corporation providing services for a State university and kept on behalf of the university constitute a 'record' that is presumptively discoverable under FOIL" (see Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, ___ NY 2d ___, December 27, 1995). In its consideration of the issue, the Court determined that the State University clearly is an "agency" that is required to comply with the Freedom of Information Law [see definition of "agency", §86(3)]. In this instance, it is equally clear that the Town is an agency for purposes of that statute. Further, the Court described

the relationship between the Auxiliary Service Corporation (ASC) and the University and concluded that records maintained by the ASC for the University were subject to the Freedom of Information Law. Specifically, the Court wrote as follows:

> "In order to fulfill its educational mission, SUNY must provide certain auxiliary services to its campus community. As set forth unequivocally in ASC's bylaws, the function of ASC is to supply these essential services--including the campus bookstore--for SUNY. ASC's acts in discharging this delegated duty, then, are performed on SUNY's behalf.
>
> "Because ASC receives a copy of the booklist compiled by its subcontractor, Barnes & Noble, to ensure that the campus bookstore is adequately maintained, it does so for the benefit of SUNY, a governmental agency. In other words, the booklist information is 'kept' or 'held' by ASC 'for an agency' (Public Officers Law § 86[4]). Thus, the information falls within the unambiguous definition of the term 'records' under FOIL.
>
> "SUNY's contention that disclosure turns solely on whether the requested information is in the physical possession of the agency ignores the plain language of FOIL defining 'records' as information kept or held 'by, with or for an agency' (Public Officers Law § 86[4]}. Where, as here, the literal language of a statute is precise and unambiguous, that language is determinative (Roth v Michelson, 55 NY2d 278; see also, Capital Newspapers v Whalen, 69 NY2d 246, 248 [giving words their natural and most obvious meaning in interpreting 'records' under FOIL]."

From my perspective, the situation that you described is somewhat analogous to that before the Court. In this instance, the Advisory Committee receives records from a party to an agreement, HHHN, for the benefit of the Town. As such, the reports are kept by the Advisory Committee for an agency, the Town of Warrensburg. Therefore, I believe that they are Town records.

The foregoing is not intended to suggest that the reports must of necessity be disclosed in their entirety. Rather, it is my view that the reports constitute records that fall within the scope of rights of access conferred by the Freedom of Information Law. In brief, 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 hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9351
OML-AO 2555

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 12, 1996

Mr. Harvey M. Elentuck
[redacted]

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. Elentuck:

I have received your letter of December 29 and the materials attached to it. You have sought my views concerning two issues that relate to the New York City Board of Education.

The first pertains to meetings of the Board in which members of the public are given an opportunity to express their views. You referred to regulations adopted by the Board relating to those meetings, and one aspect of the regulations states that: "[D]iscussion and charges relating to the competence or personal conduct of individuals will be ruled out of order at these meetings. The Board of Education cannot permit public 'trials by accusation.'" You wrote, however, that Counsel to the Board asked you not to mention the names of people identified in a written statement that you sought to make, and you questioned the propriety of precluding you from reading records, including names within them, when the records have been disclosed under the Freedom of Information Law.

In this regard, by authorizing the public to speak at meetings, I believe that the Board has, in the context of your inquiry, adopted a practice that is not required by law. 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, 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/or permit public participation, and many do so. When a public body does permit the

public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

The issue in this instance, in my view, is whether the Board's regulation or perhaps the means by which it is implemented, is reasonable. It appears that the Board's practice is based on provisions of the Freedom of Information and Open Meetings Laws that are intended to enable governmental entities to protect personal privacy. In the case of the former, §87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Section 105(1)(f) of the Open Meetings Law authorizes a public body to conduct an executive session to discuss:

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

From my perspective, not every record that identifies an individual would, if disclosed, result in an unwarranted invasion of personal privacy. Similarly, even though a discussion by a public body might include names, that alone would not necessarily justify the holding of an executive session.

I would agree that an accusation concerning the conduct of a teacher, for example, represents the kind of situation in which a public body could reasonably preclude identification of the teacher in a statement offered at a meeting of that body. In that case, I believe that the identity of a teacher who is the subject of an unsubstantiated allegation or charge could be withheld under the Freedom of Information Law or be a proper subject for consideration in executive session. Nevertheless, if a teacher is the subject of a final determination indicating that he or she engaged in misconduct (i.e., under §3020-a of the Education Law), the determination would be a matter of public record, even though the person is named in the record. Because the record is public and

because such a determination is not an accusation but rather is a finding, it would be unreasonable in my view to prohibit a public reading of that record, including the name of the subject of the determination. In other circumstances as well, a name coupled with other information may be public, and a prohibition of the utterance of the name would, in my opinion, be unreasonable. For instance, the names of all public employees, their titles and their salaries are matters of public record. I cannot envision how precluding speakers from identifying employees with their titles or salaries could be justified.

In short, it is not the name that is critical; rather, I believe that it is the name when used in conjunction with other information that should serve as the standard for permitting or perhaps prohibiting the identification of individuals during open meetings.

The second area of inquiry pertains to requests that were denied by Susan Jonides Deedy, Counsel to the Chancellor.

One request involved "All final investigative reports and statements of finding that were issued by Ed Stancik's Office, and that are physically located at 110 Livingston Street." You were informed that the records "do not exist in any one central location" and "are not maintained in a fashion that enables us to release them pursuant to your FOIL request." In short, for reasons described in previous correspondence, it appears that your request would not have "reasonably described" the records sought as required by §89(3) of the Freedom of Information Law.

The remaining request involved "litigation file cabinet 'tags'" used by individual attorneys at the Board of Education. Ms. Deedy wrote that the tags "are considered internal notations that are confidential." You contend that Ms. Deedy did not cite any statutory exemption to support her contention that the material is 'confidential.'"

I am not familiar with the notations that appear on the tags. Nevertheless, there are several grounds for denial that may be relevant, depending on the content of the notations.

In the context of the duties of an attorney employed by the Board, it is possible that the tags identify students and that the names of students would be confidential pursuant to the Family Educational Rights and Privacy Act and, therefore, §87(2)(a) of the Freedom of Information Law. Similarly, the tags could identify employees who are the subjects of disciplinary proceedings or other matters the disclosure of which would constitute an unwarranted invasion of personal privacy deniable under §87(2)(b). The tags could reflect values or opinions, i.e., by characterizing the contents of files as "important" or "unimportant", "winnable" or "unwinnable." Those kinds of notations could in my view be withheld as intra-agency material under §87(2)(g).

I refer, too, to a recent decision that might be pertinent involving access records relating to payments by a municipality to a law firm for services rendered. It was contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "...in order to uphold respondent's denial of the FOIL request, the Court would be compelled to conclude that the descriptive material, set forth in the law firm's monthly bills, is uniquely the product of the professional skills of respondent's outside counsel. The Court fails to see how the preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, can be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 [Sup. Ct. Kings Ct. 1984]). Therefore, the Court concludes that the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "However, the Court is aware that, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court).

The extent to which the preceding commentary may be relevant to the materials at issue is unknown to me, and rights of access would likely be dependent on the content of those materials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mary Tucker
Bruce K. Gelbard
Susan Jonides Deedy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-2556

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January 18, 1996

Mr. Ira Hersch
[redacted]

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. Hersch:

I have received your letter of December 20, which, for reasons unknown, did not reach this office until January 5.

The issue that you raised is whether the Baruch College Committee on Academic Standing of the School of Business is required to comply with the Open Meetings Law. According to your letter and the form attached to it, the Committee has the authority to make binding determinations.

In this regard, I offer the following comments.

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

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

Judicial decisions indicate generally that advisory bodies having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a 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, the entity in question does not appear to be advisory; again, it appears to have the ability render determinations. If that is so, I believe that it would constitute a public body subject to the Open Meetings Law.

Second, it is noted initially 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, 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.

As I understand the matter, it is unlikely that there would have been a basis for conducting an executive session. The only ground for entry into executive session that appears to relate to the issue, §105(1)(f), authorizes a public body to conduct such a session to discuss:

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

The language quoted above pertains to a variety of topics as they relate to a "particular person." However, it does not appear that the subjects described in §105(1)(f) relate to the subject considered by the Committee.

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.

Of possible relevance to the matter is §108(1) of the Open Meetings Law, which exempts from the coverage of that statute "judicial or quasi-judicial proceedings..." From my perspective, it is often difficult to determine exactly when public bodies are involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administrative functions. Similarly, often provisions require that public hearings be held; others permit discretion to hold a public hearing. Further, the holding of public hearings and providing an opportunity to be heard does not in my opinion render a proceeding quasi-judicial in every instance. Those requirements may be present in a variety of contexts, many of which precede legislative action.

I believe that one of the elements of a quasi-judicial proceeding is the authority to take final action. While I am unaware of any judicial decision that specifically so states, there are various decisions that infer that a quasi-judicial proceeding must result in a final determination reviewable only by a court. For instance, in a decision rendered under the Open Meetings Law, it was found that:

> "The test may be stated to be that action is judicial or quasi-judicial, when and only when, the body or officer is authorized and required to take evidence and all the parties interested are entitled to notice and a hearing, and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only when there is an opportunity to be heard, evidence presented, and a decision had thereon" [Johnson Newspaper Corporation v. Howland, Sup. Ct., Jefferson Cty., July 27, 1982; see also City of Albany v. McMorran, 34 Misc. 2d 316 (1962)].

Another decision that described a particular body indicated that "[T]he Board is a quasi-judicial agency with authority to make decisions reviewable only in the Courts" [New York State Labor Relations Board v. Holland Laundry, 42 NYS 2d 183, 188 (1943)]. Further, in a discussion of quasi-judicial bodies and decisions pertaining to them, it was found that "[A]lthough these cases deal with differing statutes and rules and varying fact patterns they clearly recognize the need for finality in determinations of quasi-

judicial bodies..." [200 West 79th St. Co. v. Galvin, 335 NYS 2d 715, 718 (1970)].

It is my opinion that the final determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

> "A term applied to the action, discretion, etc., of public administrative officials, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

Insofar as the Committee's proceedings could be characterized as quasi-judicial, the Open Meetings Law, in my view, would not apply.

Also relevant under the circumstances may be §108(3), which exempts from the Open Meetings Law:

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

Here I direct your attention to 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 funding or 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, a so-called "eligible student", 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).

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. Further, 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 Committee 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.

Lastly, viewing the matter from a different perspective, insofar as CUNY, Baruch College or the Committee in question maintain records pertaining to you, it appears that you would enjoy rights of access to those records pursuant to FERPA. Therefore, even if meetings of the Committee might justifiably be closed, records maintained by the Committee pertaining to you would likely be accessible to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Committee on Academic Standing

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9260
OML-AO-2557

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January 19, 1996

Mr. Leslie C. Smith, Sr.
Chairman
C.C.L.P.L.D.
256 Erie Road
West Hempstead, NY 11552

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. Smith:

I have received your letter of January 4. You asked that I prepare an advisory opinion concerning a complaint and the allegations contained therein sent in November to Richard Mills, Commissioner of Education. A copy of that documentation was sent to this office. On behalf of the Concerned Citizens of the Lakeview Public Library District, you raised a variety of issues relating to the Open Meetings and Freedom of Information Laws.

Since you alleged that the Board of Trustees conducts executive sessions prior to its open meetings, I point out that the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

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

It has been consistently advised that a public body cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at 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].

Moreover, a public body cannot conduct an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session. You referred specifically to a discussion of the revision of by-laws during an executive session. In my view, that kind of issue, which involves matters of policy, would fall outside any of the grounds for entry into executive session and should have been discussed in public.

Every meeting of a public body, such as the Board of Trustees, must be preceded by notice given to the news media and to the public by means of posting. Section 104 of the Open Meetings Law provides that:

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

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place 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. If the Board intends to convene at a certain time, if only to enter into a proper executive session immediately thereafter, notice would have be given to the effect that the Board will meet at that time.

The Open Meetings Law provides direction concerning the contents of minutes and when they must be disclosed. Specifically, §106 of that statute provides that:

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

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

Implicit in the Law and crucial to its thrust is the requirement that minutes, whether lengthy or brief, serve as an accurate and true representation of what occurred during a meeting.

With regard to recording of how each member voted, I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency", which is defined to include a state or municipal board [see §86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

As the focus of my comments shifts to the Freedom of Information Law, it is noted at the outset that the title of that statute 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 your request of June 30, for example, you sought answers to questions and information. While Library officials could have provided responses, so doing would have exceeded their obligations under the Freedom of Information Law. In the future, it is suggested that you seek existing 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.

In my opinion, 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.

> 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.

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 assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2558

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January 19, 1996

Ms. Judith R. Freeman
[redacted]

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. Freeman:

I have received your letter of January 11 in which you requested an advisory opinion. I note that the opinion has been prepared on an expedited basis at the request of Assemblyman Fessenden.

In your capacity as a member of the Board of Education of the Auburn Enlarged City School District, you wrote that the Board "is considering the offer of a business to purchase school district property", and that members of the community have raised questions and sought to express their views as part of the decision making process. You indicated that the Board has considered the matter only during an executive session, at which time a presentation was made by a potential purchaser and the matter was discussed by the Board. According to your letter, during the executive session, a majority of the Board decided "to decline the purchase offer", and the President of the Board expressed an intent to announce to the public that the Board "will reject the offer."

It is your view that the Open Meetings Law requires that the Board's deliberations should have been conducted in public and that the Board should have voted on the matter in public.

In good faith, I point out that the School District's Attorney, Charles Marangola, contacted me with respect to the issue. Mr. Marangola indicated that the firm seeking to purchase the property merely advanced a proposal and submitted no written purchase offer. After hearing the firm's presentation and discussing the matter, the Board, in his view, did not reject any particular offer, for none was presented to the Board in writing. Further, he contended that the consensus reached by the Board was in essence reflective of an agreement that no action should be

taken. Stated differently, based upon his version of the matter, there was no offer to accept or reject by means of a vote.

In this regard, as is the case with respect to many issues arising under the Open Meetings Law, it is difficult to offer unequivocal advice without having been present. Because the description of an issue is based upon one's perception of an occurrence or series of events, frequently there are different descriptions of the same event. I am not suggesting that you, Mr. Marangola or anyone else has misrepresented the facts; I am merely suggesting that there may be differing views of the facts. Nevertheless, I offer the following comments.

First, as you are aware, the Open Meetings Law is based upon a presumption of openness. Specifically, the Law requires that meetings be conducted open the public, except to the extent that an executive session may be held in accordance with the provisions of paragraphs (a) through (h) of §105(1). The only provision that appears to have been relevant concerning the executive session at issue is §105(1)(h). That provision permits a public body to enter into executive session to discuss:

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

In my opinion, the language quoted above, like the other grounds for entry into executive session, is based on the principle that public business must be discussed in public unless public discussion would in some way be damaging, either to an individual, for example, or to a government in terms of its capacity to perform its functions appropriately and in the best interest of the public. It is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

Again, without having been present, it is difficult to advise with certainty as to the propriety of the executive session. Based upon discussions with you and Mr. Marangola, it appears that some aspects of the executive session should have been conducted in public. From my perspective, it is unlikely that the presentation made by the firm concerning its proposed use of the property would have fallen with the scope of §105(1)(h). Similarly, if the Board engaged in a general discussion of the benefits or disadvantages of selling the property, it does not appear that such a discussion could properly have occurred in private. However, insofar as the Board might have discussed possible financial terms or engaged in a negotiation process regarding the proposal, it is possible that public discussion at that juncture might have significantly

affected the value of the property. To that extent, an executive session in my view could properly have been held.

With respect to voting, as you may be aware, 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)]. In short, 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.

The question in this instance is whether action was taken and, therefore, whether a vote by the Board should have occurred during an open meeting. We have discussed this issue in relation to other events, and it is my belief, based upon the judicial interpretation of the Open Meetings Law, that there may be no distinction between a so-called consensus and a final action taken by a public body if the consensus is in reality a determination reflective of action upon which an entity relies. In this instance, it appears that there was a consensus on the part of the Board that the property under consideration would not be sold.

To reiterate Mr. Marangola's view, there was no official purchase offer to accept or reject, and the Board's consensus in actuality represented a meeting of the minds to the effect that no action would be taken. If that view of the facts is accurate, i.e., that the Board agreed that no action would be taken, I do not believe that there would have been any requirement that a vote be taken.

Your version of the facts, however, is somewhat different. You indicated to me by phone that a document was distributed to each Board member indicating what the firm was willing to offer for the property. Whether that record could be characterized as a purchase offer is unknown to me. Further, you said that the President of the Board requested that each member provide an affirmative or negative response concerning the proposal. Although a decision was reached, you indicated that it was not unanimous. It is your contention that the Board in fact made a decision and rejected the proposal. Again, Mr. Marangola suggested that no vote was taken; you have suggested that the President sought a response, pro or con, from each member of the Board. If indeed that response

resulted in a rejection of what the Board considered to be an offer, it would appear that "action" was taken [see Previdi v. Hirsch, 524 NYS 2d 643 (1988)] and that a "vote" should have occurred in public.

Finally, as stated at the outset, the difficulty involved in offering an unequivocal response pertains to the reality that people's perceptions of the same events often differ. In an effort to be fair, in the preceding commentary, I have attempted to recognize the views offered by both yourself and the District's attorney.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Charles Marangola
Hon. Daniel J. Fessenden, Member of the Assembly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO 2559

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 29, 1996

Ms. Judy Freeman
[redacted]

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. Freeman:

As you are aware, I have received your letter of January 9 in which you requested an advisory opinion concerning the Open Meetings Law.

In your capacity as a member of the Auburn Enlarged City School District Board of Education, you wrote that the Board:

> "...met in Executive Session at a Special Meeting on January 3, 1996 for the purpose of Superintendent Evaluation. During this meeting in response to Mr. Sroka's question of whether there was support for contract renewal, each Board Member responded positively or negatively. The Superintendent was then informed of the majority decision. Actions in response to this decision were then discussed.
>
> "During that January 3, 1996 Executive Session I told the Board of Education and the Superintendent that the Open Meetings Law requires that there be a public vote. Mr. Sroka indicated that the school district attorney would be consulted regarding this issue.
>
> "On January 5, 1996 I spoke with Mr. Charles Marangola, attorney for the Auburn School District regarding the issue. He had already reviewed this information and he vehemently disagreed."

The issue has been discussed with you and Mr. Marangola. In brief, while you believe that action was taken and that a vote should have occurred in public, Mr. Marangola contends that no action was taken.

In this regard, I offer the following comments.

First, it appears that discussion of whether to renew the Superintendent's contract could properly have been considered during an executive session. Section 105(1)(f) of the Open Meetings Law permits a public body to 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, there is only one decision of which I am aware that has dealt with the kind of situation that you described, 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 situation that you described, if the Board reached a "consensus" reflective of its final determination of an issue, I believe that action would have been taken and that minutes should have been prepared indicating 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 or steps may be 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 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.

As suggested in previous correspondence involving different facts but an analogous issue, it is often difficult to offer unequivocal advice without having been present. Because of different perceptions of an occurrence or series of events, there may be different descriptions of the same event. I am not suggesting that you, Mr. Marangola or anyone else has misconstrued the facts; I am merely suggesting that there may be differing views of the facts.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Charles Marangola

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2560

162 Washington Avenue, Albany, New York 12231
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January 29, 1996

Mr. Thomas Lahey
[redacted]

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. Lahey:

I have received your letter of January 17. In your capacity as a member of Port Jervis City School District Board of Education, you have sought an advisory opinion concerning the Open Meetings Law.

You wrote that the Board recently held a "building planning workshop", without notice to the public, in a restaurant at the Best Western in Matamoras, Pennsylvania. A memorandum distributed prior to the meeting sought menu preferences of those who would attend.

In this regard, I offer the following comments.

First, although the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

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

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. While Matamoras may be near to Port Jervis, I believe that it would be inappropriate and inconsistent with the Open Meetings Law to hold a meeting in a restaurant where those who attend are expected to make a purchase. Any member of the public has the right to attend meetings of public bodies. In my view, the location of the meeting in this instance represented an impediment to free access by the public.

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, Second Department, which includes Westchester County and whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. It is noted, too, that in a relatively recent decision, it was held that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the council was asked to attend by a person who was not a member [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)].

In short, I believe that a meeting of a municipal body must be held at a location where members of the public who might want to attend could reasonably do so. Again, since a majority of the Board was present, a "meeting" would have occurred; nevertheless, residents of the City, despite their possible interest in the matters under consideration, would have been unable to attend.

Lastly, §104 of the Open Meetings Law requires that notice be given prior to every meeting to the news media and to the public by means of posting.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Patrick J. Hamill, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2561

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 29, 1996

Mr. Patrick Morris
[redacted]

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

Dear Mr. Morris:

I have received your letter of January 15 in which you question certain practices of the City Council of the City of Salamanca.

Specifically, you wrote that:

> "...much of the Council's discussion about the items facing the city is done in 'Workshop Session'. The sessions tend to be an informal type of meeting held in a conference room a few doors down from the Council's chambers. While these meetings tend to be 'open' to the public -- in the sense that the door is open and they do not restrict people from entering -- these sessions are not generally announced. Besides for meetings which we do not know about, the workshop sessions tend to occur about an hour before regular meetings. During workshop sessions, they discuss both the items coming up on the next agenda and long-term (or future) projects which are not up for a vote.
>
> "It is interesting that these gatherings are not called 'meetings', but are called 'sessions', whatever that means. They also do not take formal votes, but rather appear to come to a consensus about the items being discussed. If an item does not gather a consensus, it appears that it doesn't ever get to a formal meeting for a vote. Finally, there are no minutes for any of these

> meetings, at least not which are available to the public."

In this regard, I offer the following comments.

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

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

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

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

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

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

Based upon the direction given by the courts, if a majority of the City Council gathers to discuss City business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. In short, there is no distinction between a meeting and a work session; when a work session is held, a public body has the same obligations in terms of notice, openness and the ability to conduct executive sessions as in the case regular meetings.

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

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

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

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

clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, section 105(1) states in relevant part that:

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

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

Lastly, there is 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 Council relies in carrying out its duties, or when the Council, 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 Council, 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 meetings must include reference to action taken by a public body.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO 3562

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

January 29, 1996

Mr. Jack Sheehan
[redacted]

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. Sheehan:

I have received your letter of January 16. You transmitted a schedule of City Council meetings that includes the following notation: "Commencing at 7:00 pm in the City Council Caucus Room and then proceeding to the City Council Chambers for the 7:30 pm public meeting". You have asked whether "the public should be allowed to attend meetings held in the City Council Caucus Room".

In this regard, 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.).

Further, 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 Caucus Room at 7 p.m. to conduct public business, any such gathering would, in my opinion, constitute a "meeting" subject to the Open Meetings Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9290
OML-AO 2563

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February 5, 1996

Mr. Michael Lisuzzo
[redacted]

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. Lisuzzo:

I have received your letter of January 23 in which you sought clarification concerning issues relating to the process of filling a vacancy on the Shenendehowa School District Board of Education. As I understand your remarks, you are interested in gaining access to minutes or other records indicating how Board members voted in selecting a person to fill the vacancy. You wrote that the request was denied because the vote was apparently taken during an executive session, and you questioned whether "the ballots cast would be forever secret."

In this regard, I offer the following comments.

First, by way of background, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public except to the extent that an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

In my view, the only provision that might have justified the holding of an executive session is §105(1)(f) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss:

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

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining 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), modified on other grounds, 207 AD 2d 55 (1994)].

I point out that the Appellate Division affirmed the substance of the lower decision but that it did not refer to the passage quoted above. In short, while the Open Meetings Law appears to authorize an executive session to consider the relative merits of the candidates for a vacant elective position, based on the holding in Gordon, it is questionable whether an executive session could properly be held to do so.

Second, in my opinion, minutes reflective of action taken by the Board must be prepared. Section 106 of the Open Meetings Law pertains to minutes and states that:

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

> include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

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

With regard to the members' votes, I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency", which is defined to include a state or municipal board [see §86(3)], such as a school board, a record must be prepared that indicates the manner in which each member who voted case his or her vote. Ordinarily, records of votes will appear in minutes.

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

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

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

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

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

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

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

In contrast, if a series of "straw votes" were taken before any candidate received a sufficient number of votes to be selected, those prior votes, none of which were final or binding, would not have to have been recorded.

In an effort to enhance compliance with and understanding of applicable law, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2564

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

February 6, 1996

Mr. Lou Harmin
Treasurer
Village of Monticello
2 Pleasant Street
Monticello, NY 12701

<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. Harmin:

I have received your letter of January 16 and the materials attached to it.

The materials consist of minutes of several meetings of the Board of Trustees of the Village of Monticello, and they indicate that the Board conducted executive sessions, and I believe properly so, to review the resumes of persons who applied for the position of village manager, as well as other matters. Following one of those executive sessions, but without any public discussion of the matter, the Board adopted a resolution "authorizing the payment of 59 days accrued vacation time to George Panchyshyn, Director of Public Works." You have asked whether that action was taken "in violation of the open meetings law." During our telephone conversation concerning the matter, you expressed the view that a discussion of the authorization of payment of accrued vacation time likely occurred during an executive session.

In this regard, I offer the following comments.

First, the absence of lengthy or detailed discussion of an issue does not, in my opinion, necessarily lead to a conclusion that a private or secret discussion occurred. Often, in an effort to be prepared, written materials may be distributed to members of public bodies prior to meetings. Study of or familiarity with those materials may result in brief discussions or quick action. In short, if the Board did not discuss the matter in private, there would have been no violation of the Open Meetings Law.

Second, however, if the matter was discussed in executive session, I believe that the Board would have failed to comply with the statute. As you may be aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Having reviewed the minutes, it does not appear that the issue in question was referenced in any motion to enter into executive session. If that is so, and if the issue was indeed considered during an executive session, the procedural requirements imposed by §105(1) would not have been met.

Further, it does not appear that any of the grounds for entry into executive session would have applied. The only provision of possible relevance, §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."

From my perspective, it is unlikely that the issue in question fell within the scope of the provision quoted above. Typically, payment for unused vacation time involves a contractual matter or perhaps consideration of an agency's policy that would apply to all employees subject to a contractual agreement or who fall within a particular class, rather than an individual's employment history, for example. If my assumptions are accurate, there would have been no basis for considering the matter in executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2565

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

February 6, 1996

Mr. Daniel R. Sanders
[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 Mr. Sanders:

I have received your letter of January 19. You described a situation in which the Sterling Town Board entered into executive session to discuss the selection of a person to fill the unexpired term of the town clerk, even though you read aloud a passage from a decision in which it was held that such a subject must be discussed in public.

You have asked that this office investigate the incident, and you asked what steps can be taken in relation to the matter.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law. The Committee, whose staff consists of three employees, has neither the resources nor the authority to investigate or compel a public body to comply with law. It is my hope that advisory opinions rendered by the Committee educate, persuade and enhance compliance with the Open Meetings Law, and that judicial decisions provide precedent and guidance. However, if efforts to influence of that nature fail, the remedy involves the initiation of litigation by a member of the public or a group of persons under §107(1) of the Open Meetings Law. That provision 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."

In addition, §107(2) authorizes a court to award reasonable attorney fees to the successful party.

With respect to the substance of the matter, 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 to the extent that an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

In my view, the only provision that might have justified the holding of an executive session is §105(1)(f) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss:

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

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. As you indicated to the Town Board, in determining 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), modified on other grounds, 207 AD 2d 55 (1994)].

Based on the foregoing, notwithstanding its language, the court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above. Whether other courts would uniformly concur with the finding enunciated in that passage is conjectural. Nevertheless, since it is the only decision that has dealt squarely with the issue at hand, I believe that it is appropriate to consider Gordon as an influential precedent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Nadia Niniowsky, Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2566

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

February 9, 1996

Ms. Margot Lucy Thomas
Attorney at Law
197 School House Road
Albany, NY 12203

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. Thomas:

As you are aware, I have received your letter of January 11 in which you requested an advisory opinion concerning the Open Meetings Law. Please accept my apologies for the delay in response.

According to your letter, you represent an applicant for approval of a planned district development project known as "Forest Grove" in the Town of Wilton, and on October 18, the Town Planning Board determined that your client's draft environmental impact statement previously submitted to the Town as the lead agency was complete for purposes of conducting a public review pursuant to the State Environmental Quality Review Act (SEQR). You wrote that at that meeting, the "Planning Board took a straw vote and arrived at a consensus that it desired to render a certain decision on the project, without continuing to process [your] client's application under SEQR." At that time, you "opined to the Board, in words or substance, that should the Board proceed to take the action it was considering, it would violate the provisions of SEQR and resultant litigation may ensue." You added that the minutes of that meeting indicate that you said: "We could be in court."

The minutes of an ensuing meeting held on November 15 state that the Planning Board conducted an executive session concerning the Forest Grove Project for the purpose of considering "proposed or pending litigation, particularly litigation proposed by the attorney for the Forest Grove PUD project against the Town of Wilton."

You have questioned the propriety of the executive session and the sufficiency of the motion for entry into executive session. In this regard, I offer the following comments.

First, as you may be aware, the Open Meetings Law is based on a presumption of openness. Stated differently, the Law requires that meetings of public bodies be conducted in public, except to the extent that a closed or executive session may properly be held. Paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may be considered in an executive session, and it is clear in my view that those provisions are generally intended to enable public bodies to exclude the public from their meetings only to the extent that public discussion would result in some sort of harm, perhaps to an individual in terms of the protection of his or her privacy, or to a government in terms of its ability to perform its duties in the best interests of the public.

Second, the provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the description of the general intent of the grounds for entry into executive session suggested in my remarks in the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. For instance, in a decision dealing with a situation that appears to have been analogous to that which you presented, it was determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply 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. Again, §105(1)(d) would not permit a public body to

conduct an executive session due to a possibility or fear of litigation. As the court in Weatherwax suggested, if the possibility or fear of litigation served as a valid basis for entry into executive session, there could be little that remains to be discussed in public, and the intent of the Open Meetings Law would be thwarted.

In the instant situation, in my view, only to the extent that the Board discussed its litigation strategy would the executive session have properly been held.

Lastly, on the basis of the motion for entry into executive session, one cannot discern whether or the extent to which the Board discussed or intended to discuss litigation strategy. In this regard, with respect 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].

Further, in a recent decision rendered by the Appellate Division, Third Department, one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue", and 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 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 NY2d 807)" [Gordon v. Village of Monticello, 207 AD 2d 55, 58 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2567

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

February 12, 1996

Mr. Robert Olin
[redacted]

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. Olin:

I have received your letter of January 20 addressed to Mr. Walter W. Grunfeld, a member of the Committee on Open Government. As indicated above, the staff of the Committee is authorized to respond on behalf of its members.

You have raised questions concerning the legality of an election conducted by the Woodhull Fire District Board of Commissioners, and you questioned whether a special meeting was validly held. Although notice was posted prior to the meeting, you indicated that notice was not given to the news media.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Open Meetings and Freedom of Information Laws. This office cannot offer opinions concerning the legality of elections. In conjunction with the information that you provided, I note, however, that §175 of the Town Law pertains to the election of fire district officers. Subdivision (1) of that statute states in part that:

> "The board of fire commissioners shall give notice thereof by the publication of a notice once in one or more newspapers having a general circulation in the district. The first publication of such notice shall be not less than thirteen days and not more than twenty days prior to the date of such election. Such notice shall specify the time when and the place where such election will be held, the officers to be elected thereat and their terms of office, and the hours during which the polls will be open for the receipt of ballots."

With regard to the special meeting, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a board of fire commissioners. 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.

Further, 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
Executive Director

RJF:jm

cc: Board of Fire Commissioners
Walter Grunfeld

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2568

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

February 14, 1996

Mr. George A. Mayes
[redacted]

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. Mayes:

I have received your letter of January 26, in which you sought further consideration in relation to an opinion rendered at your request on December 30.

In that opinion, it was suggested that a Health Advisory Committee established by the Warrensburg Town Board pursuant to an agreement with a group of doctors is not a public body required to comply with the Open Meetings Law. Several judicial decisions were cited, and there is no need, in my view, to reiterate comments offered in that opinion. Your request for reconsideration, however, is based upon the fact that several members of the Warrensburg Town Board are or have served on the Health Advisory Committee. In view of their membership, you have asked whether the Advisory Committee might constitute a public body subject to the Open Meetings Law.

In my opinion, the only circumstance in which the Advisory Committee could be found to be a public body would involve a situation in which a majority of the members of the Town Board serves on the Committee, i.e., at least three out of five. Because the Advisory Committee is designated to advise the Town Board, if a majority of the Town Board serves on the Advisory Committee, the Town Board would essentially be providing advice to itself. Further, a majority of the Board serving on the Committee would have the ability as members of the Town Board to take action. If that is so, I do not believe that the Committee could validly be characterized as "advisory".

This is not to suggest that when the members of a public body serve in some other capacity they would always be required to comply with the Open Meetings Law. If a local bank established a citizens committee to provide the bank with assistance in raising

charity, and if that committee included a majority of members of the Town Board, the Open Meetings Law would not apply. In that situation, the members would have been designated to provide advice to the bank. In this situation, the Health Advisory Committee has been designated to provide advice to the Town Board. That being so, if a majority of the Town Board serves on the Health Advisory Committee, arguably, and I believe, logically, the Health Advisory Committee would be subject to the Open Meetings Law. If, however, fewer than three members of the Town Board serve on the Advisory Committee, that Committee in my opinion would continue to remain beyond the coverage of the Open Meetings Law.

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 2569

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

February 21, 1996

Mr. Michael J. O'Connor
Little & O'Connor
Attorneys At Law
Nineteen West Notre Street - PO Box 898
Glens Falls, NY 12801-0898

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. O'Connor:

I have received your letter of February 6 in which you sought my views concerning the propriety of action taken by the Glens Falls Industrial Development Agency ("the Agency").

According to your letter, when you recently appeared before the Agency, a question arose regarding the means by which it had adopted a new administrative fee schedule. You were informed that the Agency, "by written unanimous consent on January 18, 1996, adopted this new fee schedule...." It is your view that if an entity is able to "do anything of such substance by unanimous written consent, it would appear to completely frustrate the open meetings law."

From my perspective, the Agency cannot validly take action outside of a "meeting" held in accordance with the Open Meetings Law, during which a quorum is present and by means of an affirmative vote of a majority of its total membership. In this regard, I offer the following comments.

First, I agree with your contention that the governing body of the Agency is a public body required to comply with the Open Meetings Law. Section 102(2) of that statute defines the phrase "public body" to mean:

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

> the general construction law, or committee or subcommittee or other similar body of such public body."

As you suggested, pursuant to §856 of the General Municipal Law, an industrial development agency is a public benefit corporation, which, in turn, is a "public corporation" as that term is defined in §66 of the General Construction Law. Further, §923-b makes specific reference to the Glens Falls Industrial Development Agency as "a body corporate and politic."

Second, especially relevant in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. Specifically, the cited provision states that:

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

Based upon the language quoted above, a public body, such as the governing body of the Agency, 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.

Third, §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 public body would constitute a quorum, and that an affirmative majority of votes would be needed for a public body to take action or to carry out its duties.

Further, as you inferred, 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, 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)].

If action could validly be taken by "written consent", outside the context of a meeting held in accordance with the Open Meetings Law, the intent of that statute could be circumvented.

In sum, I believe that the Agency may take action only at a meeting during which a quorum is physically present. Consequently, if the action to which you referred is challenged, it is my view that a court would determine that no action validly was taken and that the purported action is, in essence, a nullity.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Glens Falls Industrial Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2570

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

February 22, 1996

Mr. Dennis J. Stachera
[redacted]

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. Stachera:

I have received your letter of January 27 in which you raised questions concerning the application of the Open Meetings Law.

According to your letter, near the end of your term as Alderman in the City of Lockport, which expired on December 31, you sponsored a resolution to eliminate a position that had not been filled for approximately a year and which was changed to a different position at the request of the Superintendent of the Highway and Parks Department. The committee that you chaired passed the resolution, and the 1996 budget, which had already been adopted, was amended in order to allocate additional funds for a higher paying position. At a meeting held on January 24, it was suggested that the resolution was causing problems, and a motion for entry into executive session to discuss the matter was made and carried.

Although you stood in the hallway during the executive session, you indicated that you could "clearly hear" the discussion. Consequently, you spoke to the Corporation Counsel and expressed the view that the matters under discussion could not validly be considered in an executive session. In response, you wrote that he said that "he heard statements that were definitely of executive session nature". Notwithstanding the foregoing, you stated that "you can't hold an executive session just in case they pop up with sensitive or personal items that should be discussed in private", that "a blanket executive session because they were uncomfortable with the individual or group present was not the intent of executive sessions", and that an executive session could not be held to discuss "funding and transfer of funds" or the "possibility of layoffs as an alternative if funds couldn't be found."

'may' say something personal or of a sensitive nature", and whether "personnel meetings automatically [are] closed from the public".

From my perspective, based on the language of the Open Meetings Law, a public body cannot conduct an executive session merely because an issue may be sensitive; on the contrary, the ability to conduct an executive session is limited. 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..."

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.

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 due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In neither case in such circumstances would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemumg County, October 20, 1981). Moreover, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering of the Open Meetings Law, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among

> the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of [section] 100, for which the Legislature has authorized closed 'executive sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f. of [section] 100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. The City of Middletown, Supreme Court, Orange County, December 6, 1978).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to budgetary matters, such as the funding or reduction of positions, could appropriately be discussed during an executive session. In my view, only to the extent that an issue focuses on a "particular person" in conjunction with one or more of the topics appearing in §105(1)(f) could an executive session properly have been held in the context of the issues that you raised.

Lastly, 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 forwarded to the City Council.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2571

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

February 23, 1996

Mr. Roger W. Mosher
Route 8
Johnsburg, NY 12843

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. Mosher:

I have received your letter of February 2 and the materials attached to it. In your capacity as a member of the Johnsburg Central School District Board of Education, you expressed concern with respect to the propriety of an executive session held to discuss your letter that was published in a local newspaper.

The letter pertains to various actions and considerations relating to the search for a new superintendent, and you wrote the chairman of the Search Committee "failed to contact 'all board members' to inform them about the decisions regarding the search for a new superintendent against the instructions of the Board President." Additionally, in the letter, you criticized the proposed salary of a new superintendent and the absence of a requirement that he or she live in the District. Although you asked the Board to discuss your letter and criticisms in public, the Board, in the words of a Glens Falls Post-Star editorial, had "chosen instead to whisper about it behind closed doors."

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..."

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. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

Second, in this instance, if the Board conducted an executive session to discuss your letter or the issues to which reference was made earlier, i.e., the salary of a superintendent or a residency requirement, I do not believe that there would have been any justifiable basis for so doing.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, 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 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 at least one of the topics listed in §105(1)(f) is considered.

When a discussion concerns matters of policy, such as the imposition of a residency requirement, I do not believe that §105(1)(f) could be asserted, even though the discussion might be characterized as a personnel matter. The issues that you raised, as I understand them, would not focus on a "particular person", and to reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemumg County, October 20, 1981).

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to the persons identified in your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Prall
Seth Agulnick
Gerald Carozza

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2572

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February 26, 1996

Mr. Steven M. Berman
Labor Relations Specialist
NYS United Teachers
Mid-Hudson Regional Office
201 Stockade Drive
Kingston, NY 12401-3867

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 Berman:

I have received your letter of February 5 in which you requested an advisory opinion concerning an issue relating to the Wappingers Central School District.

Based on the news article attached to your letter, you wrote that:

> "It is undisputed that seven members of the Wappingers Central School District Board of Education met on Wednesday, January 24, 1996 without public notification and privately to discuss Board of Education business."

It is your view that the Board's action is "in clear violation of the Open Meetings Law" and you have sought my opinion on the matter.

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

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

Second, the Open Meetings Law requires that notice be given to the news media, as well as by means of posting. 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" [524 NYS 2d 643, 645 (1988)].

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

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-9333
OML-AO-2573

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

February 27, 1996

Mr. Ian B. Banks
Ladendown Preservation League
[redacted]

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. Banks:

I have received your letter of February 7, as well as the correspondence attached to it. You have sought assistance in relation to your requests for records of the Village of Pomona.

In brief, in December, your organization requested a Village mailing list. The Village Clerk indicated that the Village uses its tax rolls as its mailing list and that you could purchase copies or inspect them for the purpose of preparing your own list. Nevertheless, you were told later, in your words, "that the list could be made available only from separate 8 1/2 x 11' individual tax sheets for [you] to copy, one by one, at a cost of 25 [cents] per sheet", rather than a "computer-generated list." In addition, your requests for "copies of the meeting minutes of a public hearing" held on October have not yet resulted in disclosure.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all 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 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. 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 a decision pertinent to your correspondence, 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). That decision involved a request for a school district wide mailing list in the form of computer generated mailing labels. Since the district had the ability to generate the labels, the court ordered it to do so.

With respect to the minutes, I point out that the Open Meetings Law does not necessarily apply to a hearing, and that there is a distinction between a meeting and a hearing. A meeting generally involves a situation in which a quorum of a public body convenes for the purpose of deliberating as a body and/or to take action. A public hearing, on the other hand, generally pertains to a situation in which the public is given an opportunity to express its views concerning a particular issue, such as a zoning matter, a local law or perhaps a budget proposal, for example. While the Open Meetings Law includes provisions concerning minutes of meetings, I know of no law that deals with or requires the preparation of minutes of hearings.

If there is a record of the proceedings in question, for reasons described at the outset, I believe that it would fall within the coverage of the Freedom of Information Law. If the gathering was a meeting, or perhaps a meeting and a hearing, the provisions in the Open Meetings Law concerning minutes would appear to be relevant. 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 must be prepared and made available within two weeks. 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.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Eloise Litman, Clerk
Reuben Ortenberg, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2574

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

February 27, 1996

Ms. Vicki Simons
The Independent
Box 246
Hillsdale, NY 12529

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. Simons:

As you are aware, I have received your communication of February 13, as well as related materials. You have requested an advisory opinion concerning the propriety of action taken by the Canaan Town Board.

According to a news article that you prepared, the Town Board essentially selected a new zoning code enforcement officer/building inspector outside the context of a meeting by means of a series of telephone calls. The Town Attorney wrote, however, that "[a]t most, there may have been telephone conversations between [the Supervisor] and other Board members on a one-to-one basis" and that "because no meeting occurred, there was no violation of the Open Meetings Law." Nevertheless, you informed me that there may have been more than merely a series of telephone conversations, for your notes indicate that the Supervisor said that the members were "polled by phone."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, or a meeting held by means of a telephone conference, would in my opinion be inconsistent with law.

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.

It is noted, too, 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.

Lastly, I direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

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

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by phone.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Theodore Guterman, II

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2525

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

February 27, 1996

Mrs. Vicki Affinati
[redacted]

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. Affinati:

I have received your letters of February 6 and February 9. You have raised a series of questions concerning the conduct of the Central Square School District Board of Education and its members in relation to compliance with the Open Meetings Law and other matters.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Open Meetings Law. The Committee, however, cannot offer guidance concerning conflicts of interest or the extent to which government officials treat their constituents courteously. Insofar as the questions raised pertain to the Open Meetings Law, I offer the following comments.

The initial 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.

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

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

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

Next, 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.

I would like to offer additional remarks concerning two of the grounds for entry into executive session that arise frequently.

Although it is used often, the word "personnel" appears nowhere in the Open Meetings Law. Further, although one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. By way of background, in its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion related to "personnel". For example, if a discussion involves staff reductions or layoffs which can be accomplished by according to seniority, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held.

Further, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

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

> meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

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

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

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

On the issue of notification prior to meetings, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

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

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

Since you wrote that minutes of a meeting were amended in a manner that did not reflect what actually occurred, all that I can suggest is that the Open Meetings Law presumes good faith and, as it pertains to minutes of meetings, that the minutes, above all, be accurate.

You also wrote that the Board mentions some letters that it receives during meetings but does not refer to others, particularly those from your group. I believe that a board of education has the ability under §1709 of the Education Law to adopt rules to govern its own proceedings. However, it has been held that any such rules or procedures 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 mention certain letters while ignoring others, such a rule, in my view, would be unreasonable.

Lastly, you asked whether your organization, the Citizens for Quality Education, must hold open meetings that anyone has the right to attend. In this regard, the Open Meetings Law applies to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

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

Based on the foregoing, the Open Meetings Law applies to governmental bodies, such as boards of education, and any person would have the right to attend meetings of a public body. Your group, however, is private; it is not governmental in nature. Consequently, I do not believe that it is obliged to permit the public at large to attend its meetings.

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 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-2576

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

February 28, 1996

Mr. Ronald J. Rushford
[redacted]

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. Rushford:

I have received your letter of February 8 in which you sought an advisory opinion concerning a request for records of the Oneida County Legislature.

Your request involved "copies of the minutes and any or all resolutions that were voted on in the Tuesday, January 16, 1995 Meeting of the County Public Works Committee." Although the resolutions were made available to you, as of the date of your letter to this office, you had not received the minutes. Since the receipt of your correspondence, a copy of a letter addressed to you by the Clerk of the Board of County Legislators was sent to me indicating that "the record for that meeting is the docket sheets which have already been provided to you." It was also stated there is "no other written record of this committee meeting."

From my perspective, while I am unaware of the contents of the "docket sheets", I believe that there was an obligation on the part of the Committee to prepare minutes of its meeting. When a committee consists of members of a public body, such as the Board of Legislators, the committee itself would constitute a public body required to comply with the Open Meetings Law. In this regard, I offer the following comments.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of the Board of Legislators, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Board of Legislators consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, and the same authority to conduct executive sessions, for

example, 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)]. In my view, it also has the same obligation to prepare minutes of its meetings.

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

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

Based upon the foregoing, 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. However, when a motion is made or a vote is taken, those kinds of activities, as indicated in subdivision (1) of §106, must be recorded and memorialized in the form of minutes.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Public Works Committee
Susan Crabtree, Clerk

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

February 29, 1996

Hon. Theresa A. Cooper
Town Clerk
Town of Oswego
2320 Co. Rt. 7
Oswego, NY 13126

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. Cooper:

I have received your letter of February 8 in which you requested an advisory opinion concerning the propriety of an executive session recently held by the Town Board of the Town of Oswego.

According to the minutes of the executive session that you forwarded and our discussion of the matter, the Board entered into an executive session to consider "a personnel matter", specifically, your request for a salary for a deputy town clerk. The discussion involved the Town's past practice of not paying a salary to a deputy clerk, the amount of work that a deputy would perform, and the possibility of closing the office when the town clerk is absent. The meeting ended with no allocation of a salary for a deputy clerk.

From my perspective, the issue should have been discussed in public, for the subject would not have qualified for consideration during an executive session. In this regard, I offer the following comments.

First, by way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, 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 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 at least one of the topics listed in §105(1)(f) is considered.

In the context of the situation at issue, as I understand the matter, it involved the functions of a position, irrespective of who might serve as deputy clerk, and how or the extent to which that position might be funded. Even though the subject could be considered a "personnel matter", it did not focus on any particular person and, therefore, in my opinion, should have been discussed in public.

Lastly, it has been held that a motion describing the subject to be discussed as "personnel" or "personnel matters" is inadequate, and that a 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, 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; 207 AD 2d 55 (1994)].

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 2578

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March 1, 1996

Ms. Patti Kelly
[redacted]

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

Dear Ms. Kelly:

I have received your letter of February 13 in which you complained that the Ulster County Resource Recovery Agency ("the Agency") prevented you from participating in a tour of the Agency's Ulster landfill.

By way of background, the Chairman of the Ulster County Legislature appointed a committee consisting of citizens to review documentation presented to the Legislature by the Agency. The chairman of that committee indicated that its meetings would be open to the public, with certain exceptions, none of which are relevant to the matter, and the committee has in fact conducted a series of open meetings. When it was determined that a "site tour" should be part of the committee's review, the chair of the committee said that the tour would be open to the public. Nevertheless, when the tour was about to begin, you were told by the Agency's executive director that you could not be present. You added that a reporter was permitted to attend, and that you, the only member of the public present, were the only person prohibited from joining the tour.

In this regard, I offer the following comments.

First, it is questionable in my view whether the committee would have been required to comply with the Open Meetings Law. 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 ordinarily be subject to the Open Meetings Law.

If, for example, the County Legislature determined that the committee, by means of a local law or perhaps a resolution, must comply with the Open Meetings Law, I believe that the committee would be legally obliged to do so. Absent that kind of direction, in my opinion, the committee would not constitute a public body required to comply with the Open Meetings Law. This is not to suggest that it cannot conduct open meetings; on the contrary, many advisory bodies, particularly citizens committees, hold open meetings and seek public input and participation.

Second, although the term "meeting" [see Open Meetings Law, §102(1)] has been construed expansively by the courts to encompass any gathering of a majority of a public body for the purpose of conducting public business [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], in the only decision of which I am aware dealing with a site visit, the members of a public body were in a van, and it was held that "the Open Meetings Law was not violated" [City of New Rochelle v. Public Service Commission, 450 AD 2d 441 (1989)]. In that case, members of the Public Service Commission toured the proposed route of a power line in order to acquire a greater understanding of evidence previously presented. Based upon that decision, a site visit or tour by a public body, particularly on private property, would apparently not constitute a meeting. It has been advised, however, that site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and that any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law.

It is suggested that you bring the issue to the attention of the Chairman of the County Legislature. Perhaps he and the Agency can review the matter for the purpose of avoiding the kind of problem that you encountered in the future.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Chairman, Ulster County Legislature
Louis M. Klein
Charles Shaw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO- 193
FOIL-AO- 9342
OML-AO- 2579

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March 5, 1996

Mr. Bernard J. Morosco
[redacted]

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. Morosco:

I have received your letter of February 19 and a copy of the attached appeal directed to the Board of Commissioners of the City of Utica Municipal Housing Authority.

By way of background, you requested a variety of records from the Authority pursuant to the Freedom of Information and Personal Privacy Protection Laws beginning in October of 1995, and as I understand the matter, you have not yet received a response. The records sought include minutes of Board meetings pertaining to yourself and the position of Human Resource Coordinator, advertisements or postings related to that position, records referring to you, the position and your performance since being hired, and copies of certain individuals' contracts and their salary schedules.

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

First, it is noted that the Freedom of Information Law is applicable to agency records and that §86(3) of the Law defines the term "agency" to include:

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

Section 3(2) of the Public Housing Law states that municipal housing authorities are public corporations. Since the definition of "agency" includes public corporations, I believe that a public housing authority is clearly an "agency" required to comply with the Freedom of Information Law. Moreover, it has been held judicially that a municipal housing authority is subject to the Freedom of Information Law [Westchester Rockland Newspapers, Inc. v. Fischer, 101 AD 2d 840 (1985)].

Second, however, I point out that the Personal Privacy Protection Law is applicable only to state agencies. For purposes of that statute, §92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based on the foregoing, the Personal Privacy Protection Law excludes from its coverage "any unit of local government", such as a municipal housing authority.

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

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Insofar as the records in question pertain to you, you could not engage in an unwarranted invasion of your own privacy. However, it is possible that others have commented in writing with respect to your performance, for example. If what you characterize as an "external" source (i.e., a member of the public or other person not acting as an agency employee) offered a recommendation, praise or criticism of your performance, in my view, any identifiable details pertaining to that person could be withheld as an unwarranted invasion of personal privacy.

The other ground for denial of potential significance, is §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. Based upon the foregoing, while factual information pertaining to you contained in inter-agency or intra-agency materials must be made available to you, those aspects of such materials consisting of expressions of opinion, for instance, could be withheld.

Advertisements and postings would in my opinion clearly be available for none of the grounds for denial could be asserted. Similarly, a contract between an agency and an individual, as well as one's salary, would in my view clearly be accessible, for none of the grounds for denial could justifiably be asserted to withhold those records.

With respect to minutes of meetings, I direct your attention to the Open Meetings Law. Section 106 of that statute states that:

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

> include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

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

It is also noted that the Freedom of Information Law has long required that when final action is taken by a public body, a record must be prepared indicating how each member cast his or her vote [see Freedom of Information Law, §87(3)(a)]. The record of members' votes typically appears in minutes of meetings.

Lastly, in view of the delay in response to your request, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my

opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

In an effort to encourage compliance with law, a copy of this opinion will be forward to the Board of Commissioners.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9346
OML-AO-2580

Committee Members

William Bookman, Chairman
Peter Delaney
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Elizabeth McCaughey
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Wade S. Norwood
David A. Schulz
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Alexander F. Treadwell
Patricia Woodworth
Robert Zimmerman

Executive Director

Robert J. Freeman

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March 6, 1996

Mr. George Valentine
[redacted]

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. Valentine:

I have received your letter of February 13, which reached this office on February 21. You have complained with respect to the manner in which the Brookhaven Town Board has given effect to both the Open Meetings Law and the Freedom of Information Law.

The first issue that you raised pertains to the sufficiency of a motion to enter into executive session at a recent meeting of the Town Board. Since the subjects for consideration in executive session were merely described as "personnel" and "litigation", you asked for greater specificity. However, you wrote that the Supervisor said that the Board was not obligated to reveal any additional details.

In my opinion, which is based on the judicial interpretation of the Open Meetings Law, the descriptions of the matters to be discussed in executive session were inadequate.

By way of background, 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, 207 AD 2d 55 (1994)].

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].

I note that the Daily Gazette decision was cited by the Appellate Division in Gordon.

The second issue involves what appears to be an incapacity on your part to know where records are kept or from whom they may be requested. In this regard, since you referred specifically to minutes of meetings, I note that §30 of the Town Law states in part that the town clerk is responsible for preparing minutes of town board meetings and that the clerk is the legal custodian of all town records. Further, §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 is the Town Board, and it 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.

One of the requirements pertains to the Town Board's obligation to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. In addition, §1401.9 of the Committee's regulations states that:

> "Each agency shall publicize by posting in a conspicuous location and/or by publication in a local newspaper of general circulation:
>
> (a) The locations where records shall be made available to inspection and copying.
>
> (b) The name, title, business address and business telephone number of the designated records access officer.
>
> (c) The right to appeal by any person denied access to a record and the name and business address of the person or body to whom an appeal is to be directed."

Lastly, when you requested a subject matter list of the Town's records, you were informed that no such list existed. As a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to a list maintained by an agency. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

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

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

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

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 the Town Board and the Town Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9348
OML-AO-2581

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March 8, 1996

Ms. 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 Ms. Phillips:

I have received your letter of February 20 and the materials attached to it. In your capacity as a member of the Board of Education of the Enlarged City School District of Troy, you have asked whether, in my view, you have "broken any rules, regulations, guidelines, etc. by releasing this material [certain documentation that you attached] to parents and PTA/PTO leaders." You expressed the opinion that your "position as Board member prevents and precludes [you] from releasing information received from executive sessions or information received as confidential", but that "[n]one of the enclosed memoranda fall under those categories."

In this regard, first, the Committee on Open Government is not a court and I am not a judge. Although I have reviewed the documents that you enclosed, I cannot make a judgment or determination. I believe, however, that with the exception of a few statements reflective of opinions, the memoranda would be available to any person in response to a request made under the Freedom of Information Law.

Second, I am unfamiliar with the rules that might have been adopted by the Board of Education, and I cannot conjecture as to whether you may have complied with or broken any such rules. For instance, I am unaware of the existence of any Board rule or policy that might deal with unilateral disclosures by Board members or ethical guidelines relating to disclosure by Board members. While I cannot advise that the disclosures in question were ethical or unethical, I do not believe that any statute would have prohibited you from disclosing the records.

According to your letter, some of the information contained in the records was reviewed and discussed at meetings of the PTA/PTO and the Shared Decision Making Committee. Assuming that PTA/PTO

meetings are held on school grounds, any member of the public would have the right to attend [see Education Law, §414(1)(c)]. Similarly, it has been advised that shared decision making committees established pursuant to regulations promulgated by the Commissioner of Education constitute "public bodies" required to conduct their meetings in accordance with the Open Meetings Law (see attached advisory opinion, OML-2456). Therefore, insofar as the contents of the documentation at issue were effectively disclosed at meetings open to the public, I do not believe that there would be any basis for withholding.

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, as you suggested, consist of intra-agency materials that fall within the coverage of §87(2)(g). That provision states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

From my perspective, the records in question consist in great measure of factual information, expressions of agency policy or direction given to staff. To that extent, I believe that they would be accessible under subparagraphs (i), (ii) or (iii) of §87(2)(g). As suggested earlier, minor portions might be

characterized as opinions that the District could choose to withhold.

You also referred to objections concerning the protection of personal privacy. The issue, in my view, is whether disclosure of the information sought would constituted an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. Although subjective judgments must often of necessity be made when questions concerning privacy arise, the courts have provided substantial direction regarding the privacy of public employees. 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. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

As I understand the documentation, references to names involve public employees in relation to the performance of their official duties. If that is so, it would appear that disclosure would not have resulted in an unwarranted invasion of personal privacy.

Lastly, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency

may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I am unaware of any statute that would prohibit a Board member from disclosing the kinds of information at issue. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your correspondence.

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

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of

Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9351
OML-AO-2582

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March 11, 1996

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 February 17 and the news article attached to it.

You have questioned the propriety of a procedure used by the City of Salamanca Board of Education. Specifically, the article states in relevant part that:

> "Under a new practice the school board takes one consensus vote to approve all items under Roman numeral three of the board's agenda. Specific items may be removed from the consensus vote and debated or voted on separately with a boardmember's request."

The article indicates that the new procedure was adopted "as a way to shorten lengthy board meetings."

In this regard, I know of no provision of law that pertains directly to the issue or that would prohibit the Board from continuing to implement its new procedure. However, I believe that the Board must comply with provisions within the Open Meetings and Freedom of Information Laws designed to guarantee the public's right to know of governmental decisions and ensure accountability.

For instance, §106(1) of the Open Meetings Law provides direction concerning the contents of minutes of meetings and states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals,

> resolutions and any other matter formally voted upon and the vote thereon."

Based on the foregoing, if, for instance, a consensus motion includes the appointment of a number of people, I believe that the minutes would be required to identify each person appointed and the position to which he or she was appointed. In a decision that may be pertinent to the matter, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely 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 the precise nature of the Board's action.

In addition, §87(3)(a) of the Freedom of Information Law states that: "Each agency", which includes a board of education, "shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, when the Board takes action, a record must be prepared that indicates the manner in which each member cast his or her vote. Typically, that record is included as part of the minutes.

I hope that I have been of 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-2583

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March 11, 1996

Mr. James J. Lombardi
[redacted]

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. Lombardi:

I have received your letter of February 19 in which you questioned a variety of practices of the Lewiston Town Board in relation to the Open Meetings Law. In conjunction with your comments, I offer the following remarks.

It is noted at the outset that the Open Meetings Law is applicable to meetings of public bodies, and that §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."

Judicial decisions indicate generally that advisory entities, other than committees consisting solely of members of public bodies, having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, it appears that the Task Force would not have been

subject to the Open Meetings Law. Therefore, although the Town Board is clearly a "public body" required to comply with the Open Meetings Law, a citizens advisory body designated by the Board or the Supervisor would not, according to the decisions cited above, fall within the requirements of that statute. Similarly, the "round table meetings" between the Supervisor and Town employees would not be subject to the Open Meetings Law, because no quorum of a public body would be present.

Since you referred to "work sessions", I point out that there is no legal distinction between a work session and a meeting of a public body. 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)].

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.

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.

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.

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; 207 AD 2d 55 (1994)].

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].

I note that the Daily Gazette decision was cited by the Appellate Division in Gordon.

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

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

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

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

Based on the foregoing, when a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. It is noted, however, that if a public body merely discusses an issue or issues during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

Lastly, with respect to attendance at an executive session, §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." Therefore, although the Town Board could choose to enable the town clerk or others to attend an executive session, only the members of the Town Board have the right to attend an executive session. However, §30(1) of the Town Law specifies that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..." In my opinion, §30 of the Town Law is intended to require the presence of the clerk to take minutes in situations in which motions and resolutions are made and in which votes are taken.

To give effect to both the Open Meetings Law and §30 of the Town Law, which imposes certain responsibilities upon a town clerk, it is suggested that there may be three options. First, the Town Board could permit the clerk to attend an executive session in its entirety. Second, the Town Board could deliberate during an executive session without the clerk's presence. However, prior to any vote, the clerk could be called into the executive session for the purpose of taking minutes in conjunction with the duties imposed by the Town Law. And third, the Town Board could

deliberate toward a decision during an executive session, but return to an open meeting for the purpose of taking action.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2584

162 Washington Avenue, Albany, New York 12231
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March 12, 1996

Ms. Susan Bloom
[redacted]

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. Bloom:

I have received your letter of February 20 in which you requested a 'determination" relating to issues involving the implementation of the Open Meetings Law by the Town of Goshen.

According to your letter, in November, the "regular meeting of the Goshen Town Board ended with the Supervisor and Town Board members stating 'The public could go home and the meeting was adjourned to go into executive session' they stated the topic was personnel matters." Following that statement, "the public went home and the board came back out and appointed a police officer to the title of Chief of Police and appropriated funds for a raise." You have asked whether the procedure as you described was "legal."

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law; the Committee cannot render a "determination" that is binding. Consequently, the ensuing comments should be considered advisory.

First, it appears that you may be raising the issue due to your belief that the public assumed, based on the Board's statement, that an executive session would be held for purposes of discussion only, and that no action or vote would be taken. If that is so, it is possible that the statement might have been misleading.

I note that §102(2) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate from an open meeting; rather, it is a portion or continuation of an open meeting.

Section 105(1) of the Open Meetings Law prescribes a procedure that must be accomplished, during an open meeting, before a public body may conduct an executive session. That provision states in relevant part that:

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

The following provisions specify and limit the subjects that may properly be considered during an executive session. Based on the language quoted above, a public body may vote or take action during an executive session properly held, unless the vote is to appropriate public monies, in which case, it must return to an open meeting for the purpose of voting.

In the context of your remarks, I believe that the Board could validly taken action during an executive session to appoint a police officer to the position of chief of police. If, however, the Board voted to appropriate public money, such action would have been required to been taken in public. On the other hand, if the action involved an allocation or expenditure of funds that had previously been appropriated, such action, in my view, could have been taken during the executive session to which you referred.

It is unclear whether there was an appropriation (as opposed to an allocation of funds that were budgeted) or whether there was an intent to appropriate. It does not appear, however, that the procedure was, in general, inconsistent with the requirements of the Open Meetings Law.

I point out for future reference that 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, since the discussion involved a particular person in relation to one or more of the subjects described in §105(1)(f), I believe that the executive session was justifiably held.

It has been advised that a motion describing the subject to be discussed as "personnel" or "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; 207 AD 2d 55 (1994)].

The other situation that you described pertains to gatherings attended by two members of the Town Board, the Town engineer, a developer, and the developer's attorney and engineers. Because the subject of the gatherings is, in your view, critical, you contend that they should be open to the public.

In this regard, the Open Meetings Law pertains to meetings of public bodies, and a "meeting" is a convening of a quorum of a public body for the purpose of conducting public business. If the Board consists of five or perhaps seven members, no quorum of a public body (i.e., the Town Board) would have been present. Consequently, the gatherings in my opinion would not have constituted "meetings" and the Open Meetings Law would not have applied.

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: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2585

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

March 15, 1996

Mr. Terry W. Kuehn
[redacted]

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. Kuehn:

I have received your recent correspondence, which reached this office on March 3. You have sought my views concerning two incidents that you believe "may be violations of the Open Meetings Law."

The first pertains to a meeting held by the Wheatfield Town Board on February 12. You wrote that, prior to the meeting, the Supervisor indicated that the meeting of that evening would serve as "an opportunity for town residents to express their views on the continuation of the sewering of [y]our town." However, when you attempted to share your knowledge with those in attendance, the Supervisor "established rules that did not allow input from anyone other than taxpayers who had not yet received sewers."

In this regard, although the Open Meetings Law is only indirectly related to the matter, I offer the following comments.

First, while the Open Meetings Law clearly provides any member of the public with the right to attend meetings of public bodies (i.e., town boards), that statute is silent with respect to the ability of the public to speak or otherwise participate. Therefore, if a public body does not want to permit the public to speak, it is not obliged to confer such a privilege. However, public bodies may choose to permit public participation and many do so.

Second, when a public body chooses to authorize public participation, it has been advised that it should do so in accordance with reasonable rules that treat members of the public equally. From my perspective, a rule that allows certain members of the public to speak while prohibiting others from speaking at all would be unreasonable and subject to invalidation.

And third, I do not believe that the Supervisor, acting unilaterally, had the authority to establish or change a rule. Here I direct your attention to §63 of the Town Law. While that statute provides that the supervisor "shall preside at meetings of the town board", it also states that "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of the members of the town board", and that "The board may determine the rules of its procedure." Therefore, based on §63, I believe that the Town Board as a body, not the Supervisor acting alone, would be empowered to establish rules regarding public participation.

The second incident pertains to a "special or unscheduled meeting." While the meeting in question "was advertised more than seventy-two hours prior to the actual meeting in one local publication, you "question its legality given the fact that the Town has clearly established three separate local news publications as their official publication."

The focal point of the matter involves the extent to which the Town Board 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.

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 Town 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 Town, 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 Town or to a radio station situated in or near the Town, 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. If a newspaper has a significant circulation in a municipality, it would appear to be reasonable to provide 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.

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-9378
OML-AO-3586

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 25, 1996

Mr. William S. Hecht
[redacted]

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. Hecht:

I have received your letter of March 4 in which you raised questions relating to both the Freedom of Information and Open Meetings Laws.

First, you asked whether you have the right to gain access to a "draft document", such as a proposed town plan. You compared the situation to that of minutes of meetings, which although unapproved and prepared in draft, must nonetheless be disclosed within two weeks of a meeting. In this regard, I do not believe that the situations are comparable. It was advised that unapproved draft minutes must be disclosed because §106 of the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available within two weeks of the meetings to which they pertain. There is no analogous requirement that relates generally to drafts. Nevertheless, whether a document is characterized as a draft or internal, for example, I believe that it would fall within the coverage of the Freedom of Information Law. That statute pertains to all 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."

Based on the foregoing, when information exists in some physical form, irrespective of its status or characterization as draft or

final, I believe that it constitutes a "record" subject to rights of access conferred by 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.

Relevant with respect to drafts is §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. A draft would usually consist of intra-agency material that could be withheld except to the extent that it contains any of the four categories of available information delineated in subparagraphs (i) through (iv) of §87(2)(g). Therefore, insofar as a draft consists of statistical or factual information, for example, it would be available.

Notwithstanding the preceding remarks, insofar as a draft has been distributed to the public or perhaps disclosed at meetings open to the public, I do not believe that there would be a basis for a denial of access. 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)], if disclosure is intentional rather than inadvertent, I believe that the public would enjoy rights of access.

Second, you asked whether "meetings [can] be held without any notice in the paper." Here I direct your attention to §104 of the Open Meetings Law, which states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice 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. I point out that although a public body must give notice to the news media prior to every meeting, there is no requirement that the news media publish or publicize the notice. Therefore, there may be situations in which a public body provides notice to a newspaper, for example, but the newspaper, for whatever the reason, does not publish it.

Third, you asked whether the Town may require you to abide by certain conditions prior to disclosure of records, such as a requirement that you "add a disclaimer at the top of each page" that you receive indicating that the record is "draft or unapproved." In this regard, it has been held that when records are accessible under the Freedom of Information Law, they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government

> decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Therefore, once it is determined that a record is accessible under the law, I believe that it must be made available unconditionally, irrespective of its intended use. Records are disclosed on an ongoing basis to the public and the news media, despite the possibility of misunderstanding, misinterpretation, misquotation or use out of context. In short, I do not believe that you can be required to add a disclaimer, for example, to a record that you receive in response to request made under the Freedom of Information Law.

Lastly, you referred to the possibility of delays in disclosure and expressed the opinion that "digital data should be released on day one of the day environmental review process." While it does not require immediate disclosure, 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 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 2587

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 28, 1996

Mr. Gary D. Hughes
[redacted]

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. Hughes:

I have received your letter of March 13 in which you sought assistance concerning the implementation of the Open Meetings Law by the Decatur Town Board.

You have contended that the Board of late "has begun a pattern of clandestine and illegal meetings", and that it held a meeting characterized as a "phone meeting." You suggested that in other instances, the Board has held meetings without notice to the town clerk or the public.

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 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.).

More recently, it was held 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 the Board 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 Open Meetings Law.

For purposes of clarity, it is noted that §62(2) of the Town Law pertains to "special meetings." That provision, from my perspective, deals with unscheduled meetings, rather than meetings that are scheduled in advance. Specifically, §62(2) 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.

Section 104 of the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting and states that:

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

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

Lastly, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone. However, a series of telephone calls among the members which results in a decision, or a meeting held by means of a telephone conference, would in my opinion be inconsistent with law.

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

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

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only during duly convened meetings that are preceded by reasonable notice given to all members.

Moreover, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". In my opinion, the term "convening" means a physical coming together. Further, based upon an ordinary dictionary definition of "convene", that term means:

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

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

In short, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they may validly conduct meetings by means of telephone conferences, vote or make collective determinations by means of telephonic communications.

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 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-9393
OML-AO-2588

162 Washington Avenue, Albany, New York 12231
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March 28, 1996

Mr. James P. McCarthy
Superintendent of Schools
South Glens Falls Central School
[redacted]

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

Dear Mr. McCarthy:

I have received your letters of March 15 and March 21, which deal, respectively, with issues arising under the Open Meetings Law and the Freedom of Information Law.

In the former, you asked whether subcommittees appointed by the Board of Education are subject to the Open Meetings Law.

First, 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, even if a member of the Board of Education or the administration participates.

Second, however, when a committee consists solely of members of a public body, such as a board of education, I believe that the Open Meetings Law is applicable.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members 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)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Board of

Education consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

The second letter involves whether an improper practice charge filed by the local teachers' association, as well as the answer to the charge, are available under the Freedom of Information Law. You indicated that the charge and answer have been filed with PERB.

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, the only ground for denial of possible significance would be §87(2)(b). That provision enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

If, for example, a grievance relates to an issue involving a public employee in the nature of a health or medical problem, I believe that identifying details pertaining to the employees could justifiably be withheld. On the other hand, if the charge does not focus on a particular employee but rather deals with a practice or policy of the District, for example, privacy would not be an issue, and the records in question would likely in my view be available in their entirety.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2589

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 29, 1996

Hon. Richard L. Taczkowski
Councilman
Town of North Collins
P.O. Box 306
North Collins, NY 14111

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. Tączkowski:

I have received your letter of March 18. You wrote that in your former role as a village trustee and your current capacity as a member of the North Collins Town Board, you have found that "questions regarding the degree of information an enforcement (i.e. code, dog, police, bingo) officer can provide a public body about civil or criminal enforcement activities has always been a source of governmental tension." Consequently, you asked that I address "what types of information regarding such enforcement/investigative activities must/may be presented in an open meeting and what information reportage more properly falls under the exceptions provided in the Open Meetings Law."

In this regard, I offer the following comments.

First, the extent to which the kinds enforcement activities are considered by municipal bodies at meetings varies from one entity of government to the next. Some may be heavily involved in the functions of a police department or dog control officer, for example; others may not. Similarly, in large municipalities with large staffs, it is unlikely that the governing bodies of those municipalities discuss in detail specific enforcement or investigative efforts; in smaller municipalities, there may be more direct control or interest by the governing body. In short, the areas of concern that you described may be discussed frequently or at length by some public bodies, but minimally by others. Further, the Open Meetings Law does not address what should or must be discussed by a public body. Rather, it imposes a requirement that discussions of public business be conducted in public, unless in appropriate circumstances it chooses to enter into executive session.

Second, the Open Meetings Law is permissive. Stated differently, even though a public body may have the authority to enter into an executive session, it is not required to conduct an executive session. Moreover, as you are aware, a procedure must 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 upon the language quoted above, an executive session may be held only after a motion is made and carried by a majority of the total membership. Additionally, paragraphs (a) through (h) specify and limit the subjects that may properly be considered during an executive session. Therefore, a public body cannot conduct an executive session to discuss the subject of its choice.

With respect to the ability of a pubic body to enter into executive sessions to discuss the kinds of issues that you described, several of the grounds for entry into executive session may be pertinent. However, with respect to most of them, their proper assertion would, in my opinion, be rare.

Of some significance are the first three grounds for entry into executive session. They deal with:

> "a. matters which will imperil the public safety if disclosed;
>
> b. any matter which may disclose the identity of a law enforcement agent or informer;
>
> c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed..."

Paragraphs (a) and (b) would likely arise rarely if ever.

Paragraph (c) could be discussed only in relation to "criminal" matters and only then when public discussion would "imperil effective law enforcement."

Potentially relevant is paragraph (d), which permits a public body to enter into executive session to discuss "proposed, pending or current litigation." Again, I would conjecture that litigation would infrequently be discussed in relation to the matters that you described. It is noted, too, that 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.

The remaining ground for entry into executive session of significance would in my view be paragraph (f), which authorizes a public body to enter into executive session to discuss:

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

Although the language quoted above may be somewhat limited, it is possible that situations might arise in conjunction with the activities to which you referred that would authorize the assertion of §105(1)(f) as a basis for conducting an executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 9405
OML-AO-2590

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

April 3, 1996

Ms. Donna K. Hintz
Assistant Corporation Counsel
City of Kingston
City Hall
One Garraghan Drive
Kingston, NY 12401

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

Dear Ms. Hintz:

As you are aware, I have received your letter of March 19. You have asked whether in my view the Kingston Local Development Corporation ("KLDC") is subject to the Freedom of Information and Open Meetings Laws. You indicated that the entity in question was formed pursuant to Article XIV of the Not-for-Profit Corporation Law, that the Mayor of the City of Kingston serves as its president, and that the Mayor is authorized to appoint the members of its board.

In my view, the issue is whether the KLDC is an "agency" for purposes of the Freedom of Information Law or a "public body" for purposes of the Open Meetings Law.

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

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [§86(3)].

In this regard, as you suggested, specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development

corporations. The cited provision describes the purpose of those corporations and states in part that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

Therefore, due to its status as a not-for-profit corporation, it is not clear in every instance that a local development corporation is a governmental entity; however, it is clear that such a corporation performs a governmental function.

Relevant to your inquiry is a recent decision rendered by the Court of Appeals in which it was held that a particular not-for-profit local development corporation is an "agency" required to comply with the Freedom of Information Law [Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)]. In so holding, the Court found that:

> "The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy

> dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Based on the foregoing, if the relationship between the KLDC and the City of Kingston is similar to that of the BEDC and the City of Buffalo, the KLDC would constitute an "agency" required to comply with the Freedom of Information Law.

Because the Mayor serves as the president of the KLDC and has the authority to choose the members of its board, it is clear that the City of Kingston exercises substantial control over the KLDC. If that is so, I believe that the KLDC constitutes an "agency" required to comply with 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.

If the KLDC is an agency that falls within the scope of the Freedom of Information Law, I believe that its board would constitute a "public body" for purposes of the Open Meetings Law. Section 102(2) defines that phrase to mean:

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

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of KLDC is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. Further, based upon the language of §1411(a) of the Not-for-Profit Corporation Law, which was quoted in part earlier, and the degree of governmental control exercised by the City of Kingston, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the City of Kingston.

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 an executive session may be conducted in accordance with the provisions of paragraphs (a) through (h) of §105(1) of that statute.

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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2591

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

April 4, 1996

Mr. Anthony Veraldi
[redacted]

Dear Mr. Veraldi:

I have received your letter of March 20. Having complained with respect to certain actions of the Mount Sinai School District, you asked that I "refer [you] to someone in Commissioner Mills office [who] can and will make the Mt. Sinai School District follow the laws of this land."

In this regard, the Committee on Open Government is permitted by law to provide advice concerning the Freedom of Information and Open Meetings Laws. The Committee is a unit of the Department of State, not the State Education Department, and it is not authorized to compel any person or agency to comply with law. If you believe that an agency has failed to comply with law, you may seek judicial review of its actions.

Since you referred to a refusal to permit you speak at a meeting of the Board of Education, I note that the Open Meetings Law is silent with respect to public participation. While that statute confers a right upon any member of the public to attend meetings of public bodies, neither the Open Meetings Law nor any other statute of which I am aware provides a right to members of the public to speak or otherwise participate at such meetings.

In short, I do not believe that Board of Education would have been required by law to permit you speak at its meeting.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9410
OMG AO 2592

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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April 4, 1996

Mr. Michael Piccolo
[redacted]

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. Piccolo:

I have received your letter of March 22 and the correspondence attached to it. Your inquiry concerns your right to obtain a copy of tape recording of a meeting of the Richmondville Town Board. In addition, you questioned your ability as "a private citizen" to use a tape recorder at Town Board meetings and added that the Town Supervisor has refused permission to do so to all but the Town Clerk.

In this regard, the issue involving the right to obtain a copy of the tape recording was recently considered. It is my understanding that the Town Clerk has asserted that she does not have the equipment needed to copy the tapes and that she cannot relinquish custody of the tapes, because they are the property of the Town. However, she offered to enable you to either listen to them and/or tape them by setting your recorder next to hers.

From my perspective, if indeed the Town does not maintain the equipment necessary to prepare duplicates of the tapes, the Clerk's response served as a reasonable offer to accommodate you. If you have a tape recorder that can be used to listen to the Clerk's tapes, it is likely that you have the ability to do as the Clerk suggested, i.e., duplicate the Town's tapes by placing your recorder next to hers. If your recorder cannot duplicate the tapes in that manner, perhaps you could borrow a tape recorder that would meet your needs. Alternatively, as she also suggested, you could listen to the tape at the Clerk's office.

With regard to the use of tape recorders, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Marion E. Bernocco, Supervisor
Margaret A. Wohlfarth, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2593

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

April 4, 1996

Hon. Marilynn R. Allgeier
Town Clerk
Town of Wilson
P.O. Box 737
Wilson, NY 14172-0537

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. Allgeier:

I have received your letter of March 19 in which you sought guidance concerning "the correct procedure on the decision process of the Board of Assessment Review."

You wrote that following the grievance hearings, the Board conducts an executive session to discuss the grievances and make decisions. You have asked whither the decisions should be made at an open meeting. In addition, you indicated that the Board does not prepare minutes reflecting its decisions or the reasons for reaching decisions.

In this regard, I offer the following comments.

First, I believe that a board of assessment review clearly constitutes a "public body" as defined by §102(2) of the Open Meetings Law and is required to comply with that statute.

Second, while meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public hearings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members

> collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409, 418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

Third, the Open Meetings Law requires that minutes be prepared to reflect action taken. Section 106(1) of that statute states that:

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

While I do not believe that it would have to include detailed reasons for its actions, in my opinion, the Board must prepare minutes indicating the nature of any action taken and the votes of its members.

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

FOML-AO-2594

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

April 5, 1996

Mr. Bob Baxter
[redacted]

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. Baxter:

I have received your letter of March 29 in which you requested an advisory opinion concerning a meeting described in a copy of an article appearing in the Buffalo News.

According to the article, three members of the Lewiston Town Board met with a regional director of the Office of Parks, Recreation and Historic Preservation to discuss its efforts to lease a state park. The article indicates that a reporter was refused permission to attend and that the representative of the Office of Parks, Recreation and Historic Preservation asked that the meeting be held in private.

In this regard, I offer the following comments.

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

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Edward J. Rutkowski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2595

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

April 8, 1996

Ms. Elizabeth A. Bonora
Editor
Shelter Island Reporter, Inc.
P.O. Drawer 3020
Shelter Island Heights, NY 11965

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. Bonora:

I have received your letter of April 1, as well as the news articles and judicial decision attached to it. You have sought an advisory opinion concerning "possible violations of the Open Meetings Law.

The initial issue pertains to references made during an open meeting to a closed meeting held prior to a hearing by the Village of Dering Harbor Zoning Board of Appeals. Those who attended the closed meeting indicated that the Board "had spoken with counsel" concerning an application for a variance, and when you made inquiry regarding the gathering, you were informed that it was an "executive session." Following our discussion of the matter and "because it appears that several topics discussed during that meeting were beyond that which would require confidential advice from counsel", it is your view that "the meeting was held in violation of the Open Meetings Law, since it did not fall under the criteria for an executive session."

In this regard, I offer the following comments.

First, it is emphasized 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 to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. It is also noted that it has been held that a gathering of a quorum of a public body for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the

Open Meetings Law [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)].

Second, 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, 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 the matter is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

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, and 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 stops 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.

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 the characterization of a closed meeting as an "executive session" would in my view lead one to conclude that such a session should have been conducted during an open meeting and in accordance with the procedural requirements imposed by §105(1) of the Open Meetings Law.

Next, you referred to a meeting during which you indicated that you wanted to use your portable cassette tape recorder. Both the Mayor and the Village Attorney informed you that you could not do so. In my opinion, which is based on judicial decisions, particularly a unanimous decision rendered by the Second Department, Appellate Division, which includes Suffolk County within its jurisdiction, you could not validly have been prohibited from tape recording the meeting.

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 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 any 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.

Lastly, you referred to a meeting attended by four members of the Board of Trustees at the home of a Trustee "for the purpose of hearing a report from a tax consultant hired by the village." You wrote that there was no notice given prior to the meeting, and that a decision appears to have been reached.

For reasons discussed earlier, I believe that the meeting in question clearly fell within the coverage of the Open Meetings Law, even though it might have been informal and there may have been no intent to take action. Further, the Law requires that notice be given prior to every meeting of a public body. 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.

Lastly, although the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

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

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. It is my view that it is inappropriate and inconsistent with the Open Meetings Law to hold a meeting in a private home. Again, any member of the public has the right to attend meetings of public bodies, and in my opinion, the location of the meeting in this instance represented an impediment to free access by the public. In addition, §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."

Based upon the foregoing, 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 are held in facilities that permit barrier-free access to physically handicapped persons.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copies of this opinion will be forwarded to the Board of Trustees and the Zoning Board of Appeals.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 12, 1996

Mr. J. Franklyn DeRidder
President
OMNI Electromotive, 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. DeRidder:

I have received your letters of March 22 and April 4, both of which reached this office on April 8. You have sought assistance in relation to a series of difficulties concerning the implementation of the Freedom of Information and Open Meetings Laws by the Newfield Central School District and its Board of Education.

It is noted that the Committee on Open Government is authorized to provide advice pertaining to the statutes referenced above. While the Committee is not empowered to enforce the law, it is my hope that the contents of this opinion, which will be forwarded to the Board, will serve to educate, persuade and to enhance compliance with and understanding of open government laws.

First, you complained that requests for records are not answered in a timely fashion. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which an agency, such as a school district, 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 all agency records, and §86(4) of that statute 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."

Based on the foregoing, any information "in any physical form whatsoever" maintained by or produced for the District would constitute a record, irrespective of its function or origin. Floor plans, for example, produced for the District, or copies of materials distributed at open meetings that are kept by the District would in my view clearly be records that fall within the framework of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based on 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.

Next, since several areas of your remarks involve meetings of the Board and minutes of its meetings, I direct your attention to the Open Meetings Law.

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.

Every meeting must be convened as an open meeting, and §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns.

However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981).

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.

The Appellate Division has 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; 205 AD 2d 55, 58 (1994)].

You also allege that the Board held a "secretive telephonic meeting." In this regard, it has been advised that public bodies cannot conduct meetings by phone. 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 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.

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

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

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

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies

approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

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

Enclosed for your review is "Your Right to Know", which describes the Freedom of Information and Open Meetings Laws in detail.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 15, 1996

Hon. Charles L. White II
Trustee, Village of Valatie
[redacted]

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 White:

I have received your letter of April 5. In your capacity as a newly elected member of the Board of Trustees of the Village of Valatie, you have sought an advisory opinion concerning the Open Meetings Law.

According to your letter, during your first meeting, the Board passed a resolution "to allow members of the press to attend an executive session regarding a personnel matter." It is your view that members of the new media do not have "any special privilege above that of any resident in attendance." I agree with your contention for the following reasons.

First, §103(a) of the Open Meetings Law states that meetings of public bodies "shall be open to the general public." As such, the Law does not distinguish among members of the public; any person, regardless of his or her status, interest or residence would have the right to attend an open meeting of a public body.

Second, in a related vein, I note that nothing in the Open Meetings Law provides the news media with rights that exceed or are in any way different from the public generally. While it may be true that the news media plays a unique role in relation to the use of open government statutes, they have no special rights and serve, in my view, as the eyes and ears and as an extension of the public.

Third, as you may be aware, §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 I believe that the function of an executive session is to enable members of public bodies to confer candidly in private. Also relevant to the matter is §105(2), 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". Therefore, the only people who have the right to attend executive sessions are the members of the public body conducting the executive session. A public body may, however, authorize others to attend an executive session. While the Open Meetings Law does not describe the criteria that should be used to determine which persons other than members of a public body might properly attend an executive session, I believe that every law, including the Open Meetings Law, should be carried out in a manner that gives reasonable effect to its intent. Typically, those persons other than members of public bodies who are authorized to attend are the clerk, the public body's attorney, the superintendent in the case of a board of education, or a person who has some special knowledge or expertise that relates to the subject of the executive session.

A member of the news media generally attends meetings of public bodies in order to acquire information to be communicated to the general public. Again, that person has no rights under the Open Meetings Law additional to those accorded to the public generally. In consideration of those factors and the preceding commentary, it is my view that permitting the news media to attend an executive session is the equivalent of permitting the public to attend, and I do not believe that a public body could validly justify authorizing the news media to be present at an executive session while excluding all other members of the public. Stated differently, if a public body authorizes the news media to attend an executive session, I believe that it effectively loses its basis for holding an executive session, for members of the news media serve as representatives of the public.

In short, in my opinion, it would be unreasonable and inconsistent with the general thrust of the Open Meetings Law to permit certain members of the public, in this instance, members of the news media, to attend an executive session while excluding others.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9432
OML-AO-2598

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

April 17, 1996

Hon. Linda H. Mitchell
Village Clerk
Village of Sands Point
P.O. Box 188
Port Washington, NY 11050

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

Dear Ms. Mitchell:

I have received your letter of April 9 in which you referred to an article that appeared in the Port Washington News. In the article includes a comment that "since the Port Washington Fire Department is federated and incorporated under a unique central district, they are not required to hold public budget meetings." You have asked whether "it is true" that Port Washington Fire District is exempt from the coverage of the Freedom of Information and Open Meetings Laws.

In this regard, it is likely in my view that the Port Washington Fire District is required to comply with both statutes.

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.

The Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office 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."

Again, a fire district is a public corporation. Consequently, I believe that it is an "agency" required to comply with the Freedom of Information Law.

While I am unfamiliar with the specific entity to which the article refers, I point out that §66 of the General Construction Law includes a series of definitions and states that:

> "3. A 'district corporation' includes any territorial division of the state, other than a municipal corporation, heretofore or hereafter established by law which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments, whether or not such territorial division is expressly declared to be a body corporate and politic by the statute creating or authorizing the creation of such territorial division.
>
> 4. A 'public benefit corporation' is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or the people thereof."

In addition, subdivision (1) of §66 defines the phrase "public corporation" to include "a municipal corporation, a district corporation, or a public benefit corporation." If the entity in question is a district corporation or a public benefit corporation, it would constitute a "public corporation" that clearly falls within the coverage of the open government laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT.

FOIL-AO-9434
OML-AO-2599

162 Washington Avenue, Albany, New York 12231
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April 19, 1996

Ms. Susan Bisha
[redacted]

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. Bisha:

I have received your letter of April 11, as well as the materials attached to it.

In your capacity as associate news editor of the Stylus, the campus newspaper at SUNY College at Brockport, you wrote that you cover the weekly meetings of the Board of Directors of the Brockport Student Government (BSG). At a recent meeting, however, you were "ordered" by the chairperson to leave, even though there was neither a motion made to enter into executive session nor an indication of the subjects to be discussed. You indicated that students pay a mandatory activity, that they elect the members of the BSG, and that board of the BSG "spends student fee money on behalf [of] the students.

You have asked whether the BSG "is a public body covered by the state open meeting and open records laws." In my opinion, based on the language of those laws and their recent judicial interpretation the BSG is required to comply with both the Freedom of Information Law and the Open Meetings Law. In this regard, I offer the following comments.

For purposes of the Freedom of Information Law, the question is whether the BSG is an "agency". Section 86(3) of that statute define 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."

Here I refer to Carroll v. Blinken [957 F.2d 991 (2d Cir. 1992), cert. denied, 113 S.Ct. 300 (1972)] in which it was held that a State University of New York student government's allocation of mandatory activity fee monies to a particular organization constituted a "state action." The Carroll decision, which pertains to Polity, the student government body at SUNY/Stony Brook, indicates that "the allocation of activity fee money to [a campus organization] NYPIRG" was a justifiable exercise of State action and that the allocation of funds constitutes official action because the SUNY Trustees require all SUNY students pursuant to §355 of the Education Law to pay a mandatory student activity fee each semester. "Those who fail to pay the fee...are not allowed to register" (id. at 993). Further, BSG's disbursement of these assessed funds is mandated and controlled by regulations promulgated by the State University, 8 N.Y.C.R.R. §302.14. According to Carroll, the regulation determines the manner in which the "student association budget" may allocate funds, and eleven permissible categories of expenditures are defined. As stated in that decision, "once the Student Government completes its budget" allocating funds to various campus groups, SUNY's President must then certify that the student government funds have been spent in one of the eleven ways recognized by the regulation.

In my view, the BSG is clearly involved in performing a governmental function for, on behalf of or in conjunction with the State University. In a decision that involved what may be characterized as an adjunct of a public institution of higher education, it was held that a community college foundation, a not-for-profit corporation, and its records are subject to the Freedom of Information Law. As stated by the court:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various

> educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the Foundation in Eisenberg, BSG would not exist but for its relationship with the SUNY College at Brockport. Due to the similarity between the situation at issue and that presented in Eisenberg, I believe that BSG and its records are subject to the Freedom of Information Law.

I note there is precedent indicating that a not-for-profit corporation may be an "agency" required to comply with the Freedom of Information Law. In Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as

> broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

More recently, the Court of Appeals again determined that a certain not-for-profit corporation constituted an "agency" subject to the Freedom of Information Law. In Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court determined that:

> "The BEDC, a not-for-profit local development corporation, channels public funds into the community and enjoys many attributes of public entities. It should therefore be deemed an 'agency' within FOIL's reach in this case" (id., 492).

It was also stated that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy

> dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

In this instance, there is substantial government control over BSG, for the administration at a SUNY institution is also "inextricably involved" in the operation of a student government organization. The regulations promulgated by SUNY, 8 NYCRR §302.14, specify the relationship between a student government organization, such as Polity, and SUNY. Where mandatory fees are paid, as in this case, §302.14(c)(1) provides that:

> "The representative student organization shall prepare and approve a budget governing expenditures from student activity fees in accordance with the constitution and by-laws of the student organization, and consistent with the principles of equal opportunity, prior to registration for each term. Allocations included in the budget shall fall within programs defined in paragraph (3) of this subdivision. The approved budget shall thereafter be presented to the chief administrative officer prior to the registration for each term for his review and certification that the allocations are in compliance with the provisions of paragraph (3) of this subdivision. In the event that the chief administrative officer, or his designee, concludes that a particular proposed allocation may not be in compliance with the provisions of this Part, he shall refer such proposed allocation to a campus review board composed of eight members of whom four shall be appointed by the representative student organization and four appointed by the chief administrative officer, or his designee. The campus review board shall study the proposed allocation and make a recommendation with respect to it. The chief administrative officer, or his designee, shall thereafter make the final decision. Any proposed allocation which is determined not be in compliance with the provisions of these regulations shall be excluded from the budget. Upon determination by the chief administrative officer, or his designee, that the approved budget is in compliance with these regulations, he shall so certify, and such certification shall authorize the collection of the fee at registration."

Paragraph (3) of subdivision (c) states that "[f]unds which are collected under provisions of this section which require every student to pay the prescribed mandatory fee shall be used only for support of the following programs for the benefit of the campus

community", and thereafter identifies the kinds of programs eligible for funding. As in Eisenberg, supra, in which it was held that a not-for-profit foundation was an "agency", for its purpose was to further the functions of a community college, Polity can use monies only "for the benefit of the campus community." Similarly, as in the case of Buffalo News, there is substantial oversight, if not control, by the parent entity. Paragraph (4) of §302.14(c) of the regulations states that fiscal commitments of proceeds of student activity fees by a student organization "shall have been approved by the chief administrative officer or his designee", that '[f]inal determination for approval of the compliance with this section of any fiscal commitment shall rest with the chief administrative officer or his designee", that "[f]iscal and accounting procedures prescribed by the chancellor...shall be adopted and observed by the representative student organization", and that "such procedures shall include...provisions for an annual audit."

Perhaps most importantly, a decision rendered earlier this year dealt with the status of a student government body, the Student Polity Association at SUNY/Stony Brook, which was created as a not-for-profit corporation, following a denial of a request by the campus newspaper for its records. In The Stony Brook Statesman v. Associate Vice Chancellor for University Relations (Supreme Court, Ulster County, January 22, 1996), it was determined that "Polity" is an "agency" required to comply with the Freedom of Information Law. In the decision, it was stated that:

> "Polity has refused disclosure solely on the grounds that it is not subject to FOIL since it is not a state agency as that term is defined in Public Officers Law Section 86(3). Given the fact that Polity is responsible for spending mandatory student activity fees under supervision of SUNY-Stony Brook and pursuant to and in accordance with Education Law Section 355 and 8 NYCRR 302.14, respondents' position is simply not tenable. In reaching this conclusion, the Court adopts the reasoning set forth in the opinion letter from the Committee on Open Government to petitioner dated May 17, 1995..."

In sum, it is clear in my view that BSG falls within the coverage of the Freedom of Information Law and must disclose its records in accordance with that statute.

With respect to the Open Meetings Law, the issue is whether BSG is a "public body." Section 102(2) 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 a recent decision, Smith and Maitland v.City University of New York (Supreme Court, New York County, January 25, 1996), it was held that the LaGuardia Community College Association, Inc., which is the College's student government body and analogous to the BSG, is a public body subject to the Open Meetings Law. The court rendered its decision during oral arguments, and reference will be made to a series of judicial pronouncements appearing in the transcript of the proceeding. Specifically, the judge stated that:

> "The association is performing a governmental function, it's making a final decision. It's not an advisory. Therefore, it is subject, I find that it is subject to the Open Meetings Law, and that is my ruling...This entity is not an advisory committee. Therefore, the reasoning which is set forth in these opinions of the Committee on Open Government, I concur with....they are logical, and I concur with those reasons; because, it's really substituting for governmental function, it's exercising a function of the government; and it's no different whether it's incorporated or not incorporated. It's making decisions for the government. And the government would have to make those decisions if it didn't.
>
> "And on all these other things, issues that you are raising, this is private money of the students, it's collected as part of the students- it's a student activity fee. It's mandatory. It's collected by the sovereign, if you want. The fact that it's put into an account of the association doesn't change it's character. It's still governmental function and it's subject to the Open Meetings Law."

Later in the proceeding, the judge determined that:

> "The Petitioners are entitled to a declaration that the Respondents acted in violation of the New York State Open Meetings Law by the conducting of the meeting of the college association on March 30, 1994 in which students and their attorney, right, and the reporter were denied access to attend the meeting. I don't think there is any contest about that...my reading of and my interpretation of this law is that it applies to the association just as the FOIL applies to

> the association. It's exercising a governmental function."

As a public body, BSG must conduct its meetings open to the public, unless there is a basis for entry into an executive session. It is emphasized 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.

In an effort to enhance compliance with and understanding of the Freedom of Information Laws, copies of this opinion will be forwarded to the BSG and the College President.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brockport Student Government
President, SUNY College at Brockport

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2400

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

April 26, 1996

Ms. Lucille Held
[redacted]

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. Held:

I have received your correspondence concerning local laws enacted in 1985 by the Town/Village of Harrison in 1985 applicable to the Town Board and the Village Board of Trustees respectively, and the relationship between those laws and the Open Meetings Law.

The local law pertaining to the Town Board, §65-1, states that:

> "Although, by enacting §108. Subdivision 2b of the New York Public Officers Law, the Legislature and the Governor of the State of New York have authorized members of the Town Board of the Town of Harrison who are adherents of the same political party to conduct private meetings at which public business may be discussed, the Town Board has determined that the interests of the town are best served if deliberations on public business are done in a public forum where interested members of the community can participate in the discussion and hear the views expressed by the Supervisor and the Councilmen."

Virtually the same language was enacted to pertain to the Mayor and the Village Board of Trustees by means of Local Law §10-1. Further, the two local laws were enacted on the same date, and it is my understanding that the members of the Town Board and the Village Board of Trustees are one and the same.

In this regard, by way of background, since becoming effective in 1977, the Open Meetings Law contained an exemption pertaining to

"political caucuses." When an exemption applies, the Open Meetings Law does not. In construing the scope of the exemption, several courts determined that closed political caucuses exempt from the coverage of the Open Meetings Law could validly be conducted only to discuss political party business; conversely, it was also found that a gathering of a majority of a legislative body held to discuss public business constituted a "meeting" subject to the Open Meetings Law, irrespective of the political party affiliation of those present, rather than a political caucus exempt from the Law [see e.g., Sciolino v. Ryan, 81 AD2d 475 (1981)]. In 1985, however, the State Legislature amended the Open Meetings Law. Pursuant to the amendment, §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..."

Due to the amendment, if used to an extreme, majority members of legislative bodies may conduct closed political caucuses to discuss the subjects of their choice, including matters of public business.

In reaction to the change in the Open Meetings Law, many local legislative bodies enacted local laws or adopted policies or rules to ensure that public business is discussed in public, regardless of the political party affiliation of their members. Via the local laws enacted by the legislative bodies of the Town and the Village clearly in response to the change in the Open Meetings Law, I believe that the Town Board and the Village Board of Trustees, must discuss public business in public, again, irrespective of the political party membership or adherence of their members.

As the local laws relate to the Open Meetings Law, §110 of that statute provides that:

> "1. Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article.
>
> 2. Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less

> restrictive with respect to public access than this article shall not be deemed superseded hereby.
>
> 3. Notwithstanding any provision of this article to the contrary, a public body may adopt provisions less restrictive with respect to public access than this article."

Therefore, a local law may permit greater public access than required by the Open Meetings Law, and that is so with respect to the local laws considered here, for they are "less restrictive with respect to public access" than the Open Meetings Law.

Similarly, with regard to the issue of public participation at meetings of public bodies, 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 public participation. Consequently, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so.

In this instance, the local laws include specific reference to the right of the public to speak at meetings, for both state that "interested members of the community can participate in the discussion...". When a public body permits the public to speak, as in the case of the two local laws, I believe that it should do so reasonably and in a manner that treats members of the public equally.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Town Board/Village Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9441
OML-AO-2601

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

April 30, 1996

Mrs. Antonia Rowcliffe
[redacted]

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. Rowcliffe:

As you may be aware, a variety of materials have been forwarded to the Committee on Open Government by the State Education Department concerning your complaint sent to the New York State Commission of Investigation. The Committee, a unit of the Department of State, is authorized to offer advisory opinions pertaining to the Open Meetings and Freedom of Information Laws.

By way of background, in your capacity as a member of the Caledonia-Mumford Central School District Board of Education, you indicated in a letter to the Commission "that four, sometimes five, Board members have had secret, unannounced meetings without minutes being taken" and added that "two Board members...are intentionally not notified of the meetings to obstruct [y]our participation." You also wrote that members of the Board have "admitted to these illegal meetings." It is my understanding, based on the materials, that the Board consists of seven members.

In this regard, I offer the following comments.

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

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that

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

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

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

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

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

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

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

Based upon the language quoted above, a public body, such as a board of education, cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. Therefore, if, for example, five of seven members of a public body meet without informing the other two, even though the five 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. If challenged, I believe that action purportedly taken by a majority of a public body that met without giving reasonable notice to all of the members would be found to be a nullity, i.e., that no action was validly or effectively taken.

A second issue involves your inability as a member of the Board, and also as a member of the public, to gain access to records reflective of District expenditures, particularly those pertaining to payments made to attorneys retained by the District.

Here I refer to the Freedom of Information Law. 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. Contracts, bills, vouchers and similar records reflective of payments by an agency are typically available, for none of the grounds for denial could appropriately be asserted.

With specific respect to payments to a law firm, the judicial interpretation of the Freedom of Information Law indicates that the information sought must be disclosed. A recent decision involved a request for "the amount of money paid in 1994" to a particular

law firm "for their legal service in representing the County in its landfill expansion suit", as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (Orange County Publications v. County of Orange, Supreme Court, Orange County, June 15, 1995). Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'." The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Only if such descriptions can be demonstrated to rise to the level of protected communications, can respondent's position be sustained.
>
> "In this regard, the Court must make its determination based upon the established principal that not all communications between attorney and client are privileged. Matter of Priest v. Hennessy, supra, 51 N.Y.2d 68, 69. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, as the Court determined in Matter of Priest v. Hennessy, supra,
>
> > [a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given. It is a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment is not privileged.
>
> Id. at 69.

> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 135 Misc.2d 126, 127-128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De Law Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..."

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "...in order to uphold respondent's denial of the FOIL request, the Court would be compelled to conclude that the descriptive material, set forth in the law firm's monthly bills, is uniquely the product of the professional skills of respondent's outside counsel. The Court fails to see how the preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, can be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 [Sup. Ct. Kings Ct. 1984]). Therefore, the Court concludes that the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "However, the Court is aware that, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by

> respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court).

Finally, it was contended that the records consisted of intra-agency materials that could be withheld under §87(2)(g) of the Freedom of Information Law. 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.

The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

> "...the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion,

> respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law §87(2)(g). See, Matter of Dunlea v. Goldmark, supra, 54 A.D.2d 449. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption. See, Ingram v. Axelrod, supra."

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible. As I understand your requests, they are not as detailed as the request at issue in Orange County Publications. It appears that your requests involve amounts expended. In my view, those aspects of the records would clearly be available.

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be sent to the Board of Education. Copies will also be forwarded to the State Education Department and the Commission of Investigation.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Luis E. Pacheco
Jerome Lightfoot

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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 1, 1996

Mr. Hal Travis
[redacted]

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. Travis:

I have received your letter of April 23 in which you seek an advisory opinion in your capacity as a member of the City of Syracuse Board of Education. You wrote that a controversy recently arose concerning your disclosure of records pertaining to the use of cellular phones by particular school employees.

According to your letter, the administrators' union "is threatening legal action" against you due to your release of the information, for, in your words, "they consider it personnel information since it contained the names of specific school employees." You contend, however, that it is a "general business/financial record." You added that the Board's attorney has suggested that the records are "confidential" pursuant to §805-a(1)(b) of the General Municipal Law, the rules of the Board of Education, and Part 84 of the regulations promulgated by the Commissioner of Education. You indicated further that the Board intends to discuss the matter in executive session, and you questioned whether the matter could properly be considered in an executive session.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records [see definition of "record", §86(4)] and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, in my view, the term "confidential" has a narrow meaning. While I am mindful of the section of the General Municipal Law to which the Board's attorney referred, I do not

believe that it would prohibit disclosure of cellular telephone records. That provision states that "[n]o municipal officer or employee shall... disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests." From my perspective, which is based on the language of the Freedom of Information Law and its judicial interpretation, an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, 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 opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot confer, require or promise confidentiality. Similarly, insofar as Part 84 of the regulations promulgated by the Commissioner of Education is more restrictive than a statute, the Freedom of Information Law, I believe that it is out of date and void. This not to suggest that all records must be disclosed; rather, I am suggesting that records may in some instances be withheld, but only in accordance with the grounds for denial appearing in the Freedom of Information Law, and that any claim of confidentiality based on a regulation, policy or local enactment that is inconsistent with that statute would be void to the extent of any such inconsistency.

Records often may be withheld under the Freedom of Information Law, even though they are not "confidential." A memorandum prepared by a member of staff at an agency in which he or she offers an opinion or advice to his or her supervisor *may* be withheld under §87(2)(g) of the Freedom of Information Law, for the opinion would constitute "intra-agency" material; home addresses of public employees *may* be withheld under §89(7), but it was held that an agency, a city school district, *could* disclose those addresses, notwithstanding objections by a union [Buffalo Teachers Federation v. Buffalo Board of Education, 549 NYS 2d 541, 156 AD 2d 1027

(1990)]. In short, even though an agency may have the authority to withhold records, the State's highest court has held that there is no obligation to do so [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. The only instance in which an agency is obliged to withhold would involve those cases in which records are specifically exempted from disclosure by statute.

Third, in a related vein, it is noted that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, 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.

Next, I point out that the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In my opinion, the phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part. I believe that the quoted phrase also imposes an obligation on agency officials to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld. In my opinion, three of the grounds for denial may be relevant with respect to cellular phone records.

Section 87(2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of

statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

If phone records are generated by the District, I believe that the records could be characterized as intra-agency materials. Nevertheless, in view of their content, they would apparently consist of statistical or factual information accessible under §87(2)(g)(i) unless another basis for denial applies. As such, §87(2)(g) would not, in my opinion, serve as a basis for denial. If the records were prepared by a phone company and sent to the District, they would not fall within §87(2)(g), because the phone company would not be an agency.

Also pertinent is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. 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].

When a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to an officer or employee of the District who uses a District cellular phone.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call.

There is but one decision of which I am aware that deals with the issue. In Wilson v. Town of Islip, one of the categories of the records sought involved bills involving the use of cellular telephones. In that decision, it was found that:

> "The petitioner requested that the respondents provide copies of the Town of Islip's cellular telephone bills for 1987, 1988 and 1989. The court correctly determined that the respondents complied with this request by producing the summary pages of the bills showing costs incurred on each of the cellular phones for the subject period. The petitioner never specifically requested any further or more detailed information with respect to the telephone bills. In view of the information disclosed in the summary pages, which indicated that the amounts were not excessive, it was fair and reasonable for the respondents to conclude that they were fully complying with the petitioner's request" [578 NYS 2d 642, 643, 179 AD 2d 763 (1992)].

The foregoing represents the entirety of the Court's decision regarding the matter; there is no additional analysis of the issue. I believe, however, that a more detailed analysis is required to deal adequately with the matter.

When phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. An indication of the phone number would disclose nothing regarding the nature of a conversation. Further, even though the numbers may be disclosed, nothing in the Freedom of Information Law would require an individual to indicate the nature of a conversation. In short, I believe that the holding in Wilson is conclusory in nature and lacks a substantial analysis of the issue.

This is not to suggest that the numbers appearing on a phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance, informants in the context of law enforcement, or persons seeking certain health services. It has been advised in the past that if a government employee contacts those classes of persons as part of the employee's ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance,

disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance might identify those who were contacted. In my view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted. Similarly, if a law enforcement official phones informants, disclosure of the numbers might endanger an individual's life or safety, and the numbers might justifiably be deleted pursuant to §87(2)(f) of the Freedom of Information Law.

In the context of a school district's phone bills, a third ground for denial, §87(2)(a) of the Freedom of Information Law, may be relevant, perhaps with respect to some of the records. 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), which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in funding or 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 of over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under the Buckley Amendment define the phrase "personally identifiable information" to include:

> "(a) The students 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 §99.3).

Having contacted the Family Policy Compliance Office, the entity within the federal Department of Education that oversees the Buckley Amendment, I was advised that the Buckley Amendment would be implicated in ascertaining public rights of access to the records in question.

If a person employed by the District routinely and as a part of his or her official duties contacts parents of students by telephone, those portions of a phone bill that could identify parents and, therefore, students, would in my opinion be exempted from disclosure. Stated differently, under the federal regulations cited above, if a phone number could identify a parent of a student, a disclosure of that number would likely "make the student's identity easily traceable." To that extent, I believe that the Buckley Amendment would forbid disclosure. On the other hand, if a District employee does not routinely use a cellular phone to contact parents of students, the Buckley Amendment would be inapplicable.

In sum, in my opinion, it is likely that the records that you disclosed would be accessible under the Freedom of Information Law to any person, except to the extent that the records might identify a particular student or students.

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 open to the public except to the extent that there is a basis for entry into an executive session. The grounds for entry into executive session are specified and limited to the subjects appearing in paragraphs (a) through (h) of §105(1) of the Open Meetings Law.

In the context of your inquiry, if, for example, the issue involves the extent to which the kinds of records that you disclosed are public or should not have been disclosed, it does not appear that there would be any basis for entry into an executive session. However, if, for instance, the Board is discussing your actions and perhaps seeking your removal, §105(1)(f) might be applicable. 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..."

Lastly, it is noted that like the Freedom of Information Law, the Open Meetings Law is permissive. A public body *may* enter into executive session to discuss certain subjects but it is not obliged to do so. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", it is reiterated that the term "confidential" has a narrow technical meaning. For records or for information acquired during an executive session to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. Again, the Family Educational Rights and Privacy Act generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

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

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the

absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Joseph E. LaMendola
Dr. Robert E. DiFlorio
Robert C. Allen, Jr.

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May 3, 1996

Mr. Ray Beckerman
[redacted]

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. Beckerman:

As you are aware, I have received your correspondence pertaining to the Fort Totten Redevelopment Authority (FTRA). Your inquiry involves the status of the FTRA under the Freedom of Information and Open Meetings Laws.

By way of background, the FTRA is a "local redevelopment authority" (LRA) that was created in conjunction with the Federal Base Closure Act. Section 2918(c) of Pub.L. 103-160 as amended by Pub.L. 103-337 states that:

> "The term 'redevelopment authority', in the case of an installation to be closed under this part, means any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation or for directing the implementation of such plan."

Further, the regulations promulgated pursuant to the statute defines the phrase "local redevelopment authority" to mean:

> "Any authority or instrumentality established by state or local government and recognized by the Secretary of Defense, through the Office of Economic Adjustment, as the entity responsible for developing the redevelopment plan with respect to the installation or for directing implementation of the plan" 32 CFR 91.3(g).

It is noted that the use of the term "authority" in this context differs from its common meaning in New York State law. Under state law, an authority is typically a kind of public corporation that is created by an act of the State Legislature. There is no particular method of creating an LRA, and an LRA clearly is not a public corporation. Further, if there is no recognized LRA, the applicable military department is authorized to proceed under pertinent "property disposal and environmental laws and regulations" [32 CFR 91.7(d)(3)(i)]. Therefore, while there is no requirement that they must exist, LRA's are created locally in order to provide the community at the site of a base closing with an opportunity to have a voice regarding the use of the base.

It is also noted that there are two kinds of LRA's. One has the power to purchase or convey real property and is characterized as an "implementation" LRA. The other has the duty of representing a community and developing a plan that must be approved by the Department of Defense, as well as other federal agencies in some instances and is known as a "planning" LRA. I have been informed that the FTRA has been recognized by the Secretary of Defense as a planning LRA. As such, it does not have authority equivalent to an implementation LRA.

I was also informed that the FTRA was created by means of a memorandum of agreement signed by the Mayor of New York City and the Queens Borough President.

With respect to its status under the Open Meetings Law, based upon a decision rendered by the Court of Appeals, it appears that the FTRA is not subject to that statute. In a decision that dealt with a "laboratory animal use committee" (LAUC) that was required to be established pursuant to federal law and was instituted at the State University at Stony Brook, it was determined that the entity in question fell beyond the scope of the Open Meetings Law.

That statute pertains to meetings of public bodies, and §102(2) 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."

Following its reference to the definition, the Court found that:

> "It is thus evident that the Open Meetings Law excludes Federal bodies from its ambit.
>
> "The LAUC's constituency, powers and functions derive solely from Federal law and

> regulations. Thus, even if it could be characterized as a governmental entity, it is at most a *Federal* body that is not covered under the Open Meetings Law" [ASPCA v. Board of Trustees of the State University of New York, 79 NY 2d 927, 929 (1992)].

As in this instance, the LAUC was created by an instrumentality of government in New York, and its members were selected by New York government officials. Although both the LAUC and the FTRA were created by the action of New York government officials, the existence of those entities "derive[s] solely from Federal law and regulations." Due to the similarity relative to the creation and basis for existence between the LAUC and the FTRA, again, it appears that the FTRA would not constitute a "public body" required to comply with the Open Meetings Law. Additionally, having discussed the matter with federal and other officials, I was informed that there is no provision of federal law that specifies that an LRA is required to conduct its meetings open to the public.

Notwithstanding the foregoing, I believe that records involving the activities of the FTRA generally fall within the coverage of the State's Freedom of Information Law. Further, having conferred with Michael Rogovin of the Office of the Queens Borough President, it appears that efforts have been made to ensure the disclosure of records pertinent to the FTRA by that office.

The Freedom of Information Law pertains to agency records, and due to the breadth of the definition of the term "record", the application of the Freedom of Information Law is more extensive than its counterpart, the Open Meetings Law. Section 86(4) of the Freedom of Information Law defines the term "record" to include:

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

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

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

Similarly, in a case involving documents maintained by a city relating to a deceased mayor, it was held that the documents constituted "records" that fall within the scope of the Freedom of Information Law, even though they might have pertained to the former mayor in a personal capacity or in his capacity as political party leader [see Capital Newspapers v. Whalen, 69 NY 2d 246 (1987)].

In sum, irrespective of the status of the LRA for purposes of the Open Meetings Law, any records maintained by the Office of the Borough President or any other New York City agency would in my view constitute "records" subject to rights of access conferred by the Freedom of Information Law. In addition, since the LRA was established by a memorandum of agreement signed by New York City officials, arguably any records of the LRA might be characterized as having been kept, held or produced for an agency [i.e., the City of New York].

The foregoing is not intended to suggest that all records must necessarily be disclosed, but rather that they are 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Rogovin
Joyce Shepard
Nicole Doucette
Diane Demuth

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May 6, 1996

Ms. Barbara Hodge
[redacted]

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. Hodge et al.:

I have received your letter of April 13 in which you wrote that despite your status as members of the Wyandanch-Wheatley Heights Ambulance Corporation, you have had difficulty in relation to meetings of its Board of Directors.

In some instances, meetings are not held when they are scheduled, executive sessions "are never voted on at an open meeting", notice is not posted, meetings are held in a small room, minutes are not prepared and voting records are not maintained.

In this regard, I offer the following comments.

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

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

While there is no judicial decision of which I am aware dealing with the status of the board of directors of an ambulance corporation, assuming that it is a volunteer organization, it would appear to be subject to the Open Meetings Law.

In general, the Open Meetings Law does not apply to meetings of the governing bodies of not-for-profit corporations. However,

in construing the counterpart to the Open Meetings Law, it was found by the state's highest court that a volunteer fire company is an "agency" required to comply with the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In addition, more recently it was determined that a volunteer ambulance corporation is also covered by the Freedom of Information Law because it performs its duties solely for an ambulance district and a town [see Ryan v. Mastic Volunteer Ambulance Corp., 622 NYS 2d 795, 212 AD 2d 716 (1995)]. If the ambulance company in question is similar in nature, I believe that the board of directors would constitute a "public body" required to comply with the Open Meetings Law. Based on that assumption, I offer the following comments regarding your remarks.

First, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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

Further, 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.

Third, §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."

In a related vein, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although that statute 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. Ordinarily, a record of votes of the members appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

Next, although the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

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

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of those who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

Lastly, there is nothing in the Open Meetings Law or any other law of which I am aware that would require the preparation of an agenda prior to a meeting or its distribution at a meeting.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Wyandanch-Wheatley Heights Ambulance Corporation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1605

162 Washington Avenue, Albany, New York 12231
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May 13, 1996

Hon. Nancy Beadnell
Town Clerk
Town of Thurman
Athol, NY 12810

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. Beadnell:

I have received your letter of April 25. You questioned the authority of the Town Board or a member of the Town Board to alter or insist upon the alteration of minutes that you prepare in your capacity as Town Clerk.

As I view the situation, four provisions are relevant. First, §106 of the Open Meetings Law deals with minutes and 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.

More specifically, §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist

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

Based on 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.

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. It is unlikely in my view that a town board has the authority to require the exclusion of information from minutes of an open meeting that is accurate.

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.

In short, it is my view that you, in your position as clerk, have the responsibility and the authority to prepare minutes and to ensure their accuracy. While the Board and/or the Supervisor may have other areas of authority, I do not believe that they could validly remove or insist upon the removal of information from minutes, so long as the information is accurate and, again, presented reasonably, fairly and in a manner consistent with the contents of minutes as they are generally prepared.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2606

162 Washington Avenue, Albany, New York 12231
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May 14, 1996

Thomas J. Hillgardner, Esq.
P.O. Box 656654
Flushing, NY 11365-6654

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. Hillgardner:

I have received your letter of April 25 in which you requested an opinion concerning "the applicability to the New York Open Meetings Law to meetings of the Fort Totten Redevelopment Authority" (FTRA).

As you indicated, the FTRA is a "local redevelopment authority" (LRA) that was created in conjunction with the Federal Base Closure and Realignment Act. Section 2918(c) of Pub.L. 103-160 as amended by Pub.L. 103-337 states that:

> "The term 'redevelopment authority', in the case of an installation to be closed under this part, means any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation or for directing the implementation of such plan."

Further, the regulations promulgated pursuant to the statute defines the phrase "local redevelopment authority" to mean:

> "Any authority or instrumentality established by state or local government and recognized by the Secretary of Defense, through the Office of Economic Adjustment, as the entity responsible for developing the redevelopment plan with respect to the installation or for directing implementation of the plan" 32 CFR 91.3(g).

It is noted that the use of the term "authority" in this context differs from its common meaning in New York State law. Under state law, an authority is typically a kind of public corporation that is created by an act of the State Legislature. There is no particular method of creating an LRA, and an LRA clearly is not a public corporation. Further, if there is no recognized LRA, the applicable military department is authorized to proceed under pertinent "property disposal and environmental laws and regulations" [32 CFR 91.7(d)(3)(i)]. Therefore, while there is no requirement that they must exist, LRA's are created locally in order to provide the community at the site of a base closing with an opportunity to have a voice regarding the use of the base.

It is also noted that there are two kinds of LRA's. One has the power to purchase or convey real property and is characterized as an "implementation" LRA. The other has the duty of representing a community and developing a plan that must be approved by the Department of Defense, as well as other federal agencies in some instances and is known as a "planning" LRA. I have been informed that the FTRA has been recognized by the Secretary of Defense as a planning LRA. As such, it does not have authority equivalent to an implementation LRA.

I was also informed that the FTRA was created by means of a memorandum of agreement signed by the Mayor of New York City and the Queens Borough President.

With respect to its status under the Open Meetings Law, based upon a decision rendered by the Court of Appeals, it appears that the FTRA is not subject to that statute. In a decision that dealt with a "laboratory animal use committee" (LAUC) that was required to be established pursuant to federal law and was instituted at the State University at Stony Brook, it was determined that the entity in question fell beyond the scope of the Open Meetings Law.

That statute pertains to meetings of public bodies, and §102(2) 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."

Following its reference to the definition, the Court found that:

> "It is thus evident that the Open Meetings Law excludes Federal bodies from its ambit.

> "The LAUC's constituency, powers and functions derive solely from Federal law and regulations. Thus, even if it could be characterized as a governmental entity, it is at most a *Federal* body that is not covered under the Open Meetings Law" [ASPCA v. Board of Trustees of the State University of New York, 79 NY 2d 927, 929 (1992)].

As in this instance, the LAUC was created by an instrumentality of government in New York, and its members were selected by New York government officials. Although both the LAUC and the FTRA were created by the action of New York government officials, the existence of those entities "derive[s] solely from Federal law and regulations." Due to the similarity relative to the creation and basis for existence between the LAUC and the FTRA, again, it appears that the FTRA would not constitute a "public body" required to comply with the Open Meetings Law. Additionally, having discussed the matter with federal and other officials, I was informed that there is no provision of federal law that specifies that an LRA is required to conduct its meetings open to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2607

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May 14, 1996

Mrs. W.R. Powell
[redacted]

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. Powell:

I have received your letter of April 25, as well as the materials attached to it. You referred to a meeting of the "District Review Panel" allegedly held without notice to the public on April 1.

By way of background, the District Review Panel ("the Panel") was created by the Board of Regents as the result of special legislation (Chapter 145 of the Laws of 1995) based on the Regents' determination that deficiencies existed in the Roosevelt Union Free School District that merited "immediate corrective action." By statute, the Panel consists of three members. Its primary function involves the preparation of a corrective action plan and review of the implementation of the plan by the District's Board of Education. Further, if certain conditions are present, the Panel is authorized to perform the duties of the Board of Education.

In my view, the Panel is required to comply with the Open Meetings Law, and on the basis of the correspondence that you enclosed, it appears that officials of the State Education Department agree.

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."

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)].

In this instance, however, the Panel, depending upon its role at a particular time, may function either as an advisory body or as a governing body. In either case, however, it performs a necessary and integral function in the implementation of Chapter 145.

In the decisions cited earlier, none of the entities was designated by law to carry out a particular duty and all had purely advisory functions. More analogous to the matter 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 Chapter 145, since the Panel carries out necessary functions in the implementation of that legislation, I believe it performs a governmental function and, therefore, is a public body 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. The Panel 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, it conducts public business and performs a governmental function for a public corporation, i.e., a school district.

It is also 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.

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: District Review Panel
James A. Kadamus
Kathy Ahearn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2608

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May 14, 1996

Ms. Nina Kim
Syracuse Herald-Journal
Clinton Square
P.O. Box 4915
Syracuse, NY 13221-4915

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

Dear Ms. Kim:

I have received your letter of April 29. You have sought my opinion with respect to three situations involving two municipalities in Onondaga County and their implementation of the Open Meetings Law.

The first pertained to a proposed executive session relating to "the matter of police consolidation", and the Solvay Village Board of Trustees "wanted to discuss whether or not it should meet with the city on merging police forces." The second involved the same board, for its police committee and the Mayor met with Syracuse City officials, again, on the issue of police consolidation. One of the trustees contended that "the board could go into executive session because the involved the contract." The third pertained to a meeting of the police committees of the Solvay Village Board and the Geddes Town Board to consider "the possibility of merging police departments", and the issue involves the status of those committees under the Open Meetings Law.

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..."

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.

While discussions of police agency consolidations or mergers might involve "personnel" and/or "contract negotiations", it is doubtful in my view that those issues could properly be discussed in executive sessions.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, 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 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 at least one of the topics listed in §105(1)(f) is considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemumg County, October 20, 1981).

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; 207 AD 2d 55 (1994)].

With regard to contracts, none of the grounds for entry into executive session deals 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.

In terms of a motion to enter into an executive session held pursuant to §105(1)(e), it has been held that:

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

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

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to

those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a municipal board, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the MTA Board consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

As you suggested and in an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion

will be forwarded to officials of the Village of Solvay and the Town of Geddes.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Mario DeSantis, Mayor
Leonard Costantini
William DeSpirito
Kathleen Marinelli
Anthony Modafferi
Joseph Possi
Arthur Santos
Thomas Lynch
Hon. Manuel Martinez, Supervisor
John Gosson
James Henson
Francis Palerino
Thomas Mamorella
Noreen Jankowski
Kenneth Osterhout
John Ferris

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2609

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May 15, 1996

Ms. Gloria Bianca, Town Clerk
Town of Pelham
Town Hall - 34 Fifth Avenue
Pelham, NY 10803

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. Bianca:

I have received your letters of April 26 and April 30. In your capacity as Town Clerk of the Town of Pelham, you have sought advice relating to your role in the preparation of minutes of Town Board meetings.

According to your letter, a new Town Supervisor, John Carney, has initiated practices which in your view are contrary to law. You wrote that he:

> "has insisted that my minutes of the meetings be presented to him 10 days after the meeting in the form of a diskette and a hard copy. He edits the minutes on the disc, his bookkeeper makes copies of my corrected minutes and mails them to each member of the Board. The next meeting his minutes are approved by the Town Board and accepted as official minutes."

I agree that the procedure that you described is inconsistent with law, for it is my view that you, in your position as Town Clerk, have the legal authority and responsibility to prepare minutes and ensure their accuracy. While the Supervisor and the Board may have other areas of authority, I do not believe that either has the authority to alter the minutes in the manner that you described or to characterize the minutes that they prepare as official.

The Open Meetings Law provides direction concerning the contents of minutes and when they must be prepared and made available. Specifically, §106 of that statute provides that:

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

Second and perhaps most importantly, §30(1) of the Town Law which is entitled "Powers and duties of town clerk", states in part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..." Based upon the foregoing, the clerk, not the town supervisor, has the statutory responsibility to prepare minutes and ensure their accuracy. Further, the supervisor in my view, has no right, acting unilaterally, to change or correct minutes.

Moreover, although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Additionally, in an opinion of the State Comptroller, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609).

In sum, based on the foregoing, as Town Clerk, I believe that you have a responsibility to maintain minutes that are "complete

and accurate." Further, a town supervisor does not in my opinion have the authority to alter minutes that are otherwise complete and accurate. In short, the preparation of minutes is a "power and duty" of clerk, not a supervisor or a board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. John Carney, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9478
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May 20, 1996

Ms. Lisa J. Bero
[redacted]

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. Bero:

I have received your letter of May 8 in which you sought an opinion concerning access to certain records of the Massena Memorial Hospital.

According to your letter, your requests for minutes of meetings of the Hospital's Board of Managers have been verbally denied. You also requested the vacation schedule and "operating room call schedule" pertaining to a particular physician. In response, you were informed that you must use the Hospital's request form, and that no operating room call schedule exists. You have questioned the veracity of that statement.

In this regard, I offer the following comments.

First, I believe that the Board of Managers constitutes a "public body" for purposes of the Open Meetings Law [see §102(2)] and an "agency" for purposes of the Freedom of Information Law [see §86(4)], and that it is required to comply with both statutes. Section 127 of the General Municipal Law pertains to the establishment of public hospitals by units of local government and the designation of boards of managers. Section 128 details the powers and duties of such boards. On the basis of those provisions, it is clear that a board of managers is a governmental entity that is required to comply with the Open Meetings and Freedom of Information Laws.

Second, with respect to minutes of meetings, the Open Meetings Law offers direction on the subject, and §106 of that statute states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist

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

Based upon the foregoing, minutes of open meetings must be prepared and made available within two weeks. Although minutes reflective of action later during executive sessions must be prepared and made available within one week, it is noted that such minutes need not include information that is not required to be disclosed under the Freedom of Information Law.

I point out, too, 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.

Third, with regard to rights of access to records, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Although two of the grounds for denial relate to attendance records or work schedules, based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

In addition to the provisions dealing with the protection of privacy, also significant to an analysis of rights of access 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.

Attendance records and work schedules could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning the use of leave time or absences or the time that employees arrive at or leave work would constitute "statistical or factual" information accessible under §87(2)(g)(i).

Perhaps most relevant is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." The Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 664 (Court of Claims 1978)].

In a decision affirmed by the State's highest court dealing with attendance records, specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found, in essence, that disclosure would result in a permissible rather

than an unwarranted invasion of personal privacy. In that case, 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 you seek.

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

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

> know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, it is clear in my view that work schedules or attendance records, including those concerning the use or accrual of leave time, must be disclosed under the Freedom of Information Law.

Fourth, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, 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." If you consider it worthwhile to do so, you could seek such a certification. Since you questioned the veracity of a response, while I am not suggesting that it applies, §89(8) of the Freedom of Information Law states that: "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."

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

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual, such as yourself in the situation that you described, requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the

agency possesses and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

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

In an effort to enhance compliance with and understanding of the Freedom of Information Laws, copies of this opinion will be forwarded to the Board of Managers and the Hospital's Administrator.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Managers
James Watson, Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2611

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May 20, 1996

Mr. Carlton Sears
[redacted]

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. Sears:

I have received your letter of May 2 in which you raised questions concerning the implementation of the Open Meetings Law by the Board of Education of the Maine-Endwell Central School District.

The first involves the Board's practice of scheduling and holding executive sessions in advance of its meetings. Attached to your letter is what you characterized as a "typical agenda" referring to an executive session beginning at 7:30 to be followed by a "public session" at 8:15.

In this regard, 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, 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.

Second, you referred to a public hearing that was apparently held as part of a meeting. Since certain individuals were invited

to testify at the hearing, you asked whether the Board is obliged "to issue minutes that describe what transpired" and whether the Open Meetings Law "require[s] a standard of accountability relative to reporting what transpires in meetings of public bodies."

Section 106 of the Open Meetings Law pertains to minutes and provides what might be considered as minimum requirements concerning the contents of minutes. That provision states that:

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

Based 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 public body wants to include more information than is required by law, it may do so. Nevertheless, I do not believe that the minutes in the situation that you described must, of legal necessity, include the identities of those who spoke or a rendition of their remarks.

Lastly, an agenda refers to a memorandum of understanding to be considered by the Board that was not included in "meeting materials" distributed to the public at the meeting. You asked whether "excluding such a memorandum of understanding from public materials [is] an acceptable practice."

In short, there is nothing in the Open Meetings Law or any other provision of law of which I am aware that would require the

distribution of materials to be considered at meetings either before or during meetings.

I hope I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2612

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May 20, 1996

Ms. Carolyn Schurr
Newsday
[redacted]

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. Schurr:

I have received your recent letter in which you sought my views concerning the propriety of an executive session held by the Nassau County Board of Health.

According to the materials attached to your letter, at its meeting of April 22, the Board of Health entered into executive session to discus "pending litigation." Nevertheless, during the executive session, smoking regulations were also discussed. In a news release announcing the Board's plan to recommend a 90 day "grace period in the implementation and enforcement" of the new provisions, it was stated that "[t]he Board discussed a three-month grace period until October 1st at an Executive Session", and that the matter "will be put on the agenda for formal ratification at the next regular meeting of the Board..."

From my perspective, based on the ensuing analysis, the Board could not have properly considered the implementation of the new regulations during an executive session. Moreover, the news release indicates that the Board effectively took action. From my perspective, that action should have been taken during an open meeting and memorialized in minutes of its meeting of April 22. 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, as I understand the matter, the issues before the Board essentially involved legislation, the new smoking regulations, and its implementation. If that is so, in my view, none of the grounds for entry into executive session could justifiably have been asserted.

It is noted, too, that the Appellate Division, Second Department, has held that the mere threat or possibility of litigation is insufficient to justify the holding of an executive session. The so-called "litigation" exception, §105(1)(d) of the Open Meetings Law, permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

Based upon the foregoing, 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.

Lastly, the Board effectively took action, and admitted as much in its news release, stating that the action will be "formally ratified" at an upcoming meeting and that its "decision" will be discussed with County legislators. Assuming that there was no basis for discussing issues involving the smoking regulations in an executive session, I believe that the Board should have acted during an open meeting and that it is required to prepare minutes reflective of its action.

When action is taken by a public body, it must be memorialized in minutes, for §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.

Further, 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)], 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 reached a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted [see FOIL, §87(3)(a)]. 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 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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Health

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9490
OML-AO-2613

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

May 24, 1996

Ms. Eileen Herkes
[redacted]

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. Herkes:

I have received your letter of April 30, which reached this office on May 9. Your inquiry concerns your right to gain access to records and attend meetings of the Economic Opportunity Commission of Rockland County, Inc.

In this regard, most not-for-profit corporations are not governmental in nature and, therefore, fall beyond the coverage of those statutes. If, however, the entity in question is a community action agency that functions in accordance with the Federal Economic Opportunity Act of 1964, I believe that it would be required to disclose many of its records and conduct its meetings, in great measure, open to the public.

The New York Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government. It is my understanding that community action agencies are not-for-profit corporations. Although it appears that they perform a governmental function, it is questionable whether they constitute

"governmental entities" or, therefore, are agencies subject to the Freedom of Information Law.

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."

It is my understanding that community action agencies are created by means of the authority conferred by the Economic Opportunity Act of 1964. According to §201 of the Act, the general purposes of a community action agency are:

> "to stimulate a better focusing of all available local, State, private and Federal resources upon the goal of enabling low-income families, and low-income individuals of all ages, in rural and urban areas to attain the skills, knowledge, and motivations and secure the opportunities needed for them to become fully self-sufficient..." [§201(a)]
>
> "to provide for basic education, health care, vocational training, and employment opportunities in rural America to enable the poor living in rural areas to remain in such areas and become self-sufficient therein..." [§201(b)].

When community action agencies are designated, §211 indicates that they perform a governmental function for the state or for one or more public corporations. It is noted that a public corporation includes a county, city, town, village, or school district, for example. As such, by means of the designation as community action agencies, those agencies apparently perform their duties for the state or at least one public corporation.

Section 213 of the enabling legislation expresses an intent to enhance public participation as well as disclosure of information regarding the functions and duties of community action agencies. Specifically, subdivision (a) of §213 states in relevant part that:

> "[E]ach community action agency shall establish or adopt rules to carry out this section, which shall include rules to assure

> full staff accountability in matters governed by law, regulations, or agency policy. Each community action agency shall also provide for reasonable public access to information, including but not limited to public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible..."

Again, while it is unclear that the Freedom of Information Law applies to records maintained by a community action agency, I believe that the federal legislation quoted above indicates an intent to ensure accountability to the public by providing "reasonable public access to books and records of the agency." The federal Law also evidences an intent to authorize scrutiny of the governing body of a community action agency, for it refers to "reasonable access to information, including but not limited to public hearings."

In short, whether the Freedom of Information and Open Meetings Laws clearly apply to the records and meetings of a community action agency is somewhat unclear, I believe that the language of the federal enabling legislation indicates an intent that a community action agency be accountable by offering reasonable public access to proceedings and records. It has been suggested that the provisions of those statutes serve as a guide with respect to disclosure to the public. For instance, records reflective of a community action agency's policies or finances should generally be available, while those identifiable to individuals who participate in programs based upon income eligibility requirements could justifiably be withheld based upon considerations of personal privacy. Similarly, meetings held to discuss matters of policy or budget should be open, while discussions focusing on specific individuals, particularly in relation to personal financial or employment information, might justifiably be conducted in executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Directors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2614

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

May 28, 1996

Mr. James E. Nelson
Van DeWater and Van DeWater
P.O. Box 112
Poughkeepsie, NY 12602

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. Nelson:

I have received your recent letter in which you sought an advisory opinion on behalf of the Poughkeepsie Journal.

You wrote that the Journal will be sponsoring a "mediation session between four of the nine members of the Wappingers Central School District Board and several members of the public." The session will be conducted by a professional mediator and "will be noticed as a public meeting even though less than a quorum will be participating." Other than the mediator, the four Board members and the selected members of the public, approximately 30 additional members of the public "will be permitted to attend but not participate." Because it is anticipated that more than 30 will want to attend, those authorized to attend will be determined in advance "by drawing lots from those requesting admission." You added that "[i]t is possible that some of the five board members who were not asked to participate in the mediation will ask to be included in the drawing for the thirty seats, and if their names are drawn, attend as non-participants." At the request of the Journal, you have asked for "confirmation that this procedure complies with the Open Meeting Law provisions of the Public Officers Law."

From my perspective, as you have described the event, the Open Meetings Law would not apply.

That statute pertains to meetings of public bodies, and its application is not triggered until a quorum of a public body convenes for the purpose of conducting public business collectively as a body [see definition of "meeting", §102(1)]. In this instance, four Board members will be convening, arguably to engage in conducting some aspect of public business. Since four members

of a nine person board constitute less than a quorum, the session, in my view, would not constitute a convening of a public body, and, therefore, the Open Meetings Law would be inapplicable.

The presence of one or more additional Board members at the site would not in my opinion result in a finding that the session has been transformed into a "meeting" of a public body. Any additional member or members would not be acting as participants; they would not be joining the discussion of the four Board members, the mediator and the designated public member participants. On the contrary, any additional members would merely be observers within an audience that does not have the privilege of speaking or participating.

I note that variations of the Journal's question have arisen on several occasions. For instance, when I have made public presentations before large groups, members of public bodies have asked whether a majority of their membership in attendance constitutes a meeting. My response has been that the members are not present for the purpose of conducting public business collectively as a body, but rather for the purpose of being educated as part of an audience. Similarly, often members of public bodies are also members of or attendees at gatherings of chambers of commerce or Rotary Clubs. When members of public bodies are interspersed among other attendees at those gatherings, again, they would not be present for the purpose of functioning collectively as a body, and the Open Meetings Law would not apply.

In short, the mere presence of a majority of the total membership of a public body at a particular facility or site would not necessarily lead to the conclusion that the members are conducting a meeting that falls within the coverage of the Open Meetings Law. Only when a majority of the total membership of a public body convenes for the purpose of conducting public business, as a body, would that statute be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9499
OML-AO-2615

162 Washington Avenue, Albany, New York 12231
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May 31, 1996

Mr. James J. Markowski
[redacted]

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. Markowski:

I have received your letter of May 15. In your capacity as a member of the Bedford Central School District Board of Education, you have raised a variety of questions relating to a series of events involving the development of a voter survey to be used in the District. I note in good faith that the District's attorney, Phyllis Jaffe, contacted me soon after the receipt of your letter, and that the President of the Board, Karen Akst Schecter, has forwarded her view of the facts to me.

It is also emphasized that the Committee on Open Government is authorized to advise with respect to the Open Meetings and Freedom of Information Laws. Several of your questions, although they may involve the disclosure of information, do not pertain to those statutes. Consequently, the following comments will be restricted to issues raised by both yourself and Ms. Schecter that fall within the scope of the Committee's advisory jurisdiction.

By way of background, two District residents were designated to prepare a survey to be distributed to voters on the day of the Board elections and the budget vote. Ms. Schecter wrote that "it was understood" that the draft exit survey "was to be kept confidential until the Board reviewed it and until the voters saw it for the first time" on the day of the election. Nevertheless, the draft was given by one of those who prepared it to another resident, who in turn distributed it to other members of the community. Some considered the disclosure to be improper and the Board entered into an executive session, apparently characterized as "a specific personnel matter", to discuss whether the person who initially disclosed the draft survey should be asked to "step down." In addition, the draft survey was also reviewed and revised during an executive session.

The initial key issue is whether the Board had the authority to discuss the activities of resident who disclosed the draft in an executive session. It appears from my perspective that both you and Ms. Schecter have fallen into what I have come to call "the personnel trap." I believe that the Board had a proper basis for discussing the matter during an executive session, even though it did not involve a past, present or perhaps future District officer or employee.

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.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, 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 matter leading to the dismissal or removal of the person who disclosed the draft survey, I believe that there was a proper basis for conducting an executive session.

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 (<u>See</u>, 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; 207 AD 2d 55 (1994)].

A second involves the propriety of discussing the content of the survey in private. Based on a review of the grounds for entry into executive session, I do not believe that there would have been a basis for reviewing or revising the draft survey during such a session. I point out in a related vein that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of

Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and vice versa. Further, in a decision in which the issue was whether discussions occurring during an executive session by a school board could be considered 'privileged', it was held that 'there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

Although the draft survey was not sought under the Freedom of Information Law, you asked whether it was a "confidential document." In this regard, an assertion or claim of confidentiality, unless it is based upon a statute, is generally 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, again, 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 this instance, there would have been no statute specifying that the record in question could be characterized as confidential. Rather, it is likely in my view that the record would have been available, if it had been requested, under the Freedom of Information Law.

As you may be aware, that statute pertains to agency records, and §86(4) 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."

Based on the foregoing, when a document is maintained by or produced for an agency, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

In §86(3) of the Freedom of Information Law, "agency" is defined to mean:

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

As such, a school district or school board would clearly constitute an "agency". However, the citizens who prepared the draft survey are not agency employees, and it has been found 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, the citizens would not have performed a governmental function, and they would not be part of an agency. If that is so, the only ground for denial in the Freedom of Information Law of likely relevance would in my opinion be inapplicable.

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. The provision to which I alluded, §87(2)(g), permits an agency to withhold "inter-agency or intra-agency materials", depending upon their contents. From my perspective, since the citizens are apparently not part of an agency, the draft survey would not consist of either inter-agency or intra-agency material. If that is so, §87(2)(g) could not be asserted as a basis for denial. Moreover, based on the information provided, none of the other grounds for denial would be applicable.

I hope that the foregoing serves to clarify both the Open Meetings and Freedom of Information Laws, and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen Akst Schecter, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2616

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 31, 1996

Hon. Eleanor Cooke
Town Clerk
Town of North East
Millerton, NY 12546

<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. Cooke:

I have received your letter of May 13. You questioned the authority of the Town Board or a member of the Town Board to amend or insist upon the amendment of minutes that you prepare in your capacity as Town Clerk.

As I view the situation, four provisions are relevant. First, §106 of the Open Meetings Law deals with minutes and 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". Therefore, the clerk, not the supervisor, board member or the board as whole, has the responsibility of preparing minutes of town board meetings. 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.

More specifically, §106 of the Open Meetings Law provides that:

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

Based on 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.

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. It is unlikely in my view that a town board has the authority to require the exclusion of information from minutes of an open meeting that is accurate or to require the amendment of minutes that are accurate.

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.

In short, it is my view that you, in your position as clerk, have the responsibility and the authority to prepare minutes and to ensure their accuracy. While the Board and/or the Supervisor may have other areas of authority, I do not believe that they could validly require the amendment of minutes as they see fit. Moreover, so long as the minutes you prepare are accurate and, again, presented reasonably, fairly and in a manner consistent with the contents of minutes as required by the Open Meetings Law, I believe that you would be acting appropriately.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2617

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 31, 1996

Mr. Mike Stiles
[redacted]

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. Stiles:

I have received your letter of May 9. You wrote that after a meeting of the Town of Halfmoon Zoning Board of Appeals, you "entered another room where a meeting was on who consisted of the Halfmoon Town Tax Assessor, Edwin Faulkner, two Sabre taxing people and the entire grievance board." Although you attempted to attend, you were informed by the Assessor that it was a private meeting and that you could not stay. You have sought a "determination" concerning the matter.

In this regard, the Committee on Open Government is authorized to provide opinions pertaining to the Open Meetings Law. As such, the following remarks should be considered advisory.

First, 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."

An assessment board of review in my view clearly constitutes a "public body" required to comply with the Open Meetings Law.

Second, 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 also 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)].

Third, while meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review (i.e., public hearings held on "grievance day"), I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. However, it does not appear that the gathering in question was held to deliberate following a public hearing. If my assumption is accurate, the gathering was a meeting that should have been conducted open to the public in accordance with the requirements of the Open Meetings Law.

As you requested and in an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the Assessment Board of Review.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9503
OML-AO 2618

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 3, 1996

Mr. Michael F. McKeon
Corporation Counsel
City of Auburn
Memorial City Hall
24 South Street
Auburn, NY 13021-3885

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. McKeon:

I have received your letter of May 14 in which you requested an advisory opinion concerning the following questions:

> "1. With respect to Executive Session minutes, are the handwritten notes releasable under FOIL?
>
> 2. Is there any requirement under FOIL that handwritten notes be kept as a record?"

You added that it has been the practice of the secretary to prepare minutes on the basis of her handwritten notes, and to discard the notes after the minutes have been officially printed and filed with the City Clerk.

In this regard, I offer the following comments.

First, by way of background, §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.

Again, 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 notes might be available or deniable.

Second, while the Freedom of Information Law does not address the issue, §57.25(2) of the Arts and Cultural Affairs Law deals

with the retention and disposal of records maintained by local governments. That provision states that:

> "No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments records retention and disposition schedules establishing mininum legal retention periods. The issuance of such schedules shall constitute formal consent by the commissioner of education to the disposition of records that have been maintained in excess of the retention periods set forth in the schedules. Such schedules shall be reviewed and adopted by formal resolution of the governing body of a local government prior to the disposition of any records. If any law specifically provides a retention and disposition schedule established herein the retention period established by such law shall govern."

I believe that the retention schedule indicates that notes, tape recordings and similar materials used as aids in preparing minutes of meetings must be retained for a minimum of four months following the drafting of minutes. However, to be sure, it is suggested that you confer with the City's records management officer (see Arts and Cultural Affairs Law, §57.19), who should have a copy of the schedule. Alternatively, inquiry could be made to the State Archives and Records Administration, which can be reached at (518)474-6926.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9514
OMC-AO 2619

162 Washington Avenue, Albany, New York 12231
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June 7, 1996

Lee G. Austin
[redacted]

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 Lee Austin:

I have received your letter of May 23 in which you raised questions relating to both the Open Meetings Law and the Freedom of Information Law.

The initial issue involves a refusal by the Town of Halcott to disclose minutes until they have been approved by the Town Board. 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." Minutes of executive sessions must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. I note that if a public body merely discusses an issue during an executive session but takes no action, minutes of the executive session need not be prepared.

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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.

You also questioned how records can be requested and whether an agency must have a fee schedule. Here I direct your attention to §89(1)(b)(iii) of the Freedom of Information Law, which requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

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

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

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a

records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

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

Based on the foregoing, a request should be made to an agency's designated records access officer. Most frequently, the records access officer in a town is the town clerk. Pursuant to §89(3) of the Freedom of Information Law, an applicant must "reasonably describe" the records sought. Therefore, when making a request you should include sufficient detail to enable agency staff to locate and identify the records of your interest.

With respect to fees, the provisions cited earlier pertaining to the Town Board's responsibility to adopt procedural rules and regulations also require that those rules include reference to fees. In brief, in accordance with §87(1)(b)(iii) of the Freedom of Information Law, an agency generally can charge up to twenty-five cents per photocopy for records up to none by fourteen inches; for the duplication of other records (i.e., computer tapes or disks, tape recordings, etc.), an agency may charge based on the actual cost of reproduction.

In an effort to enhance compliance with and understanding of the statutes under consideration, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Cindy Bouton, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2620

162 Washington Avenue, Albany, New York 12231
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June 10, 1996

Mr. James Vacca
District Manager
Bronx Community Board No. 10
[redacted]

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. Vacca:

I have received your letter of May 29. In your capacity as its District Manager, you wrote that Community Board #10 "has six standing committees where non-Board members are allowed to observe and speak on all pending matters before the Board." You added that it has been suggested that "[y]our mandate, minimally, is to provide such non-Board Members with the opportunity to observe", and it is your understanding that a committee may "restrict such individuals' right to observe in order to facilitate the agenda of the committee." You asked that I "confirm [y]our Board's obligation un the Open Meetings Act in this vein."

In this regard, I offer the following comments.

First, the Open Meetings Law pertains 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."

Based on the foregoing, a community board would constitute a public body, and each of the standing committees would constitute public bodies as well. However, while each member of a standing committee would also be a member of the Board, not every member of the Board

would be a member of a standing committee. In short, each standing committee would itself be a public body with a defined membership.

Second, with specific respect to the issue, 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 participation on the part of those who attend meetings. Consequently, by means of example, if a public body does not want to answer questions or permit those in attendance 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 attendees to speak, I believe that it should do so based upon reasonable rules that treat attendees 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2621

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June 12, 1996

Hon. Joanne M. Wisor
Mayor - City of Geneva
City Hall
P.O. Box 273
Geneva, NY 14456

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 Wisor:

It was a pleasure to see you at the NYCOM annual meeting, and I hope that our paths will cross again.

You have sought guidance concerning the specificity of motions made to enter into executive sessions.

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 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.

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 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].

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the City of Geneva."

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 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; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town

of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Similarly, with respect to "contract negotiations", the only ground for entry into executive session that mentions that term is §105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, §105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union.

In terms of a motion to enter into an executive session held pursuant to §105(1)(e), it has been held that:

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

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the police union."

I hope that I have been of assistance. Should additional questions arise, please free to call me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO 2622

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June 13, 1996

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 letters of May 29 and June 2 in which you raised a variety of questions concerning the government of the Town of Southold. Some aspects of the issues that you raised do not deal directly with the statutes within the scope of the Committee's jurisdiction. Consequently, the ensuing remarks will be restricted to issues pertaining to the Freedom of Information and Open Meetings Laws.

First, you raised questions concerning the status of committees under the Open Meetings Law, and you referred specifically to the Town's Ethics Committee. 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."

Several decisions indicate generally that advisory ad hoc entities, other than committees consisting solely of members of public bodies, having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v.

Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, an advisory body such as a citizens' advisory committee would not in my opinion be subject to the Open Meetings Law.

Nevertheless, if a committee consists solely of members of a public body, or if it is created pursuant to law, as in the case of an ethics committee, a planning board or a zoning board of appeals, for example, those kinds of entities in my view could clearly constitute public bodies required to comply with the Open Meetings Law.

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 committee or subcommittee consisting of members of an ethics board, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse

United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the board consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

While I believe that an ethics committee or ethics board is clearly covered by the Open Meetings Law, as you may be aware, a public body may in appropriate circumstances enter into an executive session. Section 105(1) of the Open Meetings Law specifies and limits the grounds for entry for entry into executive session.

Relevant to the duties of a board of ethics is §105(1)(f) of the Law, which permits a public body to enter into an executive session to discuss:

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

If the issue before a board of ethics involves a particular person in conjunction with one or more of the subjects listed in §105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, §105(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

I also point out that a public body cannot "meet" in 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, a procedure 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..."

With respect to the records maintained or acquired by an ethics board or committee, any such records would fall within the coverage of 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 likely in my view that two the grounds for denial would be particularly relevant with respect to records maintained by a board of ethics.

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. 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. 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.

There may also be privacy considerations concerning persons other than employees who may be subjects of a board's inquiries. For instance, I believe that the name of a complainant or witness could be withheld in appropriate circumstances as an unwarranted invasion of personal privacy.

The other provision of relevance, §87(2)(g), states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Records prepared in conjunction with an inquiry or investigation 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. Factual information would in my view be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

You also wrote that the Town Board frequently cites "personnel", without more, as its basis for conducting an executive session. 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.

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; 207 AD 2d 55 (1994)].

Lastly, you referred to a request for police officers' tours of duty. While it is not entirely clear which records you have sought, it would appear that the only significant potential basis for denial would be §87(2)(f). That provision states that an agency may withhold records or portions thereof to the extent that disclosure "would endanger the life or safety of any person". The proper assertion of that provision is in my view dependent upon attendant facts and circumstances. If, for example, a police department is small and a request is made regarding assignments or schedules to be carried out in the future, §87(2)(f) might be validly cited to withhold records. If it is known in advance that there will be police patrols in one part of a municipality but not another during a particular period, disclosure might enable potential lawbreakers to take advantage of the absence of a patrol, thereby endangering lives and safety. However, if a police department is large, and if a request does not involve the placement of officers but merely their presence during a shift, it is questionable in my view whether §87(2)(f) could properly be asserted. Further, if a request pertains to prior activity, i.e., how many officers were present during certain shifts last month or last week, it is difficult to envision how disclosure, after the fact, could endanger anyone's life or safety.

I point out that in a decision affirmed by the State's highest court dealing with attendance records maintained by an agency specifically those indicating the days and dates of sick leave claimed by a particular police officer, it was found that the records are accessible. In that case, the Appellate Division found that:

> "One of the most basic obligations 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)].

Based on the preceding commentary, I believe that attendance records pertaining to public employees must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Laury Dowd

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9524
OML-AO 2623

162 Washington Avenue, Albany, New York 12231
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June 13, 1996

Ms. Frances J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of May 29. Attached to your letter is a copy of an excerpt from the New York City Record stating that the Board of Trustees of the New York City Employees' Retirement System scheduled a meeting for May 28 at 9:30 a.m. at 220 Church Street. You wrote that, upon your arrival prior to the meeting, you were informed by the System's Executive Director, Mr. John Murphy, that you could not attend the meeting. Your request for an agenda was also refused. You have asked that I comment concerning "this alleged violation of the Open Meetings Law" and that I contact Mr. Murphy "so that he can send [you] a copy of the meeting's agenda as well as copies of any and all documents, etc. that were handed out at this meeting."

In this regard, I offer the following comments.

First, it is clear in my view that the Board of Trustees of the New York City Employees' Retirement System is a "public body" required to comply with the Open Meetings Law. Under that statute, §103, any member of the public has the right to attend an open meeting of a public body. The Law does not distinguish among those who enjoy such a right based upon residency, interest, or any other qualifier.

Second, every meeting must be convened open to the public. Following convening a meeting open to the public, a public body may in appropriate circumstances enter 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 §105(1) of the Law requires that a procedure be accomplished during an open meeting before an executive session may be held.

Based upon your commentary, it does not appear that any attempt was made by the Board to exclude you by entering into a valid executive session or that there would have been a reason, at the time of your exclusion, for prohibiting you from attending.

Third, I choose not to ask Mr. Murphy to send you copies of an agenda and materials distributed at the meeting. You may choose to request those records pursuant to the Freedom of Information Law. I note, too, that there is no requirement that records used at a meeting by a public body be made available to members of the public in attendance during the meeting. Moreover, there are many instances in which records used or considered by public bodies at meetings include information that may justifiably be withheld under the Freedom of Information Law. For instance, in the context of the duties of a pension system, it is likely that records or portions thereof might properly be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" when they include medical information, for example, or perhaps information relating to beneficiaries [see Freedom of Information Law, §87(2)(b)].

Copies of this opinion will be forwarded to Mr. Murphy and Mr. Reuben David.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Murphy
Reuben David

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2624

162 Washington Avenue, Albany, New York 12231
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June 14, 1996

Hon. Michael L. Brown
Alderman - 3rd Ward
[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 Alderman Brown:

I have received your letter of May 30 and the materials attached to it. You have requested an advisory opinion relating to the Open Meetings Law.

By way of background, your correspondence indicates that a procedure was developed for review of local applications for funding under the federal Community Development Block Grant program. One element of the process provides as follows:

> "Subsequent to Mayoral review but prior to formal submission to the Common Council, a joint appeals committee composed of DHCD senior staff and The Common Council Committee on Housing and Urban Development will review appeals and make recommendations to the Mayor for final disposition."

Based upon the foregoing, the Committee on Housing and Urban development is required to review appeals and make recommendations. You serve as a member of the Committee, and the issue involves a situation in which the Chair of the Committee notified members of the Committee of a meeting, but failed to notify you. According to a newspaper article concerning the matter, the Chair of the Committee "acknowledged that a key reason he did not notify his full panel of the meeting was to keep maverick 3rd Ward Alderman Michael Brown out."

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 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."

Based upon the language quoted above, it is clear that a committee of a public body, such as the Housing and Neighborhood Development Committee of the Common Council, is a "public body" required to comply with 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 majority 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 to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

It is also noted that 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)].

Third, viewing the matter from a somewhat different vantage point, also relevant in my view is §41 of the General Construction Law, which provides guidance concerning quorum and voting requirements. Specifically, the cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total

> number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members.

In the context of the situation described, even though a majority of the Committee might have been present, absent notice given to each member, there would not have been a quorum, and the Committee in my opinion would not have had the authority to carry out its duties.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Keith St. John

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2625

162 Washington Avenue, Albany, New York 12231
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June 14, 1996

Ms. Betty A. Loriz
[redacted]

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

Dear Ms. Loriz:

I have received your letter of June 1, as well as the materials attached to it. You referred to a "ruling" written by this office concerning executive sessions being "advertised before a meeting." You questioned whether the Liberty Central School District Board of Education has complied with the Open Meetings Law by providing a notice which is reported as follows in a local newspaper:

> "The Liberty Central School Board of Education will hold a regular meeting on Tuesday, May 28.
>
> "The board will meet in executive session, if necessary, at 5:30 p.m. in the Central Office Conference Room for the purpose of discussing: 1. continuing employment of a teacher; 2. superintendent's contract; 3. assistant superintendent's contract; 4. Liberty Faculty Association-District negotiations; 5. U.S. Department of Education-Office of Civil Rights.
>
> "The board will reconvene the regular meeting at 8:30 p.m. in the high school cafeteria."

In this regard, I offer the following comments.

First, the Committee on Open Government is not empowered to issue "rulings." The Committee is authorized, however, to render advisory opinions, and the communications that have been sent to you over the course of years by this office should be viewed as advisory.

Second, while you characterized the opinion prepared by this office as "bizarre", it was clearly intended to provide a means by which public bodies could technically comply with law while at the same time offering a measure of courtesy to members of the public. As you know, it has been advised, based upon the language of the Open Meetings Law, that a public body cannot schedule an executive session in advance of a meeting. In some instances, however, a public body can know that it will be considering a matter that may validly be discussed during an executive session. Situations have arisen in which a public body provides notice indicating that a meeting will begin at 5:00 p.m., for example. Immediately thereafter, the body might validly enter into executive session. Members of the public who chose to attend at the beginning of the meeting have been upset because they were legally excluded from the meeting soon after it had begun.

In order to avoid that kind of situation, it has been suggested that if it is known in advance that an executive session may validly be held, a public body might in its notice prior to the meeting indicate that a motion will be made immediately after convening to discuss the subject that may validly be considered during an executive session. Again, the purpose of that kind of notice is not to dissuade the public from attending; on the contrary, it is intended to enable the public to know that a public body intends to enter into an executive session at the beginning of its meeting.

The notice given by the Board of Education in my opinion is inconsistent with the thrust of the opinions rendered by this office on the subject. If the Board intends to meet at 5:30, I believe that its notice should so specify. As it is written, the notice suggests that the Board will meet at 5:30, "if necessary." Preferable in my view would be a notice indicating that a meeting will convene at 5:30 and that a motion will be made immediately after convening to enter into executive session to discuss certain permissible subjects.

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 2626

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June 14, 1996

Mr. Barry Loeb
[redacted]

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. Loeb:

I have received your letter of June 5 in which you sought clarification of §106 of the Open Meetings Law concerning minutes of meetings.

According to your letter, Mr. Gerard Terry, counsel to the Port Washington Police District, contended, in your words, that §106 "allows for minutes to be provided two weeks after approval by the commissioners and not two weeks after the meeting." I disagree with his interpretation.

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."

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerard Terry
Port Washington Police District Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2627

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June 17, 1996

Mr. C.B. Smith
[redacted]

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

Dear Mr. Smith:

I have received your letter of June 6 in which you sought my opinion concerning the applicability of the Open Meetings Law to a county jury board.

You referred to §18.02 of the Rensselaer County Charter which states that:

> "There shall be a County Jury Board constituted according to the State Judiciary Law. The County Jury Board shall appoint a Commissioner of Jurors, who shall have and exercise all powers and duties now or hereafter conferred or imposed upon him by applicable law."

The County's provision appears to be based on §503 of the Judiciary Law, which provides in relevant part that:

> "(a) There shall be established for each county a jury board composed as follows:
>
> 1. In counties outside cities having a population of one million or more, except in the counties of Albany, Westchester, Suffolk and Nassau, the county jury board shall consist of one justice of the supreme court residing in the county, or if there is no justice residing therein, a justice residing in the judicial district embracing the county to be designated by the appropriate appellate division, who shall act as chairman; the judge of the county court, or if there be more than

> one, then the senior county judge; and a member of the county legislature to be designated by the county legislature, provided that no such member of the county legislature shall be designated if he engages in the practice of law."

In this regard, while there is no judicial decision of which I am aware that pertains to the matter, it appears that a jury board would constitute a "public body" required to comply with the Open Meetings Law.

Section 102(2) of that statute defines the phrase "public body" to mean:

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

Based on §503 of the Judiciary Law, a jury board consists of three members, and based on other provisions of law (i.e., Judiciary Law, §504, Rensselaer County Charter, §18.02), a jury board conducts public business and performs a governmental function for a public corporation, a county. Moreover, pursuant to §41 of the General Construction Law, I believe that it could carry out its powers and duties only at a meeting during which a quorum of the board is present.

If indeed a jury board constitutes a "public body" as suggested in the preceding paragraph, it would be required to provide notice of its meetings pursuant to §104 of the Open Meetings Law and prepare minutes under §106. In addition, it would have the authority, after having convened an open meeting, to enter into executive session in accordance with §105.

I point out that §108(1) of the Open Meetings Law exempts judicial or quasi-judicial proceedings from the coverage of that statute. Insofar as the functions carried out by a county jury board could be characterized as judicial or quasi-judicial, the Open Meetings Law would not apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Jonathan Lippman, Chief Administrative Judge
Rensselaer County Jury Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2628

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June 17, 1996

Hon. Daniel W. Colangelo, Jr.
Hon. Peter J. Ciccone
Village of Port Chester
10 Pearl Street
Port Chester, NY 10573

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 Trustees Colangelo and Ciccone:

I have received your letter of June 5 in which you raised a series of questions concerning the application of the Open Meetings Law to political caucuses held jointly be the Port Chester Democratic and the Rye Town Conservative parties. To describe the caucuses, you referred to the following statement published in your local newspaper:

> "Every Tuesday morning at 8:30 p.m. beginning this week the Port Chester Democratic and Rye Town Conservative parties will caucus in the back of the Paris Express Cafe at 33 1/2 North Main St. That's according to party worker Chris Rocca. Since the meetings will include a majority of the Port Chester Board of Trustees - 5 out of 7 of whom are Democrat-Conservatives - and potentially the entire Rye Town Board - all Democrats - he informed the media, Rocca said there were differing legal opinions on whether this was necessary.
>
> "While we trust no votes will be taken at these meetings, you can be sure strategy will be planned and ideas will be tossed around that will come up at future village board meetings. If you're interested in being in on the latest political brainstorming which will hopefully produce some concrete ideas of how to turn the village around, Paris Express is the place to be on Tuesday mornings. See you there!"

As I understand the nature of the gatherings in question, it appears that the Open Meetings Law would not apply. The caucuses apparently will not involve only members of public bodies, such as the Port Chester Village Board of Trustees and the Rye Town Board, but other political party members as well, in addition to any member of the public who wishes to attend.

I note that the Open Meetings Law pertains to meetings of public bodies. In situations in which a majority of a public body is present as part of a larger group and the members do not conduct public business collectively, as a body [see definition of "meeting", Open Meetings Law, §102(1)], the Open Meetings Law does not apply. For example, often at presentations that I have given before large groups, there may be a majority of one or more public bodies within the audience. Because the members of those bodies are not present for the purpose of conducting public business, as a body, but rather as part of a larger group, the Open Meetings Law would, in my view, be inapplicable. Similarly, if the gatherings in question involve a large number of people, some of whom are members of the Board of Trustees or the Town Board, the presence of a majority of those Boards, including yourselves, would not in my opinion constitute "meetings" subject to the Open Meetings Law, assuming that neither of the Boards seeks to conduct public business, as a body, at those gatherings.

I point out that §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 political caucuses outside of the coverage of the Open Meetings Law.

If, however, there is an intent to conduct public business on the part of the Village Board, and you attend for the purpose of deliberating with other Board members, and together you constitute

a majority, I believe that the Open Meetings Law would apply. Similarly, if a majority of the Rye Town Board gathers to conduct public business as a body, any such gathering would, according to case law, constitute a "meeting" subject to the Open Meetings Law, notwithstanding §108(2) of the Law. It has been held that when a legislative body consists entirely of members of one political party, the exemption from the Open Meetings Law regarding political caucuses does not apply when the members seek to conduct public business in their capacities as members of the legislative body [see Buffalo News v. Buffalo Common Council, 585 NYS 2d 275 (1992)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9535
OML-AO 2629

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 17, 1996

Ms. Patricia Villanova
[redacted]

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. Villanova:

I have received your letter of June 6 in which you raised questions involving both the Freedom of Information Law and the Open Meetings Law.

With respect to the former, you asked initially who is responsible for preparing minutes of an executive session, and in a related vein, whether a town clerk must be present "in case minutes are taken."

In this regard, while the Open Meetings Law does not specify who must prepare minutes, in the case of a meeting of a town board, §30 of the Town Law states in relevant part that the town clerk:

> "Shall have the custody of all the records, books and papers of the town. He shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..."

Based upon the foregoing, the town clerk in my opinion has the responsibility to take minutes at a town board meeting.

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. As such, a "work session" or similar gathering is a meeting subject to the Open Meetings Law in all respects.

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, technically I do not believe that minutes must be prepared.

Although the Town Law requires that the clerk be present at each meeting of the town board for the purpose of taking minutes, it might not be reasonable to construe §30(1) to require the presence of a clerk at a meeting during which there are no motions, proposals, resolutions or votes taken. Section 30 of the Town Law was enacted long before the Open Meetings Law went into effect. Consequently, the drafters of §30 could not likely have envisioned

the existence of an extensive Open Meetings Law analogous to the statute now in effect. I believe that §30 was likely intended to require the presence of a clerk to take minutes in situations in which motions and resolutions are introduced and in which votes are taken. If those actions clearly will not occur during a workshop, it is in my view unnecessary that a town clerk be present to take minutes.

With regard to minutes of executive sessions, §105(2) of the Open Meetings Law provides that only the members of a public body have the right to attend executive sessions, but that a public body may authorize others (i.e., a town clerk) to attend. In order to resolve what may be a conflict between §105(2) of the Open Meetings Law and §30 of the Town Law requiring that a town clerk prepare minutes, three options have been suggested. First, a town board could authorize the clerk to be present during the entirety of an executive session. Second, the board could deliberate in private and invite the clerk to enter the executive session when it is about to take action so that the clerk can then be present to prepare minutes. Or third, the town board could deliberate in private and return to an open meeting for the purpose of taking action, at which time the clerk could take minutes.

A second issue involved a request for minutes of a "budget meeting." You were informed by the clerk that minutes do not exist, for she was told by the board that her services were not required "as they were going to make any notations necessary on their budget copies." You wrote, however, that you were informed by a board member that a "vote or consensus was taken to purchase new police cars."

As I understand the budget process, public bodies often meet several times to review proposals for the purpose of reaching consensus with regard to any number of items. Typically no "vote" is taken until the process of developing a preliminary budget has been completed. If the consensus to which you referred was one among many areas of tentative agreement prior to the adoption of a preliminary budget, I do not believe that minutes would have been required.

I note that in the leading decision dealing with the notion of a consensus reached at a meeting of a public body, Previdi v. Hirsch [524 NYS 2d 643 (1988)], 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, when a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted.

In contrast, if a "straw vote" or consensus does not represent a final action or final determination of the board, I do not believe that minutes including the votes of the members would be required to be prepared.

Lastly, you referred to a report presented to the Putnam Valley Town Board by the Putnam Valley P.B.A. containing crime statistics prepared by the Police Department covering a five year period. When you requested a copy of the report, the request was denied "on the basis that the report is the property of the P.B.A. which is a private corporation and not subject to FOIL."

In my view, the question is whether the Town has possession of the report. If it does, I believe that the report would be available to the public.

The Freedom of Information Law pertains to agency records, and §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."

Based on the foregoing, if the report is in possession of the Town, irrespective of its authorship, it would constitute a Town 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. None of the grounds for denial could justifiably be asserted in my opinion to withhold such a report assuming that it is maintained by the Town.

On the other hand, if the report was merely read or referenced at a meeting, and if the Town does not maintain the report or a copy thereof, the Freedom of Information Law would not be applicable.

I hope that I have been of 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 2630

162 Washington Avenue, Albany, New York 12231
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June 18, 1996

Ms. Frances J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of June 7 in which you raised questions concerning the Open Meetings Law in relation to a meeting of the Board of Trustees of the New York City Teachers' Retirement System. In short, you were informed by the System's executive director that you could not stay at the meeting because the Board would be going into executive session.

You have asked how he could have known that the Board would enter into an executive before the meeting started, whether there should have been an agenda, and whether it is necessary "to take minutes at any and all meetings that are held in executive session."

In this regard, I offer the following comments.

First, as you may be aware, the Open Meetings Law requires that a procedure be accomplished during an open meeting before a public body may enter into an executive session. 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. Technically, however, I do not believe that a public body can know that an executive session will be held, for it cannot be known that a motion to enter into an executive session will indeed be carried. For those reasons, it has been advised that a public body cannot schedule an executive session but may in its notice indicate that a motion to enter into executive session may be made to discuss a certain topic. It is possible, for example, particularly in view of the functions of the Board of Trustees, that matters dealing with the employment or medical histories of specific individuals would be discussed at the meeting. In that kind of situation, there would likely be a certainty that a motion to enter into an executive session would be made and carried.

Second, the Open Meetings Law is silent with respect to the preparation of agendas, and I know of no law that specifies that agendas must be prepared or followed.

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

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

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

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

Based on the foregoing, when a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. It is noted, however, that if a public body merely discusses an issue or issues during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Donald Miller, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2631

162 Washington Avenue, Albany, New York 12231
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June 18, 1996

Mr. Lawrence E. Becker
Becker & Becker
P.O. Box 575
Albany, NY 12201-0575

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 June 12 in which you indicated that you represent the Midwives Alliance of New York (MANY), as well as the attached complaint addressed to me by that organization. The complaint pertains to alleged violations of the Open Meetings Law by the New York State Board of Midwifery.

MANY's allegations are as follows:

> "1. On the morning of May 23, 1996, the Board of Midwifery (BOM) went into executive session without first publicly discussing their reasons for so doing. Also, no motion was made from the floor and no vote was taken, as required by law.
>
> 2. MANY was later informed by a member of NY Friends of Midwives (NYFOM) that during that executive session, the Board discussed the subject of whether or not to continue to allow public participation on Board subcommittees. Also, the Board apparently decided to prohibit such participation in the future. The aforementioned representative of NYFOM was informed of the Board's actions by the executive secretary of the Board of Midwifery on May 24.
>
> 3. Minutes of the May 23 BOM meeting distributed at the following June 10 meeting contained no specific mention, as required by law, of the aforementioned 5/23/96 executive session discussions and decisions regarding the subject of public participation on BOM

subcommittees."

In this regard, I offer the following comments.

First, if indeed the Board conducted an executive session that was not preceded by motion to do so, I believe that it would have failed to comply with the Open Meetings Law. Section 102(2) of that statute defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Therefore, an executive session is not separate from a meeting; rather, it is a part of a 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, provided, however, that no action by form vote shall be taken to appropriate public moneys..."

The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Consequently, a public body cannot conduct an executive session to discuss the subject of its choice.

Second, the extent to which the Board could properly have conducted an executive session to discuss public participation on Board committees would in my opinion have been dependent upon the specific nature of its discussion. It would appear that the only potentially relevant ground for entry into executive session would have been §105(1)(f). That provision permits a public body to conduct an executive session to discuss:

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

Based upon the language quoted above, insofar as the Board discussed particular individuals and whether those persons should be permitted to participate on subcommittees, I believe that the executive session was properly held. However, insofar as the discussion involved a matter of policy, i.e., whether there should be public participation on Board subcommittees, there would have been no basis in my view for conducting an executive session.

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

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

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

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

Based on the foregoing, when a public body takes action during an executive session, minutes indicating 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. In this instance, based on your description of the facts, action was taken to prohibit public participation on Board subcommittees. If that is so, minutes reflective of the nature of the action taken and the vote of each member must in my opinion be included in minutes of the meeting.

I point out 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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Midwifery

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2632

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 18, 1996

Mr. Rick Steul
[redacted]

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. Steul:

I have received your letter of June 10. You referred to a situation in which you "walked into a private meeting with 4 of 5 Town of Onondaga Board members." You questioned the status of such a gathering under the Open Meetings Law and complained with respect to the Town's accountability.

In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and

> shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

Third, I point out that every meeting must be convened as an open meeting, and that section 102 (3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, section 105(1) states in relevant part that:

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

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

Enclosed of your review are copies of the Open Meetings Law and "Your Right to Know", which describes the provisions of that statute and the Freedom of Information Law.

I hope that I have been of 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-2633

162 Washington Avenue, Albany, New York 12231
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July 12, 1996

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:

As you are aware, I have received your letter of June 18. Please accept my apologies for the delay in response.

In your capacity as a member of the Planning Board of the Town of Clarence, you indicated that questions have arisen regarding its status under the Open Meetings Law because the Board is apparently advisory in nature.

In this regard, I offer the following comments.

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

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

It is noted that 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)].

Notwithstanding the foregoing, a planning board, irrespective of its authority, is not ad hoc, for it has a continual existence and performs a variety of functions on an ongoing basis (see Town Law, §271 et seq.). Moreover, it has been held that an advisory body created by statute, which is so in the case of every planning board, is a public body subject to the Open Meetings Law [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977)].

I hope that the foregoing will serve to enhance compliance with the Open Meetings Law, for it is clear in my view that a planning board is required to comply with that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2634

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 15, 1996

Mr. Alton Beideck
[redacted]

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. Beideck:

As you are aware, I have received your letter, which reached this office on June 25. Please accept my apologies for the delay in response.

You have asked whether certain items described on the agenda of a meeting of the Saranac Lake Central School District Board of Education were proper subjects for consideration in executive session. With one exception, the language marked on the agenda represents a ground for entry into executive session appearing in the Open Meetings Law. However, the materials that you sent do not indicate how specific motions to enter into executive session might have been. Therefore, to provide you with additional information on the matter, I offer the following comments.

It is noted at the outset that the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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 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].

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Saranac Central School District."

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.

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; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my

opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

With respect to "collective negotiations", §105(1)(e) permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, §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].

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the teachers union."

Matters relating to grievances may or may not, depending on the nature of a grievance, properly be considered during an executive session. Some grievances might involve matters pertaining to policies that affect personnel generally. In those situations, it would be unlikely in my view that an executive session could justifiably be held. Others might involve specific employees, and in those cases, where an issue pertains to a particular person in conjunction with the subjects described in §105(1)(f), I believe that an executive session may be appropriately held.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2635

162 Washington Avenue, Albany, New York 12231
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July 22, 1996

Mr. Ed Robinson
[redacted]

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. Robinson:

I have received your letters of July 2,3 and 5. You have raised questions concerning the obligation of a village board of trustees to provide notice of its meetings, as well as the right of the public to speak at meetings.

In this regard, I offer the following comments.

First, the Open Meetings Law specifies that a public body is not required to pay to advertise a meeting or place a legal notice in relation to a meeting. However, that statute requires that notice of the time and place of every meeting be given to the news media. Specifically, §104 of the Open Meetings Law provides that:

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place 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 note that while the Law requires that a public body give notice to the news media, there is no requirement imposed on the news media to print the notice or otherwise publicize a meeting. Further, if a news media outlet chooses to print a notice or publicize a meeting, the Open Meetings Law does not specify when the notice must be printed or publicized.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Liverpool

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2637

162 Washington Avenue, Albany, New York 12231
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July 24, 1996

Ms. Sarah J. Nicholas
[redacted]

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. Nicholas:

I have received your letter of July 10 pertaining to the implementation of the Open Meetings Law by the Long Beach City Council.

According to your letter, the Council meets on the first and third Tuesdays of each month, and the public can attend those meetings. You indicated that "there is never any discussion or debate between the members on the issues", and that "items on the agenda are almost always unanimously approved by the Council and these meetings seem to be just a formality." You noted further that the Council meets "between these regularly scheduled meetings", and it is your belief that "this has been the practice for years." To bolster your statement, you referred to a comment by the Council President during a meeting in which he told a resident that the Council "would have meetings all week in regard to the Long Beach Incinerator issue." You wrote that the public was not permitted to attend those meetings. Similarly, when the Council President said during a radio talk show that the Council would be meeting the following night, you called the program to ask whether the public could attend, and the President said that the Open Meetings Law did not apply because it was a "policy meeting."

It is your view that the public has the right to attend the meetings to which you referred. I agree with your contention, and 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

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

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

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

Lastly, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be held. Section 102(3) of the Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Therefore, an executive session is not separate and distinct from a meeting. Moreover, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during executive sessions. Consequently, a public body cannot conduct an executive session to discuss the subject of its choice.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edmund Buscemi, Council President
City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9590
OML-AO-2638

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July 24, 1996

Ms. Nina Kim
Syracuse Herald-Journal
Clinton Square
P.O. Box 4915
Syracuse, NY 13221-4915

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

Dear Ms. Kim:

I have received your letter of July 2, which, for reasons unknown, did not reach this office until July 15.

According to your letter, in brief, the Board of Trustees of the Village of Solvay held an executive session in March to discuss hiring a consulting attorney to deal with labor negotiations. At a meeting held in May, some members of the Board contended that a consensus was reached at the March executive session not to retain the attorney. However, the Mayor apparently decided to hire him and said at a recent meeting that "an 'informal poll' was taken during the meeting and it was not necessary to take a vote in public even though the use of his services would involve village money." You wrote that the Mayor indicated that the Village Attorney advised that no public vote was necessary because retaining the attorney in question "would not change the overall legal budget of the village."

It is your view that if action is taken during an executive session, minutes must be prepared, that a voting record must be compiled that indicates how each member voted, and that "a vote by a board to hire a new person should be taken in public." I am in general agreement with your contentions. In this regard, I offer the following comments.

First, in a decision dealing specifically with the notion of a consensus reached at a meeting of a public body, [Previdi v. Hirsch, 524 NYS 2d 643 (1988)], 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 situation that you described, when the Board reached a "consensus" that was reflective of its final determination of an issue, I believe that minutes were required to have been prepared indicating the manner in which each member voted. 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 must reflect the actual votes of the members.

Second, when action is taken by a public body, any such action must be memorialized in minutes. Section 106 of the Open Meetings Law provides that:

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

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

Subdivision (2) of §106 requires that minutes of an executive session must be prepared when action is taken during the executive session. In this instance, if indeed action was taken to retain an attorney, any such minutes would in my view clearly be accessible under the Freedom of Information Law. Further, subdivision (3) requires that minutes of executive session must be prepared and made available within one week of the executive session.

Third, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although that statute 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 and the Open Meetings Law require "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987), aff'd 72 NY 2d 1034 (1988)].

To comply with law, I believe that a record must be prepared and maintained indicating how each member casts his or her vote. From my perspective, disclosure of the record of votes of members of public bodies, such as the Village Board of Trustees 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 appears in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

Lastly, with respect to a vote to expend public money, the introductory language of §105(1) of the Open Meetings Law states that:

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

however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the final clause of the provision quoted above, a public body may generally vote during a proper executive session; however, any vote to appropriate public monies must be taken during an open meeting. As such, there may be situations in which a discussion may be conducted during an executive session, but where a public body may be required to return to an open meeting to vote to appropriate public monies in relation to the subject previously considered behind closed doors. If the action involves an allocation or expenditure of funds that have previously been appropriated, such an action could, in my opinion, be taken during a proper executive session, for it would not involve an appropriation or an expenditure that had not been budgeted. In the context of the situation that you described, if the action involved an allocation of funds previously budgeted, I believe that the action could have been taken during an executive session, for it would not have involved an appropriation. On the other hand, if the decision involved moneys that had not been budgeted, action by the Board, in my opinion, should have been taken in public.

As you requested, and in an effort to enhance compliance with and understanding of open government laws, copies of this opinion and "Your Right to Know" will be forwarded to the Village officials that you identified.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Mario DeSantis
Hon. Leonard Costantini
Hon. William DeSpirito
Hon. Kathleen Marinelli
Hon. Anthony Modafferi
Hon. Joseph Possi
Hon. Arthur Santos
Hon. Phyllis DeFlorio
Thomas Lynch, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9596
OML-AO-2639

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July 25, 1996

Mr. Robert L. Pardy
[redacted]

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. Pardy:

I have received your letter of July 10 in which you raised questions concerning both access to records and the propriety of executive sessions.

You wrote that the Board of Commissioners of the Highland Fire District appoints the chief and assistant chief, and that District regulations require the completion of certain courses in order to hold those positions. When you asked to see records in order to ascertain whether the incumbents of those positions met the necessary criteria, "with any confidential information blocked out...such as SS#", your request was refused "on the claim they were personal or personnel records." It is your view that the denial of access was inappropriate. The other issue involves executive sessions held to discuss "personnel", and you contend that the Board "should be more specific.

I concur with your contentions. In this regard, I offer the following comments.

It is noted initially that the Freedom of Information Law, in brief, 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 point out that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, 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 concerning personnel records 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, 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 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).

With respect to the qualifications of employees, if, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications as a condition precedent to serving in a particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that records contain information pertaining to the requirements that must have been met to hold a position, they should be disclosed. Again, I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion of personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Concurrently, however, information included in a document that is irrelevant to criteria required for holding the position, such as marital status, hobbies, home address, social security number and the like, could in my opinion be deleted prior to disclosure of the remainder of the record to protect against an unwarranted invasion of personal privacy.

Like the Freedom of Information Law, the Open Meetings Law makes no specific reference to "personnel", and that term does not appear in the statute. While some personnel-related issues may clearly be considered during executive sessions, others clearly may not. Characterizing an issue as a "personnel matter" without additional description would be inconsistent with the direction provided in judicial interpretations of the Open Meetings Law.

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

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

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

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.

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; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, a copy of this opinion will be forwarded to the Board of Commissioners.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2640

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

July 26, 1996

Mr. Benjamin Osdoby
[redacted]

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.

Mr. Benjamin Osdoby:

I have received your letter of July 18. In brief, after setting up your recording devices to be used at a meeting of the Board of Trustees of the Village of Woodridge, the Mayor told you "to remove the camera and microphone from the room as he would not start the meeting until [you] complied." Despite your objections, you wrote that the Mayor "reiterated that he would not permit any recording device at any of the meetings while he is Mayor." You have asked for a "decision" on the matter.

In this regard, the Committee on Open Government is authorized to render advisory opinions. It is not empowered to render a "decision" that is binding. Nevertheless, it is my hope that the opinions issued by this office are educational and persuasive. In this instance, based on judicial decisions, the most pertinent of which relied upon opinions prepared by this office, I do not believe that a public body has the authority to generally prohibit the use of recording devices. In this regard, I offer the following comments.

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).

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to the Mayor and the Board of Trustees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Nat Kagan, Mayor
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2641

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 29, 1996

Mrs. Patricia E. Newberry
[redacted]

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. Newberry:

I have received your letter of July 19. According to your letter, you and thirty others were excluded from a meeting of the Town Board of the Town of Mentz held on July 16. During that meeting, the Town Supervisor, pursuant to §24 of the Executive Law, called a "State of Emergency" and issued an executive order, which states in part that:

> WHEREAS, The Chief Executive Officer hereby pursuant to said Executive Law §24, does hereby in accordance with the said provisions of said law does direct that any and all citizens who come to the said Town Municipal Building and who cannot by virtue of the seating and occupancy capacity will not be able to remain.
>
> "THEREFORE BE IT RESOLVED, that it will be directed that no crowd of more than five individuals be allowed to gather and remain on said Town Property outside the Municipal Building area Board and that it is hereby directed that said individuals leave said property by the Sheriff, Town Constable or the Chief Executive Officer immediately."

You have sought my views concerning the matter. In this regard, I offer the following comments.

First, having been associated with the Committee on Open Government since its inception and since the enactment of the Open

Meetings Law, I do not recall any situation in which a state of emergency has been declared in relation to a meeting of a public body. Similarly, there is no situation of which I am aware in which a municipal official has issued an executive order calling a state of emergency in relation to the implementation of the Open Meetings Law. From my perspective, in view of the intent of the Open Meetings Law, the nature of the executive order, and the absence of any indication of a true or verifiable emergency or threat to the public or its safety, the validity of the order is questionable.

Although the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

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

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

I note, too, that the Open Meetings Law is silent with respect to the issue of public participation or the use of placards, posters, banners and the like. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a

public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. In my view, the issue in this instance involves the reasonableness of the executive order, the size of Town Hall and the extent to which disruption occurs at meetings. In a decision rendered in 1963 concerning the use of tape recorders, it was found that the presence of a tape recorder, which then was a large and obtrusive device, would detract from the deliberative process and that, therefore, a policy prohibiting its use was reasonable [Davidson v. Common Council, 40 Misc.2d 1053]. However, when changes in technology enabled the public to use portable, hand-held tape recorders, it was found that their use would not detract from the deliberative process, because those devices were unobtrusive. Consequently, it was also found that rules adopted by public bodies prohibiting their use were unreasonable [People v. Ystueta, 99 Misc.2d 1105 (1979); Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985). Specifically, in Mitchell, it was held that:

> "While Education Law §1709(1) authorizes a board of Education to adopt by laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned."

The Town Law, §63, provides similar direction, and I believe that the Board could clearly adopt rules to prevent verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs. Whether the Board could, however, prohibit the public from attending a meeting or from being present on Town property, absent a real threat to public safety, is of doubtful validity in my opinion.

As you requested, copies of this response will be forwarded to the persons identified in your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Robert Warrick
Ronald Wilson
Richard Neilens
Thomas Guidone
Mrs. Bowen, Town Clerk
Hon. William L. Jones, Town Supervisor
Mr. Charles Itzen
Mr. David Shaw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2043

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 29, 1996

Mr. Paul J. Schafer
BOCES 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 Mr. Schafer:

I have received your letter of July 16. In your capacity as a member of the Board of the Cattaraugus-Allegany BOCES, you questioned the status of an "Annual Board Planning/In-Service Retreat" under the Open Meetings Law.

In this regard, §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, i.e., discussions of Board goals or policies, 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 purpose of conducting public business, collectively, as a body, but rather for the purpose of gaining education and training, I do not believe that the Open Meetings Law would be applicable.

In short, if the retreat is held solely for the purpose of educating and training Board members, and if the members do not

conduct Board business collectively as a body, the activities occurring during that event would not in my view constitute a meeting of a public body subject to the Open Meetings Law.

I point out that similar questions have arisen at workshops and seminars during which I have spoken and which were attended by many, including perhaps a majority of the membership of several public bodies. Some of those persons have asked whether their presence at those gatherings fell within the scope of the Open Meetings Law. In brief, I have responded that, since the members of those entities did not attend for the purpose of conducting public business as a body, the Open Meetings Law, in my opinion, did not apply. It would appear, based on the agenda that you enclosed, that the same conclusion could be reached with respect to the matter that you described.

I hope that 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 9626
OML-AO 2643

162 Washington Avenue, Albany, New York 12231
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August 7, 1996

Mr. James W. Harris
[redacted]

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. Harris:

As you are aware, I have received your letter of August 2. You indicated that in response to a request for minutes and other records concerning its deliberations, you were informed by the Board of Assessment Review of the Town of Clifton Park that it is not subject to the Freedom of Information Law. You have questioned the validity of that assertion.

From my perspective, a board of assessment review clearly falls within the coverage of the Freedom of Information Law. In this regard, I offer the following comments.

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

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

Since the entity in question is a municipal board that performs a governmental function for a town, I believe that it clearly constitutes an "agency" that falls within the scope of the Freedom of Information Law.

Second, for purposes of the Freedom of Information Law, the term "record" [§86(4)] is defined to include:

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

Based on the foregoing, any materials maintained by the Board would constitute "records" subject to rights of access.

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 most instances, records submitted by a grievant must be disclosed, for none of the grounds for denial would apply. With respect to records prepared by the Board or other Town officials, of possible significance is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. Specifically, §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.

Lastly, I believe that a board of assessment review is also a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

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

Further, since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

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

In my opinion, because an assessment board of review is a "public body" and an "agency", it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of votes in conjunction with §87(3)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2644

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 7, 1996

Hon. Howard Golden, Borough President
Borough Hall
209 Joralemon Street
Brooklyn, NY 11201

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 Borough President Golden:

I have received your letter of July 22 in which you requested an advisory opinion concerning the status of the Fresh Kills Landfill Closure Task Force (the "Task Force") under the Open Meetings Law.

Your letter and the materials attached to it indicate that Governor Pataki and Mayor Giuliani recently reached an agreement to close the Fresh Kills landfill in Staten Island by the end of 2001, nine years ahead of schedule. In an effort to develop a plan for closure of the landfill, the Governor and the Mayor appointed a joint task force, according to a news release issued by the Executive Chamber, "to develop a plan for closing Fresh Kills and recommend alternatives for disposal." The release states that the Task Force will include representatives from the staffs of the Governor and the Mayor, New York State and New York City agencies, the Borough President of Staten Island, Congresswoman Susan Molinari, the federal Environmental Protection Agency, and from an environmental group.

You have contended that the Task Force "should be subject to the Open Meetings Law." From my perspective, based on the judicial interpretation of that statute and my understanding of its functions, the Task Force appears to be beyond the coverage of the Open Meetings Law.

As you are aware, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body.

I have been informed that the Task Force, which has not met as of this date, will not operate pursuant to any quorum requirement, has only the capacity to offer recommendations to the Governor and the Mayor, and will not function as a body, i.e., in a manner similar to a city council, or a typical board or commission. On the contrary, the Task Force appears to have been created to carry out functions typical of the exercise of executive authority. Although the majority of the Task Force consists of specified government officials or their representatives, not all of the members or their staffs will participate in every aspect of Task Force business; rather, participation will occur as needed, based upon programmatic and functional considerations, as well as agencies' areas of expertise.

Somewhat analogous are entities with which you are familiar, district service cabinets. Those entities were created by §2705 of the New York City Charter. While that provision states that certain officials serve as members of the cabinet, other members 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 appropriately 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 dependent upon the nature of the issues that might arise in a community. In consideration of those factors, because a district service cabinet does not have a specific membership, nor would those in attendance at a given meeting function collectively as a body, it has been advised that a district service cabinet does not constitute a "public body" subject to the Open Meetings Law.

Several judicial decisions indicate generally that advisory ad hoc entities having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspaper 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)]. Perhaps most closely related to the matter is the decision rendered in Poughkeepsie Newspaper, supra. In that case, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law...(id.).

In sum, for the reasons expressed in the preceding commentary, the Task Force, in my opinion, does not constitute a public body and, therefore, is not required to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3645

162 Washington Avenue, Albany, New York 12231
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August 8, 1996

Ms. Marie Villari, President
Citizens for Education
[redacted]

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. Villari:

I have received your recent letter prepared in your capacity as President of Citizens for Education. You have raised a series of issues concerning the implementation of the Open Meetings by the Canastota School District Board of Education. Based on your description of events, I offer the following comments.

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

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process. Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. Therefore, 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.

I point that the Open Meetings 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. In a decision rendered in 1963 concerning the use of tape recorders, it was found that the presence of a tape recorder, which then was a large and obtrusive device, would detract from the deliberative process and that, therefore, a policy prohibiting its use was reasonable [Davidson v. Common Council, 40 Misc.2d 1053]. However, when changes in technology enabled the public to use portable, hand-held tape recorders, it was found that their use would not detract from the deliberative process, because those devices were unobtrusive. Consequently, it was also found that rules adopted by public bodies prohibiting their use were unreasonable [People v. Ystueta, 99 Misc.2d 1105 (1979); Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985). Specifically, in Mitchell, it was held that:

> "While Education Law §1709(1) authorizes a board of Education to adopt by laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned."

In my opinion, the Board could adopt rules to prevent verbal interruptions, shouting or other outbursts. Whether the Board could, however, prohibit the public from attending a meeting or remove itself from public view absent a real threat to public safety, is of doubtful legality in my opinion.

The Open Meetings Law is based on a presumption of openness, and 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.

Considering your commentary from a different vantage point, potentially relevant in my view is §41 of the General Construction

Law which provides guidance concerning quorum and voting requirements. Specifically, the cited provision states that:

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

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members.

Lastly, a public body cannot enter into executive session to discuss the subject of its choice, and minimal descriptions of the subjects to be considered in executive session, such as "litigation", "personnel", or "contractual matters", are inadequate to comply with law.

As you may be aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. I note, too, that the phrase "executive session" id defined in §102(3) of the Law to mean a portion of an open meeting during which the public may be excluded. 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.

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 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].

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the School District."

Although it is used frequently, the word "personnel" does not appear in the Open Meetings Law and the language of the so-called "personnel" exception, §105(1)(f), 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.

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; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Similarly, with respect to "contractual matters", the only ground for entry into executive session that directly refers to those matters 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].

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the teachers union."

While I appreciate your kind invitation to visit your community, I was unable to do so at the time to which you referred. However, I will be speaking at a public forum on the Open Meetings and Freedom of Information Laws sponsored by a local newspaper in Madison County on October 9. To obtain additional details, you might contact Maria Forastiero at 635-3921.

Enclosed is a copy of "Your Right to Know", which describes both the Freedom of Information and Open Meetings Laws. If you would like more copies, please feel free to contact me. In addition, in an effort to enhance compliance with and understanding

of the Open Meetings Law, a copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2646

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

August 9, 1996

Mr. Peter W. Sluys
Community Media, Inc.
25 W. Central Avenue, Box 93
Pearl River, NY 10965

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

Dear Mr. Sluys:

I have received your letter of August 8. You indicated that the Rockland County Commissioners of Elections "are unsure whether the filing of rulings and the hearings that precede them fall under the Open Meetings Law."

In this regard, in good faith, I must admit to an absence of expertise concerning the means by which county boards of elections carry out their duties. It appears that you are referring to proceedings conducted in relation to objections to nominations and designations filed pursuant to §6-154 of the Election Law. Based on that assumption, I offer the following comments.

First, the Open Meetings Law pertains 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."

Based on the terms of the definition, as well as §3-200 of the Election Law, I believe that a county board of elections constitutes a "public body" subject to the Open Meetings Law.

Second, as a general matter, meetings of public bodies must be conducted open to the public. However, there are two vehicles

under which a meeting may be closed. One involves executive sessions. Section 102(3) of the Open Meetings Law defines the term "executive session" to mean a portion of an open meeting during which the public may be excluded. Section 105(1) prescribes a procedure that must be accomplished in public before an executive session may be held, and it specifies and limits the subjects that may properly be considered in an executive session. From my perspective, it is unlikely that any of the grounds for entry into executive session would be applicable. The other vehicle involves "exemptions" from the Open Meetings Law; if an exemption applies, the Open Meetings Law does not.

Potentially relevant to the matter is §108(1), which exempts "judicial or quasi-judicial proceedings" from the coverage of the Open Meetings Law. Often it is questionable where the line of demarcation may be drawn between what might be characterized as quasi-judicial and administrative or perhaps quasi-legislative kinds of functions. In a decision rendered by Judge Cooke, who later served as Chief Judge of the Court of Appeals, it was found that:

> "It is difficult at times to distinguish judicial acts from those which are merely legislative, executive or administrative and that act of an administrative or ministerial officer does not become judicial and therefore subject to review by certiorari merely because it is necessary to use discretion and judgement its performance...The test may be stated to be that action is judicial or quasi-judicial when, and only when, the body or officer is authorized and required to take evidence and all the parties interested are entitled to notice and a hearing and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only where there is an opportunity to be heard, evidence presented and a decision had thereon...Here, there is nothing in the laws in question directing or authorizing the Superintendent of Public Works to conduct such a hearing or to give the parties interested an opportunity to be heard, nor is there any allegation in the petition that such a hearing was conducted, and the determinations of Superintendent would not be judicial or quasi-judicial in nature" [City of Albany v. McMorran, 230 NYS 2d 434, 436-437 (1962); see also Schettino v. Alter, 510 NYS 2d 806, 809 (1986)].

While hearings or oral arguments, for example, as well as administrative matters must be conducted in public, following those public proceedings, it would appear that a board's deliberations

might be quasi-judicial in nature if they include the ingredients described above and, therefore, outside the coverage of the Open Meetings Law. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, although a board of elections might deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during an open a meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Elections

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2647

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

August 21, 1996

Hon. Marianne R. Piscitelli
Village Clerk
Village of Seneca Falls
P.O. Box 108
Seneca Falls, NY 13148-0108

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. Piscitelli:

I have received your letter of August 15 in which you sought clarification with respect to a variety of issues pertaining to the Open Meetings Law.

The initial area of inquiry concerns the application of the Open Meetings Law to a subcommittee of the Board of Trustees or other Village commission consisting of less than a quorum of the Board or commission. In this regard, 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, even if a member of the Board of Education or the administration participates.

However, when a committee consists solely of members of a public body, such as a board of trustees or a municipal commission, I believe that the Open Meetings Law is applicable.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a board of trustees or a commission, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the

Board of Trustees consists of seven, its quorum would be four; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

You also asked whether the Open Meetings Law applies when the Mayor meets with department heads and invites one trustee to the meeting. In my view, that kind of gathering would not constitute a "meeting" for purposes of the Open Meetings Law, for no quorum of a public body would be present.

Another issue involves the conduct of executive sessions and the information needed to be included in motions to enter into executive sessions. 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.

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 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].

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Village of Seneca Falls."

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 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 at least one of the topics listed in §105(1)(f) is considered.

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; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Similarly, with respect to "contract negotiations", the only ground for entry into executive session that mentions that term is §105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public

employee unions. As such, §105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union.

In terms of a motion to enter into an executive session held pursuant to §105(1)(e), it has been held that:

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

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the police union."

Lastly, enclosed is the supplement to the Committee's most recent annual report. It includes appendices to written advisory opinions that are available through this office, as well as summaries and citations of judicial decisions rendered under the Freedom of Information and Open Meetings Laws. In addition, I frequently conduct training sessions and public forums on open government laws, and a videotape is available for loan that includes presentations of approximately a half hour on each of the two statutes. If you are interested in the videotape or a presentation in Seneca Falls, please feel free to contact me.

I hope 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

FOIL-AO-3648

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

August 23, 1996

Ms. Grace Bodine
[redacted]

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. Bodine:

I have received your letter of August 12, as well as the correspondence attached to it. The materials involve the propriety of a meeting held by the Barker Central School District without notice.

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 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 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 the Board gathers to conduct public business, any such gathering would, in my opinion, constitute a "meeting" subject to the Open Meetings Law.

Second, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a board of education. 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.

Further, 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.

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

I hope that I have been of 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-2648a

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 23, 1996

James H. Gillespie
Trustee
P.O. Box 232
Washingtonville, NY 10992

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 Gillespie:

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

According to the correspondence, at least three members of the Village of Washingtonville Board of Trustees meet every Monday and Friday at a local bagel shop at 7 a.m. to discuss various aspects of Village business. The meetings are "informational" only; no action is taken. Notice has been given the public and it is clear that the public is invited to attend. Nevertheless, it is your view that the meetings are "not needed" and "unconstitutional."

From my perspective, there is no issue concerning the constitutionality of the meetings. I believe, however, that questions may be raised concerning the location and time of the meetings. In this regard, I offer the following comments.

First, although the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

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

> control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

In my opinion, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. If a meeting is held at a site involving a requirement that those in attendance pay for some sort of service or must order food, for example, some people who might otherwise attend might be unable or dissuaded from attending. If that is so in this instance, it would appear that the choice of location of the meetings in question would be inconsistent with the thrust of the Open Meetings Law.

Second, the same kind of consideration would applicable with respect to the time of the meetings and whether, in view of the intent of the Open Meetings, it is reasonable to schedule meetings at 7 a.m. In a recent decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

> "It is...apparent to this Court that the scheduling of a board meeting at 7:30 a.m. -- even assuming arguendo that such meetings were properly noticed and promptly conducted -- does not facilitate attendance by members of the public, whether employed within or without the home, particularly those with school age or younger children, and all but insures that teachers and teacher associates at the school are unable to both attend and still comply with the requirement that they be in their classrooms by 8:40 a.m." (Matter of Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996).

While the Court focused on the matter as it related to a Board of Education, I believe that similar factors would be present with respect to the ability of Village residents to attend meetings at 7 a.m. Many may be unable to attend because they too have small children, because of work schedules, commuting, and other matters that might effectively preclude them from attending meetings held so early in the morning. In short, particularly in view of the decision cited above, the reasonableness of conducting meetings at 7 a.m. is in my view questionable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Tom DeVinko

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2649

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

August 26, 1996

Mr. Gary L. Rhodes
[redacted]

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

Dear Mr. Rhodes:

I have received your letter of August 16 and the materials attached to it. You have complained with respect to certain activities of the Town of Henderson Town Board and have sought an opinion "as to the legality of these acts."

The first pertains to an executive session held "to discuss the Highway Superintendent position." In the context of your remarks and the minutes of the meeting, it appears that the Board considered the relative merits of having an elected as opposed to an appointed highway superintendent. If that was so, I do not believe that there would have been a basis for conducting an executive session. In this regard, I offer the following comments.

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.

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.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated or whether a position should be appointive or elective, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". In order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemumg County, October 20, 1981).

Based upon the specific language of the Open Meetings Law and its judicial interpretation, I do not believe that a discussion of whether a position should be elective or appointive could appropriately be discussed during an executive session. In my view, only to the extent that an issue focuses on a "particular person" in conjunction with one or more of the topics appearing in §105(1)(f) could an executive session properly have been held in the context of the issue that you raised.

It has been advised that a motion made in relation to §105(1)(g) should be based upon the specific language 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

> 518), 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; 207 Ad 2d 55 (1994)].

The second issue involves the publication of a legal notice concerning a public hearing to be held on a proposed local law to have a single appointed assessor rather than three elected assessors. Your complaint is that prior to the publication of the notice, there was no discussion of the matter at an open meeting or any Board action to prepare a proposed local law or hold a public hearing. It appears that the Town Attorney acted at the direction of one Board member. Further, according to the attachments that you forwarded, although the notice was published on August 14, the Board did not adopt a resolution to hold a public hearing until a meeting on the evening of that date, "after the fact."

Insofar as actions were taken that could only have been taken by the Town Board, I believe that they should have occurred during one or more open meetings. I note that I am unfamiliar with the Board's rules of procedure and whether, for example, a single member can ask the Town Attorney to draft a proposed local law. Nevertheless, it is my understanding that a decision to publish a legal notice regarding the holding of a public hearing can be made

only by means of a vote of a majority of the Board at a meeting during which a quorum is present.

Especially relevant in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. Specifically, the cited provision states that:

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

Based upon the language quoted above, a 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.

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 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 2650

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

August 26, 1996

Mr. Edward J. Patanian
[redacted]

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. Patanian:

I have received your letter of August 15, which reached this office on August 21. Your inquiry concerns meetings of a "Master Plan Implementation Advisory Committee" appointed by the Sand Lake Town Board and whether records of the Committee are subject to the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

Several decisions indicate generally that advisory ad hoc entities, other than committees consisting solely of members of public bodies, having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149,

motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, an advisory body, such as a citizens' advisory committee, would not in my opinion be subject to the Open Meetings Law.

I point out that the first decision cited above dealt with the status of a zoning revision commission designated by a town board to recommend changes in the town's zoning ordinance. Since the Appellate Division found that the entity in that case was not subject to the Open Meetings Law, and due to the apparent similarity between that entity and the committee that is the subject of your inquiry, I do not believe that the committee would constitute a public body.

Second, notwithstanding the foregoing, I believe that its records would be subject to the Freedom of Information Law. That statute is more expansive in its scope than the Open Meetings Law, for it pertains to all agency records. The Town clearly is an agency, and §86(4) of the Freedom of Information 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 definition of "record", information "in any physical form whatsoever" that is maintained, acquired or produced by the Committee in question would constitute a Town record and, therefore, would fall within the coverage of 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.

I hope 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 OML-AO-2651

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

August 27, 1996

Mrs. Dorothy H. Repetski
[redacted]

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. Repetski:

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

You have sought clarification in your capacity as a member of the Board of Education of the Niagara-Wheatfield Central School District relative to a meeting held on June 23. As I understand the matter, you have alleged that notice of the meeting was not given to all of the Board members, nor was it given in accordance with the Open Meetings Law.

In this regard, I offer the following comments.

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

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For

> the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body, such as a board of education, cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. Therefore, if, for example, 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.

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.

I note 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, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9661
OML-AO-2652

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

August 28, 1996

Mr. David Paige
[redacted]

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. Paige:

I have received your letter of August 21 in which you complained with respect to a variety of activities in local governments in your vicinity in which public rights of access to government appear to be diminishing. You wrote that you "do not understand why the responsibility of gaining access to records or meetings via Supreme Court Action should be the financial burden of citizens whose Constitutional Rights have been denied." Specific reference was made to a resolution recently adopted by the Woodridge Village Board of Trustees which enables the Board to prohibit a member of the public from recording a meeting unless written notification is given at least twenty-four hours prior to the meeting.

In this regard, I offer the following comments.

First, the right to attend meetings and to obtain records from government agencies is not constitutional in nature; rather it is statutory. Unless a statute confers rights of access to government records, there is no such right. Several judicial decisions, none in this jurisdiction, indicate that there is no constitutional right to government records. Similarly, prior to the enactment of the Open Meetings Law, the public had no right to attend meetings of public bodies.

I note that the Open Meetings Law provides the public with the right to attend, observe and listen to the proceedings of public bodies. Nevertheless, the Law is silent with respect to public participation. Consequently, a public body may choose to prohibit the public from speaking at meetings. On the other hand, public bodies may choose to authorize public participation, and many do. In those instances, it has been suggested that a public body permit

the public to participate by means of reasonable rules that treat members of the public equally.

With respect to the requirement imposed by the Board of Trustees relative to notice of an intent to record prior to a meeting, I believe that the requirement would be found to be invalid. As you may be aware, several judicial decisions indicate that a member of the public may record, either by means of audio or video recorders, open meetings of public bodies, unless the use of the recording devices would be disruptive or obtrusive. Perhaps a leading decision on the matter, a unanimous decision rendered by the Appellate Division, Second Department, is Mitchell v. Board of Education of the Garden City Union Free School District [113 AD 2d 924 (1985)], in which it was held that a Board of Education's rule prohibiting the use of tape recorders at meetings was unreasonable and therefore invalid. I note that the Court referred to "the unsupervised recording of public comment", and found that such recording "will not distract from the true deliberative process of the body" (id., 925). In my view, the use of the term "unsupervised" is intended to mean that no formal prior notification or permission should be needed for a member of the public to use recording equipment, so long as the equipment is used in a manner that is neither obtrusive nor disruptive.

Lastly, it is true that the Committee on Open Government has no authority to enforce either the Freedom of Information Law or the Open Meetings Law. It is my hope, however, that the opinions rendered by this office are educational and persuasive and that they enhance compliance with law. While the opinions are not binding, as you may be aware, they have been cited frequently by the courts and the courts have agreed with them in the great majority of those cases. It is also true that the only means of compelling compliance with the two statutes involves the initiation of a judicial proceeding. In both statutes, the courts have discretionary authority to award attorney's fees to the successful party.

Under the Freedom of Information Law, §89(4)(c) provides that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public; and

ii. the agency lacked a reasonable basis in law for withholding the record."

Under the Open Meetings Law, §107 authorizes a court to award attorney's fees to the successful party. I note, too, that in a recent decision rendered by the Court of Appeals, the State's highest court, it was held that when a court determines that a flagrant violation of the Open Meetings Law occurred and when a request is made for an award of attorney's fees, it would be an abuse of discretion not to award such fees [see Gordon v. Village of Monticello, 87 NY 2d 124 (1995)].

In addition to judicial mechanisms for guaranteeing compliance, I believe that demonstrations of interest by the public have a positive effect upon compliance with open government laws. When individuals and groups seek to assert their rights, governmental entities often give greater attention to the spirit of those laws.

I hope that I have been of 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-9662
OML-AO-2653

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

August 28, 1996

Mr. Joseph R. Lipczynski
[redacted]

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. Lipczynski:

I have received your letter of August 19 in which you complained that the Leisurewood Recreational Campgrounds is operated like "a dictatorship." You referred to your inability to obtain its records and participate at meetings and questioned how this can be so "in a free country."

In short, Leisurewood appears to be a private entity; it is not government. The laws that guarantee citizens' rights in a free country pertain to their relationships with their government, not with private organizations.

As indicated in previous correspondence, the statutes within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information and Open Meetings Laws, require that government agencies disclose records and that government bodies conduct meetings in public. Those laws, however, do not apply to private organizations, such as Leisurewood.

Specifically, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office 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 includes entities of state and local government within its coverage; it does not cover entities that are not governmental.

Similarly, the Open Meetings Law applies to public bodies, and §102(2) of that law defines the phrase "public body" to mean:

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

As such, public bodies include such governmental entities as city councils, town boards, village boards of trustees, boards of education, the State Senate and Assembly and similar governmental bodies; it does not include the governing body of a private organization.

Under the circumstances, I do not believe that I can offer assistance, for the matter is beyond the jurisdiction of this office. If you object to the manner in which Leisurewood is run, there is no requirement that you continue to live there. I hope, however, that the preceding commentary enhances your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 2654

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

August 28, 1996

Mr. William S. Hecht
[redacted]

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. Hecht:

I have received your letter of August 22 in which you complained that the Skaneateales Board of Education's minutes "are getting shorter and more cryptic." Consequently, you asked whether there may be guidelines concerning the content and disclosure of minutes.

In this regard, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. Section 106 of that statute states that:

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

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of statements made or discussion occurring at meetings. However, in a decision that may be pertinent to your inquiry, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely 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 the precise nature of a public body's action.

As indicated in §106, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, 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.

An exception to the general rule pertains to boards of education. Various interpretations of the Education Law, §1708(3) indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote. When a board of education cannot vote during an executive session, it is not required to prepare minutes of the executive session.

I hope that the foregoing serves to clarify your understanding of the law as it pertains to minutes of meetings and that I have been of 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 2655

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

September 6, 1996

Mr. Michael Torchia
[redacted]

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. Torchia:

I have received your letter of August 23. You have requested "a ruling on whether an elected official is entitled to executive session with the Town Board to discuss personnel matters." You also raised questions concerning discussions by the Greenport Town Board involving a decision to change insurance carriers and why certain elected officials were given health insurance.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to offer advice and opinions concerning the Open Meetings Law. The Committee cannot issue a "ruling" that is binding. It is my hope, however, that opinions rendered by this office are educational and persuasive, and with that goal, I offer the following comments.

First, while only the members of a public body have the right to attend an executive session, a public body may invite or permit others to attend an executive session [see Open Meetings Law, §105 (2)]. Those other than members authorized to attend typically have some specific knowledge or perform a function pertinent to an executive session, such as a clerk, a consultant, the public body's attorney, etc.

Second, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, 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.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, 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

I hope that I have been of 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- 2656

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

September 9, 1996

Hon. Margaret J. Stacy
Town Clerk
Town of Canton
Municipal Building
Canton, NY 13617

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. Stacy:

I have received your letter of August 29 in which you sought my views concerning issues relating to minutes and meetings.

You wrote that, in your capacity as Town Clerk of the Town of Canton, an example of a portion of minutes that you prepare might state: "Historian: Historian Linda Casserly submitted her monthly report in writing." Thereafter, you "file that report in a file marked 'Historian' subfile 'Monthly Reports' (Perm. Retention)." A member of the Town Board has requested that the kinds of reports to which you referred "be presented with their corresponding minutes for approval at the appropriate Board meetings" and that he "would like to see these reports affixed to the official minutes (in the minute book of the Town of Canton."

In this regard, while there is nothing in any provision of law of which I am aware that deals specifically with the request by the Board member, I note that the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, as the Law pertains to minutes of open meetings, §106(1) states that:

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

Based on the foregoing, it is clear that the minutes need not consist of a verbatim account of everything said at a meeting, and so long as minutes include the kinds of information described in

§106(1), I believe that they would be appropriate and meet legal requirements.

From my perspective, unless the Town Board by means of a motion carried by a majority of its total membership directs that a certain record or report be incorporated as part of the minutes, there would be no requirement that you do so. In addition, under §30 of the Town Law, as Town Clerk, you are the legal custodian of all Town records, and under §57.19 of the Arts and Cultural Affairs Law, you are also the records management officer for the Town. Therefore, again, unless the Town Board by motion provides direction to the contrary, I believe that you may file the reports in question as you see fit in accordance with legal responsibilities imposed upon you by law.

You also raised a question concerning your duty to distribute copies of certain records at Board meetings. Once you have submitted your monthly fee reports to the Town Supervisor, you asked whether there is an additional requirement to distribute the reports to Board members. Similarly, you asked whether it is necessary to refer to the reports in minutes of a meeting. Again, I know of no law that deals directly with the issue. Consequently, absent direction given by a majority of the Board, in my view, there would be no requirement that copies of the report be distributed at meetings or that reference to a report be made in minutes of a meeting. I note, however, that I am not an expert with respect to requirements imposed upon municipalities regarding financial matters. Therefore, to be assured of the presence or absence of law on the matter, it is suggested that you contact the Office of the State Comptroller.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2657

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

September 20, 1996

Mr. Sandor Deak
[redacted]

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

Dear Mr. Deak:

I have received your letter of September 6. In brief, you indicated that the Board of Trustees of the Village of Pawling includes a period at its meetings during which the public has the opportunity to offer comments. You added that the Mayor calls upon those who want to speak based upon where they are seated. You alleged that "[w]here he starts depends where [you] sit. If [you] sit in the front, he starts calling in the back. If [you] sit in the back, he starts in the front. If [you] sit in the middle of the room, he goes around you." Further, you wrote that when you start to speak, the Mayor "cuts [you] off by some pretext...closes the meeting and leaves the room."

In this regard, it is emphasized at the outset that the Open Meetings Law is silent with respect to public participation. While that statute provides the public with the right to attend meetings of public bodies, it does not provide a right on the part of the public to speak. Consequently, if a public body does not want to permit public participation, it is not required to do so.

On the other hand, if a public body chooses to authorize the public to speak, and many do, it has been advised that it should do so by means of reasonable rules or policies that provide an equal opportunity to speak to those who may wish to do so. If the circumstances that you described are accurate, it would appear that an effort has been made to diminish your capacity to express your views in a manner inconsistent with the treatment of others. If that is so, the practice as you described it, would in my view be unreasonable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Glenn Carey, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2658

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

September 20, 1996

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

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

Dear Mr. Greenfield:

I have received your letter of September 5 in which you sought an advisory opinion.

In brief, you wrote that your firm is the largest commercial taxpayer in the Village of Atlantic Beach, and that you asked to meet with the new mayor. He rejected your request based on a contention that meeting with you "would be unwise and surely create an appearance of impropriety."

From my perspective, there would be nothing improper, in terms of law or appearance, when an elected official, such as a member of Congress, a state legislator, or the mayor of a village meets "one on one" with a constituent. Those kinds of face to face meetings occur continually and provide constituents with opportunities to express their points of view and raise issues and concurrently enable elected representatives to become familiar with matters important to their constituents.

If you requested a private audience with the Board of Trustees, my response would be different. Under the Open Meetings Law, any gathering of a majority of a public body for the purpose of conducting public business would constitute a "meeting" subject to the requirements of that statute, even if there is no intent to take action and irrespective of the manner in which the gathering is characterized. Meetings of public bodies must be preceded by notice given to the news media and posted and conducted open to the public, except to the extent that the subject under consideration may properly be discussed in an executive session.

It is emphasized, however, that the application of the Open Meetings Law is not triggered until a majority of a public body has convened. In the case of a board of trustees consisting of five members, a majority would be three. Consequently, in a situation in which the Mayor or other member of the Board of Trustees meets or seeks to meet with a constituent, one on one, the Open Meetings Law would not apply.

In an effort to clarify his understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the Mayor.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Stephen R. Mahler, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2659

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

September 20, 1996

Mr. William N. Blenkinsopp
[redacted]

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. Blenkinsopp:

I have received your recent letter in which you requested an advisory opinion concerning action taken by the Board of Trustees of the Village of Buchanan by means of a "phone call vote (out of sight and hearing of the public)." In short, as I understand the matter, a series of votes occurred by phone to approve a fireworks display in a village park. The phone vote was taken on July 24 and later formalized at a meeting held on September 3.

From my perspective, the Board could not have validly taken action in the manner that you described. In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone. However, a series of communications between individual members or telephone calls among the members which results in a decision or a meeting held by means of a telephone conference would in my opinion be inconsistent with law.

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

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

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

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only during duly convened meetings in which a quorum is present and that are preceded by reasonable notice given to all members.

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

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

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

I also direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

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

If action is taken by phone, the public has no ability to observe, attend or listen to the decision-making process.

In short, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they may validly conduct meetings by means of telephone conferences, vote or make collective determinations by means of telephonic communications.

I hope that I have been of 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-2660

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

September 20, 1996

Hon. Theresa M. Knickerbocker
Trustee
Village of Buchanan
[redacted]

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 Knickerbocker:

I have received your recent letter in which you raised questions concerning to the Open Meetings Law relating to certain events that occurred in the Village of Buchanan.

As I understand the matter, on July 25, you were contacted by a Village administrator, and a Village police officer came to your door with a memorandum intended to inform the Police Chief that the Board of Trustees had approved a fireworks show to be held on Saturday, July 27. Having telephoned the Village Administrator thereafter, he indicated that he was "polling the Board" in order to gain approval to use a park for a fireworks display and that a decision to do so would be "formalized" at the next Board meeting, which was held on September 3. Despite your opposition, through polling in the manner that you described, the fireworks show was approved. In addition to questioning the legality of the foregoing, you wrote that one of the trustees objected to your use of a tape recorder at the meeting of September 3. You wrote the local news media and the Village Administrator frequently tape record the meetings.

From my perspective, the Board could not have validly taken action in the manner that you described. Further, I believe that anyone may use a tape recorder at an open meeting of a public body, so long as it is used in a non-disruptive manner. In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone. However, a series of communications between individual members or telephone calls among the members which

results in a decision or a meeting held by means of a telephone conference would in my opinion be inconsistent with law.

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

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

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only during duly convened meetings in which a quorum is present and that are preceded by reasonable notice given to all members.

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

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

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

I also direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

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

If action is taken by phone, the public has no ability to observe, attend or listen to the decision-making process.

In short, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they may validly conduct meetings by means of telephone conferences, vote or make collective determinations by means of telephonic communications.

Second, I believe that any person may use a tape recorder at an open meeting. 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.

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

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Thomas J. Jankowski, Village Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2661

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

September 20, 1996

Mrs. Fiona Ormiston
[redacted]

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. Ormiston:

I have received your letter of September 1, which reached this office on September 9. You have raised a series of questions concerning the Highland Central School District and its Board of Education. While I believe that I can offer opinions relating to some of the issues, it is noted that the jurisdiction of this office pertains to meetings of public bodies and public access to government records. As such, my remarks will be limited to matters involving those subjects.

With respect to the initial issue, you wrote that the Board of Education took action on August regarding the retirement of the Superintendent of Schools, but that the Board President "signed off on the agreement" on August 12 "without a public meeting of the Board." You indicated that the President said that she was given the authority to do so by the Board. When you asked when the authorization was given by the Board to the President to act on its behalf, you were informed that a vote was taken on July 24 during "an executive session" that "was not advertised as a public meeting and action was in fact taken at that meeting." You have asked whether the Board can conduct an executive session "by simply stating the purpose of the session is to deal with personnel issues."

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

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

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

It has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of or separate from 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 or hold an executive session separate from 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.

Further, every meeting must be preceded by notice. Section 104 of the Open Meetings Law pertains to notice of meetings and states that:

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

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

Second, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, 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.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related

to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

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; 207 AD 2d 55 (1994)].

Lastly, the Open Meetings Law requires that action taken by a public body be reflected in minutes. Section 106 of that statute pertains to minutes and states that:

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

Based on the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote.

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 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 2662

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

September 25, 1996

Mrs. Richard W. Thompson
[redacted]

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

Dear Ms. Thompson:

Your undated letter addressed to the Department of Law has been forwarded to this office by the State Commission of Investigation. The Committee on Open Government, a unit of the Department of State, is authorized to provide advice and opinions relating to the Open Meetings Law.

The first complaint in your letter pertains to what you characterized as "an illegal meeting" held by certain members of the City of Gloversville Common Council. In short, you wrote that the members of one political party who serve on the Council met in a caucus to discuss a matter of public business but excluded the remaining members.

While your concerns may have merit, it is noted that §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. If, however, a majority of Council members meet to discuss public business, and those present 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.

The second issue that you raised pertains to a matter beyond the scope of the Committee's jurisdiction or expertise. In view of the subject, it is suggested that you contact the Office of Municipal Service at the State Department of Civil Service (457-9553). Perhaps a representative of that agency could offer appropriate guidance.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2663

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

September 27, 1996

Mr. Dennis W. Hardy
[redacted]

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. Hardy:

I have received your letter of September 9, which reached this office on September 16. You have sought an opinion concerning the propriety of the Village Board of the Village of Piermont conducting Village business by telephone. You wrote that you are aware of two actions taken by phone.

From my perspective, the Board could not have validly taken action in the manner that you described. In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone. However, a series of communications between individual members or telephone calls among the members which results in a decision or a meeting held by means of a telephone conference would in my opinion be inconsistent with law.

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

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

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

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only during duly convened meetings in which a quorum is present and that are preceded by reasonable notice given to all members.

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

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

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

I also direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

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

If action is taken by phone, the public has no ability to observe, attend or listen to the decision-making process.

In short, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they may validly conduct meetings by means of telephone

conferences, vote or make collective determinations by means of telephonic communications.

I hope that I have been of 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-2664

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 1, 1996

Hon. John F. Carney, Supervisor
Town of Pelham
108 Boulevard
Pelham, NY 10803

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

Dear Supervisor Carney:

I have received your letter of September 19 and the materials relating to it.

You referred to an advisory opinion of May 15 addressed to the Pelham Town Clerk concerning minutes of meetings of the Town Board and wrote that:

> "Our board has passed a resolution that the minutes of the Town Board do not become official minutes until approved by the Board. Our Town Clerk has consistently failed to comply with Public Officers Law Section 106 which requires *inter alia* that the minutes be made available in draft form within two weeks of the meeting.
>
> "The minutes as drafted by our Town Clerk are routinely circulated by her when she gets around to producing them. [You] and other members of the Town Board prepare written corrections and make them available to the Town Board for their approval at an ensuing Board meeting. The Town Board has available to them the Town Clerk's poorly drafted, ungrammatical, erroneous draft and the corrected copy. The Town Board may then choose between the Town Clerk's draft and the changes which [you] or any other Board member suggests. The vote and any discussion with regard to corrections takes place at the Town Board meeting with all presented including the Town Clerk."

It is your view that the procedure that you described is "proper and legal" and you asked whether I disagree the opinion of the Town Attorney, who relied on a several opinions of the State Comptroller.

In this regard, I offer the following comments.

First, since the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks of meetings, I believe that we agree that the Town Clerk is required to prepare minutes within that period, irrespective of whether the minutes are characterized as unofficial or draft, for example.

Second, I cannot strenuously disagree with the views expressed by the Town Attorney or the Comptroller. However, in many instances, the issue involves the reasonableness of the means by which a public body implements its rules, procedures or policies.

As I view the matter, 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. Bianca. 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. While the Town Board's procedure may be intended to ensure that appropriate minutes are prepared, there is no guarantee of the result. Similarly, although the opinions of the Comptroller that may serve in part as the basis for the procedure ostensibly appear to be reasonable, they could be implemented in ways that are unreasonable. For purposes of illustration, I offer the following scenarios involving potential problems or pitfalls. To be sure, I am not inferring that any relate to the Town of Pelham, but rather that policies or procedures, although apparently reasonable, may be carried out in a manner inconsistent with their intent.

What if the Board has a lop-sided majority of political party membership, or, irrespective of party membership, it includes a maverick 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 maverick? While there may be no intent to

do so, the Board's discretionary authority could lead to unfair or inconsistent results.

In the same hypothetical situation as posited in relation to the first, 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 or in summary form. While the 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. I am not suggesting that the Pelham 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.

By requiring that minutes be submitted to the Board for correction of errors and omissions and approval, the intent is obvious -- to ensure 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 inferring that the Board would do so; however, even a rule or procedure 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 and procedures regarding minutes may be appropriate if they are carried out in a manner consistent with law and their apparent intent; on the other hand, if that does not occur, the Board might be considered to be carrying out its duties unreasonably. 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 and reviewed 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:jm
cc: Gloria Bianca, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 9704
OML-AO- 2665

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

October 1, 1996

Hon. Susan Briggs
Town Clerk
Town of Russell
Box 628
Russell, NY 13684

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

Dear Ms. Briggs:

I have received your letter of September 20. In brief, you referred to a series of events focusing on the new Russell Town Supervisor and his actions, and you asked for guidance in an effort to enable you and other town officials to carry out your duties effectively and in a manner consistent with law.

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice concerning agency records and meetings of public bodies. Consequently, my comments will generally relate to issues pertaining to those subjects.

It is emphasized at the outset that the Supervisor is but one among five members of the Town Board. Although as Supervisor, he may have several specific duties or areas of authority (see e.g., Town Law, §29), he has one vote at Board meetings, and §63 of the Town Law states in part that "Every act, notion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board", and that "The board may determine the rules of its procedure." In short, the Board is the governing body of the Town.

Second, the Open Meetings Law provides direction concerning the contents of minutes and when they must be disclosed. Specifically, §106 of that statute provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

In addition and perhaps most importantly, §30(1) of the Town Law states in part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting." Based upon the foregoing, the clerk, not the town supervisor, has the statutory responsibility to prepare minutes and ensure their accuracy. Further, the supervisor in my view, has no right, acting unilaterally, to change or correct minutes.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his or her statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181).

Moreover, although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Additionally, in another opinion of the State Comptroller, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609).

In short, it is my view that you, in your position as clerk, have the responsibility and the authority to prepare minutes and to insure their accuracy. While the Supervisor may have other areas of authority, I do not believe that the alteration of minutes is among them.

With respect to records, §30 of the Town Law states that the town clerk: "Shall have the custody of all the records, books and papers of the town." Therefore, even though a person other than

yourself may have physical possession of the records in question, as Town Clerk, I believe that you have legal custody of the records.

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

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

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

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

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

As such, the Town Board has the ability to designate "one or more persons as records access officer." Further, §14012(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. If you have been designated records access officer, I believe that you have the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information Law.

Lastly, and in a related area, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments.

With respect to the retention of records, §5725 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office."

While a person other than you may have physical possession of records, I do not believe that that person has legal custody of them. As indicated earlier, §30 of the Town Law specifies that the town clerk is the custodian of town records. Consistent with that provision is §5719 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

A failure to share records or to inform the clerk of their existence may effectively preclude the clerk from carrying out her duties as records management officer, or as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if the records access officer does not know of the existence or location of Town records, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law or comply with other provisions of law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2666

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

October 2, 1996

Mr. Lee Austin
[redacted]

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. Austin:

I have received your letter of September 23 and the correspondence attached to it.

You referred to a letter addressed to the Halcott Town Supervisor in which you sought clarification concerning the Supervisor's statement at a meeting that there was "no place in the meeting for public comment." It appears that he offered that remark after you raised a question during the meeting. You also asked that the letter "be read at the next regular meeting and become part thereof."

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

While public bodies have the right to adopt rules to govern their own proceedings (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.

In addition, there is no requirement that a request to have a letter read aloud at a meeting or to have a letter made part of the minutes must be granted. From my perspective, agreeing to or rejecting that kind of request would be within the discretionary authority of the Town Board.

You also asked that I refer you to a person who can offer guidance concerning a variety of issues relating to municipal law. It is suggested that you contact Harry Willis, an attorney with the New York State Department of State who has great expertise regarding local government and municipal law. He can be reached by mail at the Department of State or by phone at (518)474-6740.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Ted Randazzo, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2667

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 4, 1996

Sandra G. Mallah
Superintendent of Schools
Greenburgh Eleven Union Free
School District
P.O. Box 501
Dobbs Ferry, NY 10522-0501

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. Mallah:

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

You have sought advice concerning the sufficiency of the following resolution used to enter into executive session:

> "Executive Session to discuss the employment history of particular persons, collective negotiations under Article 14 of the Civil Service Law, grievances, litigation and individual student issues."

From my perspective, although two elements of the resolution are proper, based on the judicial interpretation of the Open Meetings Law, the reference to "litigation" should be more descriptive. Further, insofar as the resolution pertains to "grievances" and "student issues", again, I believe that additional precision would be warranted. In this regard, I offer the following comments.

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.

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 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].

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the District."

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.

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, which includes Westchester County, 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; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be exactly as you proposed: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Similarly, with respect to negotiations, §105(1)(e) permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." 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].

Based on the foregoing, your resolution, as it relates to collective negotiations, would be appropriate. It has been suggested that a motion under §105(1)(e) might also be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the teachers union", for example.

In my view, a description of the subject to be considered in executive session as "grievances" would be inadequate. It is doubtful in my opinion that all grievances involve collective negotiations or relate to a particular person. If a grievance is made based on a claim that the roof is leaking and causing an unsafe condition, I do not believe that there would be a basis for conducting an executive session. On the other hand, if a grievance is made in conjunction with a teacher's health condition or problem, I believe that §105(1)(f) could appropriately be asserted.

Lastly, while my comment is not intended to be unnecessarily technical, rather than referring to "individual student issues", I would conjecture that your intent is to conduct executive sessions, where appropriate, to discuss issues involving individual students.

It is also noted that discussions pertaining to particular students may in proper circumstances be conducted outside the coverage of the Open Meetings Law. I point out that there are two vehicles that may authorize a public body to discuss public business in private. One is the executive session; the other involves "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.

Relevant with regard to discussions of specific students is §108(3), which exempts from the Open Meetings Law:

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

In this regard, I direction your attention to 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. In those circumstances, it is suggested that the Board inform the public that it will be discussing an issue relating to a particular student and that the matter is exempt from the Open Meetings Law.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9719
OML-AO-2668

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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October 8, 1996

Ms. Frances J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of September 17 in which you raised a variety of issues concerning a meeting of the Investment Committee of the New York City Teachers' Retirement System Board of Trustees. In conjunction with your commentary, I offer the following remarks.

First, when a committee consists solely of members of a public body, such as the Board of Trustees of the Teachers' Retirement System, I believe that the Open Meetings Law is clearly applicable.

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of the Board of Trustees, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Board of Trustees consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

Second, 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. 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.

While I am unaware of the specific nature of the subject matter considered during the executive session to which you referred, I believe that two grounds for entry into executive session would likely be pertinent. Specifically, §105(1)(f) permits a public body to discuss, among other matters, the financial history of a particular corporation. In addition, §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."

With respect to minutes of meetings, §106 of the Open Meetings Law provides that:

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

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

Based on 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. If a motion is made to enter into executive session, I believe that minutes must refer to the motion.

Since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although that statute 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. Ordinarily, a record of votes of the members appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

Lastly, it is noted that there is nothing in the Open Meetings Law or any other provision of law of which I am aware that deals with agendas or requires that they be prepared. However, if an agenda is prepared and includes a general description of the topics to be discussed, it would likely be available under the Freedom of Information Law.

I hope that I have been of 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- 2669

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

October 10, 1996

Ms. Agnes E. 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 recent letter as well as a copy of a letter of complaint addressed to Community School Board #17 in Brooklyn relating to its implementation of the Open Meetings Law. You have sought an opinion concerning the issues raised in that letter. In addition, you questioned the propriety of a resolution indicating that minutes of Board meetings would not be disclosed until approved by the Board.

The first issue pertains to an executive session "to discuss personnel." In the context of the meeting, it appears that the executive session was held to enable Board members to make presentations concerning their desire to become officers of the Board, for the election of officers occurred immediately after the closed session. You also referred to meeting held by a board committee to discuss the hiring of an interim acting superintendent and indicated that there had been no public discussion of the procedure for selection or the criteria that must be met.

In this regard, 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.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, 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.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". Similarly, if a discussion involves the procedure for seeking or hiring an interim superintendent or the criteria that must be met to hold such a position, I believe that it should be discussed in public. That kind of discussion would not relate to any particular individual. However, later in the process, when a public body has received applications for the position and is reviewing the relative merits of the candidates, the focus would be on particular persons and there would be a basis for conducting an executive session.

While a discussion of or presentation concerning the election of officers involves consideration of particular individuals, it is unlikely that any of the specific subjects included within §105(1)(f) would be addressed. In short, while "matters leading to" certain actions relating to particular persons may be discussed during executive sessions, matters leading to the election of officers ordinarily is not among them.

Further, it has been advised that a motion describing the subject to be discussed as "personnel" or "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, which includes Brooklyn within its jurisdiction, 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; 207 AD 2d 55 (1994)].

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a municipal board, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Board consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

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, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Community School Board #17

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2670

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

October 11, 1996

Ms. Frances J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of September 27.

Your initial question is whether a tape recorder can be used at meetings of the Board of Trustees of the New York City Teachers' Retirement System and other meetings of public bodies. In this regard, I believe that any person may use a tape recorder at an open meeting. 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."

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

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

> the resolution of the respondent board of education" (id. at 925).

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

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

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

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

Second, it is your view that "it is necessary to have a court stenographer present in order to make certain that the minutes...are properly recorded and prepared." Notwithstanding your belief, there is no such requirement. 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.

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 2671

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

October 15, 1996

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 October 2. You have sought an opinion "as to whether it is legitimate to go into executive session to discuss candidates for appointment to an unpaid public, open Town sponsored committee."

Based on the language of the Open Meetings Law, I believe that a public body, such as the Southold Town Board, has the authority to conduct an executive session to evaluate those under consideration for appointment to a Town committee.

Since you made reference to the term "personnel", and because that term is often used as a basis for entry into executive session, I note that it does not appear in the law. Some personnel related issues may clearly be discussed in private; others just as clearly cannot. Further, due to the language of the so-called "personnel" exception, often issues other than those associated with personnel matters may be discussed in executive session.

The pertinent provision, §105(f), permits a public body to enter into executive session to discuss:

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

Again, the language quoted above is not restricted to personnel matters. In the context of your inquiry, to the extent that the Board engages in a discussion of a matter "leading to the

appointment...of a particular person" or persons, I believe that it would have a basis for conducting an executive session.

In a related vein, 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, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions o 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; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)", or "a matter leading to the appointment of a particular person." Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

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

Robert J. Freeman
Executive Director

RJF:pb
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2673

Albany, New York 12231
(518) 474-2518
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October 17, 1996

Mr. Dan Hewitt, CLU ChFC
[redacted]

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. Hewitt:

I have received your letter of October 7, which relates to the implementation of the Open Meetings Law by the Town Board of the Town of Saratoga. You described a series of scenarios and asked whether that statute would be applicable. Although you sought "yes or no" responses, I believe that additional explanation is warranted. In conjunction with your questions, I offer the following comments.

The primary issue involves whether certain gatherings constitute meetings subject to the Open Meetings Law. In this regard, 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, such as a town board, gathers to discuss town business, in their capacities as board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Since one of your questions pertains to a site visit, I note that in the only decision of which I am aware dealing with a site visit, the members of a public body were in a van, and it was held that "the Open Meetings Law was not violated" [City of New Rochelle v. Public Service Commission, 450 AD 2d 441 (1989)]. In that case, members of the Public Service Commission toured the proposed route of a power line in order to acquire a greater understanding of evidence previously presented. Based upon that decision, a site visit or tour by a public body, particularly on private property, would apparently not constitute a meeting. It has been advised, however, that site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and that any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law.

The remaining issues relate to notice of meetings. In short, the Open Meetings Law requires that every meeting be preceded by

notice given to the news media and posted. Section 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."

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

I point out that the notice must indicate the time and place of a meeting; there is no requirement that an agenda be included or that reference be made to the topics to be considered. Further, subdivision (3) of §104 specifies that a public body is not required to pay to place a legal notice in a newspaper or to "advertise" prior to a meeting; rather, notice must be "given" to the news media. Once in receipt of notice of a meeting, a news media organization may but is not required to publicize a meeting.

I hope that I have been of 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-2673

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

October 22, 1996

Mr. Edward H. Denhoff
[redacted]

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. Denhoff:

I have received your letter of October 7 in which you requested an advisory opinion concerning the Open Meetings Law. The issue involves the status of an ad hoc committee consisting of the supervisors of five towns in your vicinity.

In this regard, as you are aware, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

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

Based on the legislative history of the definition and its judicial interpretation, the committees and subcommittees constituting public bodies would include entities created by law or those consisting entirely of members of a particular public body. For example, a county legislature consisting of fifteen members might designate committees consisting of five of its members. In that kind of situation, a committee would in my view be a "public body" required to comply with the Open Meetings Law.

The ad hoc committee to which you referred would not, based on judicial decisions, be subject to the Open Meetings Law. The committee in question does not include a majority of the membership of any particular entity, it does not consist wholly of members of

a larger public body, as in the case of a committee of a legislative body, and it has no authority to take final and binding action. I note that judicial decisions indicate generally that ad hoc entities having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 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 the ad hoc committee that you described, would not in my opinion fall within the requirements of the Open Meetings Law. This is not to suggest that the committee could not hold open meetings, but rather that there is no obligation to do so.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-2674

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

October 23, 1996

Ms. Shirley A. Heller
Alliance of Concerned Taxpayers
P.O. Box 506
Cleveland, NY 13042

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. Heller:

I have received your correspondence of October 9. You have questioned the propriety of the Central Square Central School District's policy on "Broadcasting and Taping of Board Meetings."

The policy provides as follows:

> "The use of any tape recording device at public meetings of the Board of Education or committee appointed thereby is permissible as long as the device is unobtrusive and will not distract from the true deliberative process of the Board. The Board President or chairperson of the committee shall be informed prior to the meeting that such recordings are being made.
>
> "The Board and/or the committee reserves the right to direct that a tape recording be made to ensure a reliable, accurate, and complete account of Board meetings."

Following the statement quoted above, reference is made to the Open Meetings Law and the leading decision concerning the use of recording devices at open meetings, Mitchell v. Board of Education of Garden City Union Free School District, 113 AD2d 924 (1985).

From my perspective, it is unlikely that the Board or a committee can validly require that it be informed prior to a meeting of the intent to record a meeting or that it has the right to ensure that recordings are reliable, accurate or complete. In this regard, I offer the following comments.

First, by way of background, the Appellate Division in Mitchell 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, the court in Mitchell indicated that the comments of members of the public, as well as public officials, may be recorded. As stated by the court:

> "[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 the tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process. I point that essentially the same conclusion was reached with regard to the use of video recording devices in Peloquin v. Arsenault, 616 NYS2d 716 (1994).

Second, with respect to the requirement that the Board or a committee be informed in advance of a meeting of the intent to record, I note that the Court in Mitchell referred to "the unsupervised recording of public comment" (id.). In my view, the term "unsupervised" indicates that no permission or advance notice

is required in order to record a meeting. Again, so long as a recording device is used in an unobtrusive manner, a public body cannot prohibit its use. Moreover, situations may arise in which prior notice or permission to record would represent an unreasonable impediment. For instance, since any member of the public has the right to attend an open meeting of a public body (see Open Meetings Law, §100), a reporter from a local radio or television station might simply "show up", unannounced, in the middle of a meeting for the purpose of observing the discussion of a particular issue and recording the discussion. In my opinion, as long as the use of the recording device is not disruptive, there would be no rational basis for prohibiting the recording of the meeting, even though prior notice would not have been given. Similarly, often issues arise at meetings that were not scheduled to have been considered or which do not appear on an agenda. If an item of importance or newsworthiness arises in that manner, what reasonable basis would there be for prohibiting a person in attendance, whether a member of the public or a member of the news media representing the public, from recording that portion of the meeting so long as the recording is carried out unobtrusively? In my view, there would be none.

With regard to the final element of the policy, that the Board or a committee "have the right to direct" that recordings be "reliable, accurate, and complete account[s] of Board meetings", I doubt that it could be enforced or that it would be found by a court to be reasonable. The court in Mitchell specifically rejected the argument that the use of a tape recorder could be prohibited because "recordings can be edited, altered, or used out of context" and added that "[c]learly if the Board were to prohibit the use of pen, pencil and paper, because of the potential for misquotation, such a restriction would be unreasonable and arguably violative of the 1st Amendment" (id.). Those who attend meetings with pen and paper are not required to take notes throughout the entirety of a meeting; they take notes based upon what they consider to be of importance or interest to them. I believe that a person using a recording device should have the same discretion, i.e., to tape or record the discussions of interest to them.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2675

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

October 31, 1996

Hon. Joanne Sivers
Schroeppel Town Board
[redacted]

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

Dear Ms. Sivers:

I have received your letter of October 14. In your capacity as a member of the Schroeppel Town Board, you questioned the propriety of an executive session held at a recent meeting.

You wrote that the executive session was held to discuss "personnel", and that a member of the Planning Board was permitted to attend. He "spent approximately ten minutes harassing [you] regarding a recent newspaper article which quoted statements [you] had made publically [sic] at a previous board meeting." You indicated that he "tried to intimidate [you] from speaking to the press, and cautioned" that political party members should "stick together."

Based on the foregoing, you raised the following questions: "Would political criticism fall under the issue of personnel? Was this an appropriate topic for executive session? Is this really a personnel matter? Was this a legal executive session?"

From my perspective, there likely would have been no basis for conducting an executive session. 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..."

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 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 at least one of the topics listed in §105(1)(f) is considered.

As I understand the matter, while you might have been the focus of criticism, it does not appear that any of the topics described in §105(1)(f) were involved in the discussion. You are not an employee, and the facts do not indicate that the discussion involved a matter leading to any sort of official action. If my interpretation of the facts is accurate, there would not have been any basis for entry into executive session.

Lastly, 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.

It is noted that the Appellate Division has 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; 207 AD 2d 55 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9754
OML-AO-3676

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

October 31, 1996

Ms. Linda A. Mangano
[redacted]

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. Mangano:

I have received a series of letters from you, as well as a variety of material relating to them. You have raised a number of issues concerning the implementation of the Freedom of Information and Open Meetings Laws by the Town/Village of Ossining. In the following paragraphs, I will attempt to deal generally with them.

You asked "how important" it may be to include in the approved minutes of a meeting comments made by members of the audience. In my view, while the minutes may include reference to those kinds of comments or statements, there is no requirement that they be included. The Open Meetings Law provides what might be viewed as minimum requirements concerning the content of minutes. Section 106(1) of that statute provides that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said at a meeting or that they include reference to each remark that might have been made.

However, if a public body or its clerk as a matter of practice or policy refers in some way to speakers in minutes, it has been suggested that any such references by consistent. For instance, if some kind of reference is intended to be made with respect to speakers, I believe that the reference should relate to all such speakers; minutes should not include or exclude reference to comments because of the points of view expressed.

A related matter concerning meetings of the Village Board of Trustees involves your statement that the meetings are videotaped by a person paid by the Village to do so. You wrote that the fees for copies of videotapes varies, and you have contended that the tapes must be retained by the Village.

It is unclear on the basis of your letter whether the videotapes are prepared for the Village and can be considered to be Village records. If they are the private property of the person who prepares the videotapes, the Freedom of Information Law would not apply and that person could do with those tapes or charge for copies as she sees fit. On the other hand, if the videotapes are produced for the Village, I believe that they would constitute Village records subject to rights conferred by the Freedom of Information Law. I note that the fee for copies of a videotape would, according to §87(1)(b)(iii) of the Freedom of Information Law, be based on the actual cost of reproduction.

Similarly, if the videotape is a Village record, it would be subject to the records retention requirements imposed by Article 57-A of the Arts and Cultural Affairs Law. To the best of my knowledge, audio and videotapes of meetings must be retained for a minimum of four months. At that time they may be destroyed or reused.

Next, you referred to a request for a time sheet, and that you were sent a "smidgeon" of what you requested, and you asked what you may do in that event. As a general matter, I believe that time sheets or similar records indicating when a public employee arrives at or leaves work, as well as the days and dates of leave time used or accrued, must be disclosed [see Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986)].

If you believe that a response to a request is incomplete and that a portion of a record or records might have been withheld, you would have the right to appeal the denial of access 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 of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

You also referred to situations in which you have made requests where the receipt of those requests has been acknowledged but where you "have no idea when [you] can expect the information."

Under §89(3) of the Freedom of Information Law, if an agency needs more than five business days to determine rights of access to records, it may acknowledge the receipt of the request in writing within that period and extend the time for reaching its determination. However, when the agency chooses to do so, the cited provision requires that the letter of acknowledgement include an estimate of the date when the agency believes it will be able to grant or deny the request.

In one series of requests, you sought information by raising a variety of questions. In this regard, as you may be aware, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency is not required to create a record in response to a request. Similarly, while I believe that an agency is required to respond to a request for existing records, agency officials in my view in a technical sense are not required to answer questions or to provide information that does not exist in the form of a record or records in response to questions.

Since the questions relate to a building construction and permits, in general, I believe that permits or records reflective of violations of a building code, for example, must be disclosed.

One of your inquiries involves a request for the Village's laws concerning fire escapes. While laws, codes, regulations and the like are clearly available under the Freedom of Information Law, a potentially relevant issues involves the requirement in the Freedom of Information Law, §89(3), that an applicant "reasonably describe" the records sought. Whether a request meets that standard may be dependent upon the nature of an agency's filing or recordkeeping system. If, for instance, there are sections of the Village Code that relate directly to fire escapes, it would likely be easy to locate the applicable provisions. However, if references to fire escapes are made in a variety of provisions that are not indexed in a manner that would enable Village officials to locate each that might apply, a request likely would not meet the standard of reasonably describing the records.

Another area of concern relates to situations in which some people are required to request records in writing, while others may obtain records in response to oral requests. Pursuant to the regulations promulgated by the Committee (21 NYCRR Part 1401), an agency may require that a request be made in writing, but in its discretion, it may also accept oral requests. From my perspective, an agency should have flexibility to respond to requests in a manner that is efficient and sensible. In some instances, requests might involve a search for records or an evaluation of their content to determine rights of access. In those instances, it may be fully appropriate to require that a request be made in writing. On the other hand, there may be other cases in which records are unquestionably public and readily retrievable. For example, if a person enters the clerk's office and asks for the minutes of the last meeting, the clerk might simply direct that person to the

minute book rather than requiring a written request. In my view, that would be fully appropriate.

You raised a similar issue with respect to the assessment of fees for copies of records. In short, you have contended that some people must pay for copies, while others receive copies at no charge. Again, I believe that an agency should carry out its duties reasonably and consistently. If a particular record or number of records is made available to one applicant for free, I believe that other applicants should receive the same treatment.

A possible exception might arise in conjunction with the legislative declaration appearing at the beginning of the Freedom of Information Law which refers to the public being "represented by a free press." Because the news media serves as the eyes and ears of the public, and because a disclosure to the news media may effectively be a disclosure to thousands of people, it is not unusual for an entity of government to provide information free or even unsolicited to the news media. From my perspective, disclosures of that nature would be consistent with the thrust and intent of the Freedom of Information Law.

I point out that the printed materials that you enclosed dealing with fee waivers pertain to the federal Freedom of Information and Privacy Acts (5 U.S.C. §552 and 552a respectively), which apply to federal agencies only. As you may be aware, the state counterpart contains no provision concerning fee waivers.

Lastly, you referred to a "list of pet peeves" to which allusion was made at a meeting. It is unclear whether such a list exists in writing. In this regard, as indicated earlier, since the Freedom of Information Law pertains to existing records, if there is no such list, that statute would not apply. If it does exist, it would fall within the coverage 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gennaro Faiella, Village Manager
Marie A. Fuesy, Village Clerk

Clerical Error

No #2677

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9756
OML-AO-2628

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

November 1, 1996

Ms. Rita Randall
[redacted]

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. Randall:

I have received your letter of October 18. You have raised a series of questions pertaining to the Town of Lake Luzerne that relate to both the Open Meetings Law and access to records under the Freedom of Information Law.

The first concerns meetings held prior to each Planning Board meeting during which the Zoning Enforcement Officer and "at least two Planning Board members" gather to discuss the agenda. In this regard, if less than a majority of the Planning Board is present, the Open Meetings Law would not apply, and the gathering could be conducted in private. However, if a majority is present to discuss public business, I believe that the gathering would constitute a "meeting" subject to the Open Meetings Law.

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

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In considering 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 convenes to discuss the public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, notice of the time and place of every meeting must be given to the news media and to the public by means of posting in accordance with §104 of the Open Meetings Law, which states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the

> extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto..
>
> 3. The public notice 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.

You also referred to situations in which the Town Board enters into an executive session and requires that the public leave the room. Since there are no other places to sit, you asked whether it is proper to make the public leave the room. In my view, the Board would clearly have the ability to exclude the public from its executive session. If the meeting room is the only location in which the executive session can be held, the Board may have no reasonable option other than requiring that members of the public leave the room. However, if a different room is available to the Board for its executive session, in consideration for the public, it would be reasonable in my opinion for the Board to conduct the executive session in the other room in order that members of the public could remain in the meeting room until the open meeting continues after the executive session.

Reference was made to the Town Clerk, who leaves the meeting when the Board goes into executive session, and you asked "who is supposed to take the minutes after the Clerk leaves..." 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." Therefore, although the Town Board could choose to enable the town clerk or others to attend an executive session, only the members of the Town Board have the right to attend an executive session. However, §30(1) of the Town Law specifies that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..." In my opinion, §30 of the Town Law is intended to require the presence of the clerk to take minutes in situations in which motions and resolutions are made and in which votes are taken.

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

Lastly, following an application that you made to the Planning Board, a person who sent a letter to a member of the Board requested "confidentiality", and your request for a copy of the letter was denied on that basis. You asked whether marking a document "confidential" serves to enable an agency to withhold it.

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, an assertion, a request or a claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my view serve to enable an agency to justify withholding a record. In this instance, I am unaware of any statute that would render the report exempted from disclosure by statute. It is also noted that it has been held that a rule or regulation promulgated by an agency cannot be cited as a "statute" that would serve to exempt records from disclosure [see Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982) and Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976)].

Notwithstanding the absence of any justification for withholding the letter based on a claim of confidentiality, it is possible, depending on the facts, that some aspects of the letter might properly be withheld. Section 87(2)(b) of the Freedom of

Information Law permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." If the letter was written by a member of public who sought to express his or her point of view concerning the application, it is likely that identifying details pertaining to that person could be deleted to protect privacy. The remainder of the letter might be available. If the letter was written by or for a business entity, an organization or association of some sort, there would likely be no personal privacy implications. In that event, it appears that the letter would be accessible in its entirety.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2679

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

November 12, 1996

Ms. Frances J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of October 20. In brief, you complained that the minutes of the September meeting of the Board of Trustees of the New York City Teachers' Retirement System were not "ready" at the Trustees' next meeting held on October 17.

From my perspective, it is clear that minutes of a meeting of a public body must be prepared and available to the public within two weeks of the meeting. In this regard, I offer the following comments.

Section 106 of the Open Meetings Law provides direction on the subject 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, I believe that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald Miller
Jonathan L. Kimmel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2682

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

November 25, 1996

Mr. Lee G. Austin
[redacted]

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. Austin:

I have received your letter of October 21 in which you complained with respect to certain activities of the Supervisor of the Town of Halcott.

As I understand the matter, you are a member of the Town Board, and you wrote that the Town placed a notice to bidders in the local newspaper that bids would be opened and read at noon on October 11; the notice did not provide any indication or intent that a meeting would be held. Further, you wrote that you contacted the Supervisor on October 10 and asked whether there would be a meeting the following day. He said that there would be no meeting. Nevertheless, you learned later that after the bids were opened, a special meeting was called to discuss them. Although two other Board members were present, you indicated that neither had any prior knowledge of a meeting. A third member also said that he had no notice that a meeting would be held, and you asked whether "all of this violate[d] the law." In addition, you asked how you can bring charges against the Supervisor.

From my perspective, the meeting as you described it was not validly held, and any action that might have been taken at the meeting could be determined to be null and void. In this regard, I offer the following comments.

First, as you may be aware, §62(2) of the Town Law pertains in part to unscheduled or "special meetings" of Town Boards. That provision requires that notice be given to members of a town board and 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".

Based on the foregoing, while a supervisor may call a special meeting, written notice must be given to board members at least two days prior to a special meeting.

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

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

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

Third, 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, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law.

However, in order to constitute a valid meeting, I believe that all of the members of a public body must be given reasonable

notice of a meeting. Relevant in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. The cited provision states that:

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

Based upon the language quoted above, a public body, such as a town board, cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. Therefore, if, for example, three of five members of a public body meet without informing the other two, even though the three constitute 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. If challenged, I believe that action purportedly taken by a majority of a public body that met without giving reasonable notice to all of the members would be found to be a nullity, i.e., that no action was validly or effectively taken.

Lastly, while I am not an expert on the subject, §36 of the Public Officers Law pertains to the removal of local government officers.

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 the Town Board and the Town Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Gary A. Rose

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2681

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 6, 1996

Mr. William Watson
[redacted]

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

Dear Mr. Watson:

I have received your letter of October 21, as well as the news article attached to it.

It appears that you serve as a member of the City of Tonawanda Board of Education, which recently held an executive session to discuss the fact that a "class 3 sex offender" lived in the City of Tonawanda. You indicated that information concerning the sex offender was distributed to Board members, including that person's name, address and description. Also discussed were procedures for informing staff of the matter, that "the Board would not be informing parent[s]", and that "the individual had four convictions." According to the newspaper article, the individual is a "level 3 risk classification, meaning his records are available only through the local police agency." Further, the Chief of Police indicated that "the guidelines for releasing information make it difficult to inform the public."

You have asked whether the executive session was validly held and whether a board of education may "legally discuss the name, address, description, and record of convictions of a sex offender in open session."

In this regard, I offer the following comments.

First, with respect to the propriety of the executive session, it is my view that most and perhaps all of the session as you described it should have been conducted in public. As you may be aware, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. While two of the grounds may be pertinent to the matter, it is questionable whether either could properly have been asserted.

Section 105(1)(a) permits a public body to enter into executive session to discuss "matters which will imperil the public safety if disclosed." Although I am unaware of the specific nature of the Board's discussion, it might be contended that public discussion would improve or enhance public safety by enabling school officials and the public to be alert. The other provision of possible significance, §105(1)(f), enables a public body to conduct an executive session to discuss "the medical...history of a particular person..." Insofar as the Board considered the psychological profile or characteristics of a parolee, it would appear that the executive session would have been proper. However, insofar as the Board discussed policies and procedures or whether to inform staff or parents of the matter, it is unlikely in my opinion that there would have been a valid basis for entry into executive session.

Second, as you may be aware, Article 6-C of the Correction Law, the Sex Offender Registration Act, also known as "Megan's Law", includes certain public notification provisions applicable when a convicted sex offender is paroled. The validity of those provisions has been challenged in federal court, and in order to learn more of the matter, I contacted the assistant attorney general who is representing the State in the proceeding. In brief, there is in effect at this time a court order that prohibits law enforcement agencies in New York from making the disclosures envisioned by the public notification provisions. You did not indicate the means by which the District acquired information pertaining to the sex offender. As I understand the effect of the court order, the District could not have obtained the information from a law enforcement agency pursuant to the public notification procedures.

However, the District might have acquired information pertaining to a paroled sex offender appropriately from public sources. For instance, court records would contain much of the same information as that envisioned by Megan's Law. Similarly, if a sex offender is given a level three designation and challenges the designation, a public hearing is held to determine the propriety of the designation, and the public has the ability to obtain information via that hearing.

Assuming that the District acquired information pertaining to the parolee through valid means, such as those described in the preceding paragraph, it would have the authority to disclose the information as it sees fit. Further, since the court order prohibiting disclosure applicable to law enforcement agencies does not apply to the District, it is my understanding that the Board would not be prohibited from discussing the details pertaining to the sex offender during an open meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9775
OML-AO 3682

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Mr. Howard Ostrander
[redacted]

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. Ostrander:

I have received your letter of October 25 and the materials attached to it. Please accept my apologies for the delay in response.

The materials relate to a public hearing during which representatives of several towns were present, as well as the Chief of a fire company with which the towns contract. When you asked the Fire Chief for a copy of the fire company's budget, he indicated that it was not public and that he could not release a "line item sheet".

From my perspective, the budget and any "line item" breakdown must be disclosed. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) of the Law defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local governments.

However, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of

Appeals, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire

fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and

> under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to 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.

A budget adopted by an agency would clearly be public. In addition, related records insofar as they consist of statistical or factual information must be disclosed pursuant to §87(2)(g)(i). That provision requires that "statistical or factual tabulations or data" found with intra-agency materials" must be disclosed.

You also questioned whether a public hearing may be properly be conducted when less than a quorum is present. Here I point out that there is a distinction between a hearing and a meeting. A hearing is usually held in order to offer members of the public an opportunity to express their views on a particular subject. A meeting [see Open Meetings Law, §102(1)] is a gathering of a quorum of a public body to discuss public business, to deliberate as a body, and, potentially, to take action. There must be a quorum of a public body present to conduct a meeting in accordance with the Open Meetings Law, and action can be taken by a public body only at meeting by means of an affirmative vote of a majority of its total membership. I know of no provision of law, however, that requires the presence of a quorum of a public body at a public hearing.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Chief of the Borden Hose Company and the Town of Guilford.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Chief Miles
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2683
FOIL-AO 9778

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Mr. Gordon Dutter
Metro Justice
36 St. Paul Street
Suite 112
Rochester, NY 14604

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. Dutter:

I have received your letter of October 25, in which you sought an advisory opinion concerning the implementation of the Open Meetings Law and the Freedom of Information Law by the County of Monroe Industrial Development Authority ("the Authority").

The initial issue involves the Authority's "practice of holding 'pre-meetings' closed to the public, before every monthly board...meeting." You added that "[i]t is clear, from discussion in the parts of the meetings open to the public that substantive discussions have been held and decisions made in the 'pre-meetings'."

From my perspective, the "pre-meetings" must be conducted in public in accordance with the Open Meetings Law. I point out 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 conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the

issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

Based upon the direction given by the courts, when a majority of the Authority is present to discuss Authority business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, because the "pre-meeting" is a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law. Therefore, if a pre-meeting is scheduled to begin at 11:45, notice must be given to that effect.

The second issue involves the Authority's approval of an amendment to its by-laws permitting its meetings to be held and decisions made "by telephone or teleconference."

While there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone, a series of communications between individual members or telephone calls among the members which results in a collective decision, or a meeting held by means of a telephone conference, would in my opinion be inconsistent with law.

As indicated earlier, §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.

It is noted, too, 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.

Additionally, I direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

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

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by phone.

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

Your remaining questions pertain to a request made under the Freedom of Information Law. While numerous records that you requested were made available, you were informed there was no documentation concerning other aspects of your request and asked whether the Authority should have so indicated in writing.

In my view, an agency must respond to a request by making the records sought available, denying the request in whole or in part in writing, or by indicating in writing that records are not maintained by the agency or do not exist (see regulations promulgated by the Committee on Open Government, 21 NYCRR Part 1401). I note that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law provides in part that an agency need not create or prepare new records in response to a request.

Lastly, you asked whether there is a particular length of time during which a request for records "is good" and how many times requested records may be inspected. While it has been held that an agency must permit an applicant to review records throughout its

regular business hours [see Murtha v. Leonard, 210 AD 2d 441 (1994)], I know of no provision or decision that deals with the number of times that a record may be inspected or how long a request may be considered to be active. From my perspective, the principle of reasonableness should govern. If a request involves a great number of records, I do not believe that an agency can restrict inspection to a single day; rather, it should provide an opportunity to the applicant to review all of the records, perhaps on a piecemeal basis so as not to unduly interfere with the agency's ability to perform its duties. Similarly, I know of no limitation concerning the inspection of records. However, I do not believe that an agency must make the same records available over and over if such disclosure would unnecessarily interfere with its capacity to carry out its duties.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: County of Monroe Industrial Development Authority
Martin Lawson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2684

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Ms. Diane L. Chaissan, President
Highland Central School District
Board of Education
320 Pancake Hollow Road
Highland, NY 12528

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

Dear Ms. Chaissan:

I have received your letter of October 22. Please accept my apologies for the delay in response.

You referred to an opinion of September 20 addressed to a resident of your district in which it was advised that an executive session is not separate from a meeting but rather is a portion of an open meeting. You questioned how you can comply with the Open Meetings Law and be considerate to the public if it is clear that the only topic to be considered at a meeting may be discussed during an executive session.

In this regard, it is reiterated that the Open Meetings Law clearly states that an executive session can only be held after completion of the procedure described in §105(1) during an open meeting. 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.

For the reasons expressed in the preceding opinion, a public body cannot in my view schedule an executive session in advance of

a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Similarly, 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.

The second issue that you raised pertains to minutes of "Workshop Meetings." 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 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. If, however, a motion is made to enter into an executive session, the Law requires that the motion be referenced in minutes of the meeting.

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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OM-AO 2685

41 State Street, Albany, New York 12231
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December 12, 1996

Mr. Marco Zumbolo
Chairman
Montgomery County Ethics Advisory
Board
County Annex Building
P.O. Box 1500
Fonda, NY 12068

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. Zumbolo:

I have received your letter of October 28, as well as the materials attached to it.

In your capacity as Chairman of the Montgomery County Ethics Advisory Board, you have sought guidance concerning the Board's authority to conduct executive sessions. You referred specifically to a situation in which an individual may be involved in a conflict of interest.

In this regard, I offer the following comments.

First, the Board is in my opinion required to comply with the Open Meetings Law. That statute is applicable to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

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

A county board of ethics in my view is subject to the Law, for it is created by a county legislature in accordance with §808 of the

General Municipal Law, it consists of at least two members, it may conduct its business only be means of a quorum (see General Construction Law, §41), and it conducts public business and performs a governmental function for a public corporation, a county.

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

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. Further, a public body must accomplish a procedure, during an open meeting, before it may enter into an executive session. Specifically, §105(1) of the Open Meetings Law states in relevant part that:

> "Upon a majority of 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..."

Perhaps most significant in relation to the duties of a board of ethics is §105(1)(f) of the Law, which permits a public body to enter into an executive session to discuss:

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

If the issue before a board of ethics involves a particular person in conjunction with one or more of the subjects listed in §105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, §105(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

Lastly, assuming that the Board may validly enter into an executive session, it may authorize the attendance of others pursuant to §105(2). Therefore, again assuming that the Board may conduct an executive session, it may interview the individual who is the subject of the inquiry, or others, during the executive session.

Enclosed for your review are copies of the Open Meetings Law and advisory opinions concerning boards of ethics that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2686

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December 12, 1996

Ms. Sandra G. Mallah
Superintendent of Schools
Greenburgh Eleven Union Free
School District
P.O. Box 501
Dobbs Ferry, NY 10522-0501

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. Mallah:

I have received your letter of November 1 in which you sought advice and clarification concerning the Open Meetings Law. Please accept my apologies for the delay in response.

You questioned the validity of the following motion for entry into executive session:

> "RESOLVED that the Greenburgh Eleven Board of Education go into Executive Session to discuss the employment history of particular persons, collective negotiations under Article 14 of the Civil Service Law, Taylor Law Union grievances, issues involving individual students, and litigation strategy in the Article 78 proceeding index #1234."

In this regard, I offer the following comments and hope that you do not view them as unnecessarily technical.

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, the 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.

I believe that the motion as it relates to a discussion of the employment history of particular persons is consistent with the Open Meetings Law.

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

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

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the District."

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].

As such, the portion of the resolution pertaining to collective negotiations is, in my opinion, proper.

With regard, to "Taylor Law Union Grievances", it is my view that not all such grievances could be considered in executive session. In most instances, they do not involve collective bargaining negotiations, for negotiations would have been completed; rather, they would likely pertain to issues involving compliance with or implementation of a collective bargaining agreement. If that is so, §105(1)(e) would not serve as a basis for entry into executive session.

The provision that might apply, §105(1)(f), as you know, 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..." (emphasis added).

If, for instance, the grievance relates to an inadequate parking area or a faulty heating system, I do not believe that §105(1)(f) or any other ground for conducting an executive session would apply. On the other hand, if the grievance involved the health of a specific teacher due to the presence of asbestos in her classroom, an executive session would apparently be proper, for the issue would pertain to the "medical history...of a particular person." In short, I believe that the ability to discuss grievances in private would be dependent on their nature and the specific language of the grounds for entry into executive session.

With regard to issues "involving individual students", of likely relevance is §108(3), which exempts from the Open Meetings Law "...any matter made confidential by federal or state law."

Here I direct your attention to 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 funding or 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. 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. Further, 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 technically would be exempt from the Open Meetings Law.

Lastly, you questioned your compliance with the notice requirements imposed by the Open Meetings Law. 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."

If, as you indicated, meetings scheduled at least a week in advance are preceded by notice of the time and place posted not less than seventy-two hours in advance on the Town Hall bulletin board and in your two central offices and faxed to the local radio station, I believe that you would complying with §104.

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

FOIL-AO 9794
OML-AO 3687

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(518) 474-2518
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December 16, 1996

Ms. Frances J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of October 24 concerning the meetings and records of the Investment Committee of the New York City Teachers' Retirement System.

In this regard, since you asked that I attempt to acquire information from the Director of the Retirement System, I note that the Committee on Open Government is not an investigatory body and that it has no investigative powers. The staff of the Committee consists of myself and two secretarial assistants. As such, we have neither the staff nor the authority to engage in the kind of examination that you seek. Nevertheless, in conjunction with your commentary, I offer the following remarks.

First, as you suggested, every public body must provide notice in accordance with §104 of the Open Meetings Law. Specifically, that provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

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

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

Second, for reasons discussed in another opinion addressed to you, rights of access to the kinds of records to which you referred would be governed by §87(2)(g) of the Freedom of Information Law. I agree that you should have the ability to review records indicating the performance of "Variable A", the asset mix of the Pension Fund and how well or poorly the Fund is performing. Insofar as those records consist of "statistical or factual tabulations or data", I believe that they must be disclosed pursuant to §87(2)(g)(i). However, a person's membership in the Retirement System does not necessarily provide that person with the right to review all records of the System or attend every aspect of meetings conducted on its behalf. Again, advice, opinions and recommendations prepared by staff or consultants may properly be withheld. Similarly, §105 of the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances with which you are familiar.

Lastly, there is no requirement that a verbatim transcript of a meeting must be prepared. Section 106 of the Open Meetings Law provides what might be considered as minimum requirements concerning the contents of minutes and states that:

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

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said at a meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2688

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 23, 1996

Ms. Francis J. Thompson
[redacted]

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

Dear Ms. Thompson:

I have received your letter of November 24 concerning agendas and the timely approval and disclosure of minutes of meetings of the Investment Committee of the New York City Teachers' Retirement System.

In this regard, there is nothing in the Open Meetings Law that pertains to agendas. While public bodies frequently prepare agendas, there is no requirement that they must do so or that they must follow an existing agenda.

With respect to minutes of meetings, §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 of open meetings must be prepared and made available within two weeks. If action is taken during an executive session, minutes indicating the nature of the action taken must be disclosed to the extent required by the Freedom of Information Law.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2689

41 State Street, Albany, New York 12231
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December 23, 1996

Hon. Shirley Franchi
Councilwoman
Town of Richfield
P.O. Box 786
Richfield Springs, NY 13439

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

Dear Councilwoman Franchi:

I have received your letter of November 15 in which you sought "a clarification of the Open Meetings Law with regard to the use of camcorders before a meeting is called to order." You asked whether a person has "the right to record Town Officials and the general public as they come into a building and continue to tape their informal, unofficial conversations with each other?"

In this regard, I know of no law or judicial decision that deals directly with the issue that you raised. Several decisions pertain to the use of recording devices during meetings of public bodies, and it has been held that:

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

In view of the 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 the tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. I point that essentially the same conclusion was reached with regard to the use

of video recording devices in Peloquin v. Arsenault, 616 NYS2d 716 (1994).

As inferred in the passage quoted above, there is an expectation during an open meeting, a gathering governed by statute, that peoples' comments are fully public. I do not believe that the same expectation would generally be present when people are talking informally prior to the start of a meeting. While the Open Meetings Law would not pertain to the situation that you described, the Town Board may have the ability to deal with the matter, for it is authorized by the Town Law, particularly §§63 and 64, to establish rules and to manage Town property. By means of the authority conferred by those provisions, the Board may be able to restrict the use of recording devices in the meeting room before or after meetings, unless the individuals being recorded clearly consent to being recorded.

Since the issue does not directly involve the Open Meetings Law, it is suggested that you discuss it with your town attorney or perhaps an attorney from the Association of Towns.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9803
OML-AO 2690

41 State Street, Albany, New York 12231
(518) 474-2518
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December 23, 1996

Mrs. W.R. Powell
[redacted]

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. Powell:

I have received your letter of November 13, which reached this office on November 13. Please accept my apologies for the delay in response.

You raised a series of issues concerning the State Review Panel created by Chapter 145 of the Laws of 1995 and asked whether it is required to comply with the Freedom of Information and Open Meetings Laws.

In this regard, for reasons discussed in an advisory opinion addressed to you on May 14, I believe that the Review Panel is a "public body" subject to the Open Meetings Law. Since you referred to attendance at its executive sessions, I note 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. While the public has no general right to attend an executive session, §105(2) of that statute 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." Therefore, the only people who have the right to attend an executive session are the members of the public body, i.e., the Review Panel. However, a public body, such as the Review Panel, may authorize others to attend. Often the attendance of certain others is routine and occurs informally. For example, while a superintendent is not a member of a board of education, that person may attend executive sessions as a matter of course. In other cases, a public body may authorize the attendance of non-members by means of a motion and vote to permit a particular person or persons to attend.

I believe that the records of the Review Panel are clearly subject to the Freedom of Information Law as well. That statute

pertains to agency records, and §86(3) defines the term "agency" to include:

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

From my perspective, a statutorily created entity such as the Review Panel clearly performs a governmental function for the state and/or a public corporation, the Roosevelt School District.

Viewing the matter from a somewhat different perspective, §86(4) 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 on the language quoted above, any documentation maintained by the review panel would have been acquired or produced by or for an agency, i.e., either the State Education Department or the Roosevelt School District and therefore would constitute a "record" that falls within the coverage of 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. Since you referred to "abuses" relating to money, I note that records involving the expenditure of public monies are typically accessible, for none of the grounds for denial of access would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: State Review Panel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2691

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Ms. Leona Ortlieb
President
CSEA Hospital Unit 0825
P.O. Box 324
Martinsburg, NY 13404

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. Ortlieb:

I have received your letter of November 27 in which you requested a "ruling" concerning the propriety of an executive session conducted by the Lewis County Board of Legislators.

According to your letter, the Board entered into executive session to discuss the "sale of property", specifically, the transfer of the County Hospital to a not-for-profit corporation. You indicated that "[t]he proposed sale involves no bids or actual market value on the hospital" and "would simply involve the transfer of the facility and existing debts."

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the Open Meetings Law. It is not empowered to issue a "ruling" or otherwise compel a public body to comply with law. Therefore, the following remarks should be considered advisory in nature.

First, the Open Meetings Law is based upon a presumption of openness. Specifically, the Law requires that meetings be conducted open the public, except to the extent that an executive session may be held in accordance with the provisions of paragraphs (a) through (h) of §105(1).

Second, the only provision that appears to have been relevant concerning the executive session at issue is §105(1)(h). That provision permits a public body to enter into executive session to discuss:

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

In my opinion, the language quoted above, like the other grounds for entry into executive session, is based on the principle that public business must be discussed in public unless public discussion would in some way be damaging, either to an individual, for example, or to a government in terms of its capacity to perform its functions appropriately and in the best interest of the public. It is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

If the general public was aware of the parcel under consideration for the proposed transaction and the identities of the parties, and if no entity other than the not-for-profit corporation would potentially have been involved in the transaction, it is difficult to envision how public discussion of the matter would had an impact on the value of the property. However, in some circumstances, even when the parties and the site of the parcel are known, a discussion of financial terms or a negotiation process, might, if conducted in public, have an effect on the value of the property. If the effect upon the value would be "substantial", as opposed to minimal or possible, an executive session could, to that extent, be properly held.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Legislators

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2693

41 State Street, Albany, New York 12231
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December 27, 1996

Ms. Helen S. Rattray
Editor
The East Hampton Star
P.O. Box 5002
East Hampton, NY 11937

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

Dear Ms. Rattray:

I have received your letter of November 26 in which you requested an advisory opinion concerning the Open Meetings Law. Please accept my apologies for the delay in response.

According to your letter, several school districts in the Town of East Hampton are "engaged in discussions about a new multi-year tuition contract", and two of the districts are involved in a dispute over tuition increases. You added that attorneys for the school boards involved in the dispute contend that issues relating to the matter may be discussed in executive session, for they "liken the talks to contract negotiations with teachers" and because litigation "has been threatened periodically." You have questioned the validity of their assertions.

In this regard, I offer the following comments.

As you are aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into an executive session. Further, paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may appropriately be considered in executive session. Based upon a review of the grounds for entry into executive session, from my perspective, none could properly be asserted with respect to the issue that you described.

I point out that even though the discussions involve negotiations, the only provision in the law that refers to negotiations is §105(1)(e), which permits to entry into executive

session to discuss or engage in collective bargaining negotiations under the Taylor Law. That series of statutes pertains solely to the relationship between public employers and public employee unions; it does not encompass all negotiations and would not be pertinent to the issue under consideration.

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9812
OML-AO 3693

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December 27, 1996

Mr. Donald S. Stefanski
[redacted]

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. Stefanski:

I have received your undated letter, which reached this office on November 26. You asked that I advise the Town of Elba of its obligations under the Freedom of Information Law, and I will do so by sending copies of this response to Town officials.

As I understand the matter, you opposed an application for an area variance. Although you furnished written comments in which you expressed your view, you were unable to attend the meeting during which the matter was considered by the Zoning Board of Appeals. Consequently, you asked that a transcript of the meeting be sent to you. You wrote that legal challenges to determinations of zoning boards of appeal must be initiated within thirty days, and that the Town failed to respond to your request within that period. Further, the response that you finally received was in your view inadequate, for it consisted of minutes of a meeting rather than a transcript.

In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of the receipt of a request. If more than five business days is needed to locate or review records, the agency must acknowledge the receipt of the request and provide "a statement of the approximate date when such request will be granted or denied..." The Committee on Open Government, by means of regulations promulgated in 1978 pursuant to §89(1)(b)(iii) of the Public Officers Law, sought to insure timeliness of response by requiring agencies to grant or deny access to records within ten business days of the acknowledgement of the receipt of a request [21 NYCRR 1401.5(d)]. However, the court in Lecker v. New York City Board of Education

[157 AD 2d 486 (1990)] invalidated that portion of the regulations on the ground that the Freedom of Information Law does not include a time limitation within which agencies must determine to grant or deny access to records following the acknowledgement that a request has been received. As such, the requirement in the Committee's regulations that agencies grant or deny access to records within ten business days after acknowledging the receipt of a request is no longer binding.

However, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days. If an agency fails to respond in any manner, within five business days, such failure would constitute a constructive denial of access that may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. When an acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Second, the Open Meetings Law pertains to minutes of meetings and §106 states that:

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

Based upon the foregoing, minutes must be prepared and made available within two weeks. I note 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, it is also clear that minutes need not consist of a verbatim account of all that is said at a meeting. Further, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, while the Open Meetings Law requires minutes of meetings be prepared and made available within two weeks of a meeting, there is no requirement that a transcript be prepared. If no transcript exists, the Freedom of Information Law would not be applicable. If, however, the meeting was tape recorded by the Town, I believe that the tape would be accessible, and that it should have been made available promptly.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2694

41 State Street, Albany, New York 12231
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December 27, 1996

Mr. Stewart S. Lilker
[redacted]

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

Dear Mr. Lilker:

I have received your letter of November 19 in which you questioned the propriety of certain executive sessions held by the Village of Freeport Board of Trustees.

You characterized the Trustees as "voting to send themselves on trips and dinners." By means of example, the minutes of an executive session held in August include reference to a motion to grant permission to "reserve a table" at a testimonial dinner. You have contended that, as elected officials, they are not employees and that referring to the issues as "matters of personnel" does not justify the holding of executive sessions.

While your contentions are, in my view, not determinative, I agree that the executive sessions were improperly held. In this regard, I offer the following comments.

In this regard, I offer the following comments.

First, by way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, 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.

From my perspective, consideration of whether to reserve a table at a testimonial dinner or to attend a meeting of the Conference of Mayors, for example, would not fall within the limited and specific scope of §105(1)(f). Similarly, choosing to send a member of staff to a talk or a workshop would presumably involve consideration of the functions inherent in a position. If that is so, again, I do not believe that there would be a basis for conducting an executive session.

Lastly, it has been advised and held judicially that a motion describing the subject to be discussed as "personnel" or "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 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; 207 AD 2d 55 (1994)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees