STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2824

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 20, 1998

Mr. Jerry Brixner
[redacted]

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

Dear Mr. Brixner:

I have received your letter of January 2. You referred to previous correspondence concerning the opening of bids by the Town of Chili.

Specifically, you indicated that the opening of bids is not conducted by the Town Board, but rather is "presided over by the Chili Commissioner of Public Works." You questioned the manner in which the Town gave notice of the bid opening and indicated that you were unaware of which local newspapers might have published notice of the event.

In this regard, I do not believe that the Open Meetings Law would have been relevant or applicable. Rather, the statute cited in the previous correspondence, section 103 of the General Municipal Law, would have governed. Subdivision (2) of that provision states in part that the governing body, such as the Town Board in this instance, "may by resolution designate any officer of employee to open the bids at the time and place specified in the notice." With respect to notice, the same provision states that "[a]dvertisement for bids shall be published in the official newspaper or newspapers, if any, or otherwise in a newspaper or newspapers designated for such purpose." Therefore, notice need not necessarily be published in every newspaper having circulation in the Town; if an official newspaper has been designated, notice would be required to be given only in that newspaper.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2825

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 14, 1998

Ms. Kristen E. Bennett
District Office Manager
Office of Assemblyman John J. Flanagan
75 Woodbine Avenue
Northport, NY 11768

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

Dear Ms. Bennett:

I have received your recent letter in which you sought assistance concerning a question raised by a constituent of Assemblyman Flanagan. Specifically, Dr. Hector Battaglia, a Commissioner for the Centerport Fire District, sought confirmation of "his right to videotape a fire district meeting."

In this regard, I offer the following comments.

First, I believe that a board of fire commissioners, which is the governing body of a fire district, is clearly a "public body" that falls within the scope of the Open Meetings Law. Section 102(2) of the Law defines the phrase "public body" to mean:

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

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], a board of commissioners of a fire district in my view constitutes a public body subject to the Open Meetings Law.

Second, I point out that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. However, there is one 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 sum, based on judicial decisions, in my opinion, any person may record an open meeting of a public body, so long as the recording is carried out in a manner that is not disruptive to the proceedings.

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-2826

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 2, 1998

E-Mail

TO: Joseph Schwartz [redacted]

The staff of the Committee 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. Schwartz:

I have received your communication of January 13, as well as a variety of related material. You have sought my views concerning a gathering of three members of the Danby Town Board during which a special meeting was scheduled. You wrote that the "three of them admitted to the meeting" and "went into the supervisor's office and shut the door." You also wrote that an attorney for the Association of Towns advised that, in your words, " a discussion between the supervisor and two or more board members regarding a date and time to hold the meeting is not considered a meeting for the purpose of discussing town business and is therefore beyond the scope of the open meetings law."

From my perspective, an appropriate response concerning the applicability of the Open Meetings Law is dependent on the facts. If indeed, as you indicated during a telephone conversation, the gathering lasted for approximately a half hour, I would agree that it would have constituted a meeting subject to the Open Meetings Law. On the other hand, if the encounter was brief and did not involve any discussion or deliberation on the part of the three Board members, the Open Meetings Law might not have applied.

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 Board is present to discuss the Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Again, if in fact the members met for approximately a half hour, perhaps to consider scheduling or its agenda for an upcoming meeting, that kind of gathering, based on the direction provided by the courts, would in my opinion have constituted a "meeting" subject to the requirements of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Lori Mithen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-A- 2827

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 2, 1998

Mr. Jerry Brixner
[redacted]

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

Dear Mr. Brixner:

I have received your letter of January 8 concerning notice and your ability to attend a meeting of the Town of Chili Comprehensive Master Plan Update Committee.

In this regard, it is possible that the entity in question is not subject to the requirements of the Open Meetings Law. That statute is applicable 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."

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

This is not to suggest that it must hold closed meetings. On the contrary, often advisory bodies are encouraged to seek public participation at their meetings.

Lastly, when the Open Meetings Law is applicable, I note that it does not require a public body to pay to place a legal notice in a newspaper prior to a meeting. Section 104 of the Law requires a public body to give notice to the news media and by means of posting. Nevertheless, once in receipt of notice, a newspaper may choose to publicize the meeting, even though it is not required 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:tt

cc: Hon. William C. Kelly, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-10597
OMC-AO-2829

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 3, 1998

Mr. Anthony Logallo
[redacted]

The staff of the Committee on 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. Logallo:

I have received your letter of January 8. You referred to a decision rendered under the Open Meetings Law concerning the award of attorneys' fees [Gordon v. Village of Monticello, 87 NY2d 124 (1995)] and asked whether the direction provided by the Court of Appeals in that decision would be applicable relative to an award of attorneys' fees under the Freedom of Information Law.

From my perspective, the standards are different. Under §107(2) of the Open Meetings Law, a court has the discretionary authority to award attorneys' fee to the successful party. In contrast, §89(4)(c) of the Freedom of Information Law states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public: and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

Notably, the Court of Appeals in Gordon referred to the distinction in the two statutes, stating that "unlike New York's Freedom of Information Law - a related statute enacted two years earlier.... the

Open Meetings Law contains no requirement, for an award of attorneys' fees, that the information be of 'clearly significant interest' and that there be no 'reasonable basis' for withholding it..." (id., 127).

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

As you requested, enclosed is copy of the memorandum on "Confidentiality" that you requested.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2829

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 9, 1998

Mr. Donald P. Bamann
[redacted]

The staff of the Committee on 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. Bamann:

I have received your letter of January 15, as well as the materials attached to it. You have sought my views concerning a meeting conducted in November in the Town of Williamson.

According to your letter, the Town created a "Comprehensive Plan/Master Plan Committee" to prepare a comprehensive zoning plan and retained Phoenix Associates to assist in the preparation of the plan. On November 3, a meeting was held "for the purpose of reviewing the Comprehensive Plan at which the Committee invited members of the Town Board, the Planning Board, the Zoning Board of Appeals, and the School Board." During the meeting, a representative of Phoenix Associates presented a plan and the members of each of the boards to which you referred asked questions and discussed the plan. At the end of the meeting, the Committee approved the plan.

You indicated that few members of the public attended, "because there was little if any publication or notice of this meeting", and that the only notice appeared in a local newspaper, but "only as a Committee meeting." You added that notice of the meeting was not posted at Town Hall.

From my perspective, if a majority of the members of any of the boards to which you referred was present at the gathering in question, the gathering would, in my opinion, have been a "meeting" subject to the Open Meetings Law. Further, I believe that each of those boards for which a majority was present would have been obliged to provide notice in accordance with §104 of that statute. In this regard, I offer the following comments.

First, it is emphasized that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public,

whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

I point out that it has been held that joint meetings held by two or more public bodies are subject to the Open Meetings Law [Oneonta Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)], and that in a more recent decision, it was held that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the Council was asked to attend by a city official who was not a member of the city council [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the gathering in question might have been held at the request of the Committee, I believe that it was

a meeting of any board a majority of whose members was present for the purpose of conducting public business.

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

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

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

Third, the status of the Committee that called the meeting is unclear. As you may be 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."

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, if the Committee that called the meeting has only the ability to recommend, and no power to take action on behalf of the Town, it would not constitute a "public body" subject to the requirements of the Open Meetings Law. This is not to suggest that the Committee could not hold open meetings, but rather that there would be no obligation to do so. On the other hand, if the Committee does have the authority to take action, I believe that it would be a "public body" required to comply with the Open Meetings Law.

To reiterate, however, notwithstanding the status of the Committee under the Open Meetings Law, the presence of a majority of any of the boards to which you referred would, in my opinion, indicate that the gathering at issue would have been a "meeting" of any such 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

OML-AO-2530

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 9, 1998

Ms. Anna Sherman
[redacted]

The staff of the Committee on 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. Sherman:

I have received your letter of January 13, which reached this office on January 20. You have sought my views concerning the propriety of actions of the Westport Town Board at a meeting held on January 13.

It is noted that the advisory jurisdiction of the Committee on Open Government is limited, in the context to your letter, to matters relating to the Open Meetings Law. Consequently, the following remarks will pertain only to that statute.

You referred to an executive session held during the meeting, and you indicated that, after the Board returned to the open meeting, it "voted on items a-b-c-d-, etc. and never informed the public what they were voting on." Having reviewed the minutes of the meeting, the primary issue in my opinion involves the extent to which the executive session was properly held. Insofar as the Board discussed specific individuals and their qualifications to serve in certain positions, I believe that the executive session would properly have been held. However, insofar as the Board considered the establishment or elimination of positions, the discussion should have occurred in public. 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.

Although the minutes of the meeting make reference to a motion to enter into executive session, there is no indication of any reason for entry into executive session. From my perspective, one of the grounds for entry into executive session would have pertinent, but as inferred earlier, that provision, in my view, would not have permitted the Board to discuss each of the matters considered in private.

The relevant provision, §105(1)(f) of the Open Meetings Law, is often characterized as the "personnel" exception. Nevertheless, it is emphasized that the term "personnel" appears nowhere in the Open Meetings Law. The language of the so-called "personnel" exception, 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 layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the functions of an agency and 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, Third 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)].

Another issue relates to minutes and their contents. Section 106(1) of the Open Meetings Law provides direction concerning of minutes of open meetings and states that:

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

Based on the foregoing, if, for instance, a 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 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 a 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, and 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 Town Board's actions.

The remaining provisions of §106 provide as follows:

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

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

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

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:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 12, 1998

Ms. Michelle Breidenbach
Syracuse Newspapers
Madison County Bureau
601 Lakeport Road
Chittenango, NY 13037

The staff of the Committee 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. Breidenbach:

I have received your letter of January 20 in which you requested an advisory opinion in relation to several questions concerning the interpretation of the Open Meetings Law.

First, you asked whether a town and village board may conduct executive sessions to discuss "pending litigation" if their intention is "to discuss a lawsuit to which they are not a party." You referred to and executive session held, apparently jointly, by the Lenox Town Board and the Canastota Village Board of Trustees "to discuss Oneida Indian land claim negotiations, which are currently being held between the Indians and the state and county governments."

In this regard, as a general matter, 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.

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. Specifically, it has been held that:

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

In the situation that you described, neither the Town nor the Village is party to the litigation that is the subject of the discussion. If that is so, it does not appear that §105(1)(d) would serve as a basis for conducting an executive session.

Second, you questioned whether the same boards may "go into executive session for 'contracts' to discuss the possibility of a service contract with the Oneida Indian Nation." Although some issues relating to "contracts" or "contract negotiations" may be considered in executive session, the ability to do so, in my view, is limited. The only provision that pertains specifically to contract negotiations, §105(1)(e), deals with collective bargaining negotiations between a public employer and a public employee union under Article 14 of the Civil Service Law, which is commonly known as the Taylor Law.

There is, however, a different ground for entry into executive session that may, depending upon the nature of the discussion, be asserted to discuss certain matters pertaining to contract negotiations. Section 105(1)(f) authorizes a public body to enter into executive session to discuss:

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

In some instances, a public body's discussion might focus on the financial or credit history of a particular corporation, for example. To the extent that a discussion involves such matters, I believe that an executive session could properly be held. I am unaware of whether the Indian Nation has

created a "corporation." However, since the matter involves a service contract, it would appear that the Indian Nation is acting in the capacity of a business entity and that §105(1)(f) may be pertinent.

Third, you asked whether there is a requirement that both the Village and the Town Board must "notify the public about a joint public meeting." In this regard, 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 has also been held that a joint meeting of majorities of two public bodies is subject to the Open Meetings Law [Oneonta Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)], and that a planned meeting of a public body held at the invitation of a non-member would constitute a "meeting" subject to the requirements of the Open Meetings Law [see Goodson-Todman v. Kingston, 153 Ad 2d 103, 105 (1990)].

Further, 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.

And fourth, you asked whether the Village and Town Boards may "hold a meeting on private property." There is nothing in the Open Meetings Law that specifies where meetings may be held. The only provision that deals somewhat directly with the issue is §103(b), which states that public bodies must make or cause to made reasonable efforts to hold meetings in locations that offer barrier-free access to physically handicapped persons. Perhaps equally pertinent is §100 of the Open Meetings Law, the Legislative Declaration, which 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 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. Whether a meeting is held on public or private property, to give reasonable effect to the law, I believe that meetings should be held in locations in which those likely interested in attending have a reasonable opportunity to do so.

Lastly, if my recollection is accurate, I have received one or more telephone calls from one or both of the municipalities whose activities are the subject of your inquiry. As I understand the situation, the Boards may be in something of a "catch-22." While they may have every intention of complying with the Open Meetings Law, I recall being informed that representatives of the Indian Nation would meet only on their property and only in private. In that kind of situation, should the Boards want to resolve problems, engage in agreements and the like by conferring with representatives of the Indian Nation, they may essentially be forced to violate the Open Meetings Law.

My hope is that this opinion, copies of which will be sent to both the Town Board and the Village Board of Trustees, will provide the Indian Nation and others an indication of the responsibilities imposed upon governmental bodies in New York. Also, and I am not suggesting this as a means of circumventing the Open Meetings Law, the Town and the Village could send representatives from their boards to meet with representatives of the Indian Nation. If less than a majority of those boards attends, the Open Meetings Law would not, in my opinion, be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Lenox
Board of Trustees, Village of Canastota

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2832

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February 13, 1998

Mr. Fred Schmelzer
[redacted]

The staff of the Committee on 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. Schmelzer:

I have received your letter of January 17. You alleged that the "Town of Pittsfield Town Board has been in the habit of changing the dates of town meetings whenever it suits them." You also referred to a "hiring" that "was not done in open meeting and was not announced to the public."

In this regard, I offer the following comments.

First, in order to avoid confusion, I point out that the phrase "special meeting" is found in §62(2) of the Town Law. That provision, from my perspective, deals with unscheduled meetings, rather than meetings that are scheduled in advance. Specifically, that provision states in relevant part that:

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

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

The Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, 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.

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

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

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

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

In an effort to enhance understanding of and compliance with 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
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February 13, 1998

Ms. Mary J. Hertwig, President
Yonkers Council of Parent Teachers Association
[redacted]

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

Dear Ms. Hertwig:

I have received your letter of January 21 in which you sought my views concerning a matter relating to the City of Yonkers Board of Education.

According to your letter, five members of the Board, a majority of its membership, met with the Mayor of Yonkers early in January "for the purpose of interviewing a perspective [sic] headhunting firm to conduct a proposed search for a new Superintendent of schools..." You indicated that no notice was given prior to the meeting due to what was characterized as a clerical oversight.

From my perspective, although it appears that the issue discussed could have been considered during an executive session, the gathering should nonetheless have been preceded by notice and convened open to the public. In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated

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

Third, the phrase "executive session" is defined in §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 separate from or 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 conduct or schedule an executive session separate from or in advance of a meeting.

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

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

Based on the foregoing, while I believe that the Board failed to comply with various aspects of the Open Meetings Law, it appears that the issue under consideration could validly have been discussed during an executive session properly convened.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this response 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

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February 18, 1998

Mr. Charles Tiano
[redacted]

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

Dear Mr. Tiano:

I have received your letter of January 20 in which you raised a variety of issues relating to meetings of the Woodstock Town Board.

You referred to a practice adopted with respect to its afternoon meetings in which "only board members, members of the press and representatives of various town departments may speak." In this regard, while the Open Meetings Law provides that any member of the public may attend, listen to and observe the performance of public officials at meetings, that statute is silent with respect to the ability of the public to speak or otherwise participate. Therefore, a public body, such as a town board, may choose to prohibit the public from speaking. Certainly a public body may permit the public to speak, and many do so. It has been advised that if a public body chooses to permit public participation, that it do so by means of reasonable rules that treat members of the public equally.

From my perspective, while the news media plays a special role in informing the public of government activities, members of the news media generally enjoy no special rights. For the purpose of attending meetings, members of the news media have the same as those accorded to the general public. In my view, for purposes of participation at meetings, members of the news media, as members of the public, should have the same privileges as the public generally, and *vice versa*. Stated differently, to be reasonable and fair, and to carry out its rules in a manner that treats the public equally, I believe that any member of the public should have some ability to speak as does the news media.

You also asked whether the Board must "indicate the subject of the executive meetings before going into closed meetings." As you inferred, 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 following commentary pertains to the most commonly cited reasons for conducting executive sessions, their scope and the language of the appropriate motions to be made prior to entry into executive sessions.

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

In an effort to enhance understanding of and 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
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February 18, 1998

Ms. Linda 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 your letter of January 19 in which you questioned the propriety of a certain executive session conducted by the board of Trustees of the Village of Ossining.

Without additional knowledge concerning the nature of the discussion, I cannot offer a specific response. Nevertheless, in an effort to provide guidance in relation to the matters that you described, I offer the following comments.

It is noted at the outset that there are two methods that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, 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.

Of possible relevance to your inquiry is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

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

though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, often at some point in a discussion, the attorney has stopped giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting.

Second, as inferred earlier, 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 would have been §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.

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:tt

cc: Board of Trustees

STATE OF NEW YORK
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February 18, 1998

Mr. Jonathan J. Miller
County Attorney
County of Franklin
Court House
Malone, NY 12953

Dear Mr. Miller:

I have received your letter of February 12 and congratulate on your appointment as Franklin County Attorney. As you requested, enclosed is a package of materials dealing with the Open Meetings Law, as well as the Freedom of Information Law.

With regard to the issue that was recently raised, whether the County Legislature may conduct an executive session "after closing the meeting", or whether an executive session "must take place prior to the formal closing of the meeting", it is clear in my view that an executive session may validly be held only prior to the closing of a meeting.

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. 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.

I hope that I have been of assistance and that we will have the opportunity to meet at the meeting of the County Attorneys Association in Ithaca in May.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

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February 18, 1998

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

I have received your letter of January 19 in which you sought "corrective action" concerning closed meetings held by a "Community Health Planning Committee." That entity, according to your letter, consists of "a few members of community boards on Manhattan's West Side, representatives of the Hospital Center's union and their neighborhood supporters."

For reasons that I believe have been discussed in previous correspondence, the entity in question does not appear to be subject to 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.

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 Committee in question, in my opinion, does not constitute a public body and, therefore, is not required to comply with 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:tt

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February 20, 1998

Mr. Edward Szymkowiak
Citizens for Fiscal Responsibility
[redacted]

The staff of the Committee on 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. Szymkowiak:

I have received your letter of January 27 in which you asked whether "the Open Meetings Law require[s] committees of the Delaware County Board of Supervisors to compile and make available minutes of their meetings."

From my perspective, when a committee consists solely of members of a public body, such as a county legislature, the Open Meetings Law is fully applicable. 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 a county legislature, 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 Supervisors consists of nineteen, its quorum would be ten; in the case of a committee consisting of five, a quorum would be three.

When a committee is subject to the Open Meetings Law, it has the same obligations regarding notice, openness, and the preparation of minutes, 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 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."

Based on the foregoing, if, during a meeting of a committee, there are any motions, proposals, resolutions or action taken, minutes must be prepared. Contrarily, if none of those events occurs, there would be no requirement that minutes be prepared.

In addition, as indicated in §106, when minutes are required, it is clear that they must be prepared and made available "within two weeks of the date of such meeting." 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 been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to Delaware County officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Raymond Christensen
Richard B. Spinney
William R. Moon

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February 20, 1998

Mr. Albert D. Fagant
[redacted]

The staff of the Committee on 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. Fagant:

I have received your letter of January 27 in which you raised questions concerning the application of the Open Meetings Law to the Shared Decision Making Committee at the South Country Central School District, as well as "individual building teams", which are frequently characterized as "school-based committees."

In conjunction with your questions, I offer the following comments.

First, as you may be aware, regulations promulgated by the Commissioner of Education, 8 NYCRR §100.11, require that boards of education "in collaboration with" so-called "compact for learning" or "shared decisionmaking" committees must develop a plan "for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking".

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

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

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

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or dy. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were one of the persons or officers disqualified from acting."

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

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

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

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

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

With respect to the entities that are the subject of your inquiry, while the regulations make reference to "school-based" committees, there is no statement concerning their specific role, function or authority. It is my understanding, based upon a discussion with a representative of the State Education Department, that school-based committees carry out their duties in accordance with the plans adopted individually by boards of education in each school district, and that those plans are intended to provide the committees in question with a role in the decision making process. When, for example, a plan provides decision making authority to school-based committees within a district, those committees, in my opinion, would clearly constitute public bodies required to comply with the Open Meetings Law. Similarly, when a school-based committee performs a function analogous to that of the shared decision-making committee, i.e., where the school-based committee has the authority to recommend, and the decision maker or decision making body must consider its recommendations as a condition precedent to taking action, I believe that the committee would be a public body subject to the Open Meetings Law, even when the recommendations need not be followed.

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

Next, you asked whether minutes of meetings must identify those who make and second motions. While nothing in the Open Meetings Law specifies that those who introduce or second motions must be identified in minutes, it is common practice to do so.

Lastly, although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I note 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)]. Section 87(3)(a) of the Freedom of Information Law requires that agencies maintain a record indicating the vote of each member in every agency proceeding in which the member votes. In short, as you inferred, if a vote is other than unanimous, a record must be prepared that indicates how each member cast his or her vote. That record is typically part of the minutes.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph A. Laria
William C. Morrell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2839

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February 24, 1998

Mr. Richard DeLorenzo
[redacted]

The staff of the Committee on 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. Lorenzo:

I have received your letter of February 2. You have asked whether in my view certain "facts constitute musical chairs' and therefore is illegal." In brief, the scenario involved a member of the Village of Croton Board of Trustees exchanging her position with a member of the Planning Board. You indicated that the exchange occurred during an open meeting of the Village Board and that "no executive session was held prior to the meeting."

From my perspective, based on your description of the events, the Board would have complied with the Open Meetings Law. I note that the so-called "musical chairs" case [Gordon v. Village of Monticello, Supreme Ct., Ulster Cty., August 5, 1993; modified, 207 AD2d 55 (1994); reversed on other grounds, 87 NY2d 124 (1995)] focused on a situation in which a public body conducted an executive session to discuss the creation of a position and associated issues that led to a series of changes in positions. That does not appear to have been the case in the situation that you described.

The provision at issue in Gordon, §105(1)(f) of the Open Meetings Law, permits a public body to enter into executive session to discuss:

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

Based on the language quoted above, when a discussion involves the creation or elimination of a position, for example, the focus would not pertain to a "particular person", and there would be no basis for conducting an executive session. However, when an issue pertains to a particular person

in conjunction with one or more of the subjects enumerated in §105(1)(f), an executive could validly be held.

If I have misunderstood the matter, please feel free to attempt to offer clarification. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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February 25, 1998

Mr. Kevin Harlin
Government Reporter
The Ithaca Journal
123 W. State Street
Ithaca, NY 14850

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

Dear Mr. Harlin:

I have received your letter of January 30 in which you requested an advisory opinion concerning the propriety of an executive session held by the Budget and Administration Committee of the City of Ithaca Common Council.

According to your letter, the Committee had planned to discuss and perhaps recommend changes in the City's snow emergency policy as it relates to employees who do not go to work during a state of emergency. You indicated that at least one employee filed a grievance, contending that the policy was unfair and that benefit time should be restored. The Chair of the Committee informed you that the issue of policy would be tabled, pending an executive session concerning the grievance. The City Attorney suggested to you that the initiation of the grievance, in your words, "made it a litigation matter and a personnel item" and that consideration of the fairness of the policy and the merits of the grievance could not be separated. Consequently, you wrote that "she found it necessary to advise the committee to discuss strategies for the grievance in executive session, and then let the grievance run its course before bringing the general policy question back to the table."

It is your contention that the matter involved neither litigation nor personnel and that the executive session should have been conducted open to the public.

In good faith, I note that I recently received correspondence from the City Attorney in which she explained her position concerning the executive session. In addition to her contention that the matter involved litigation, she wrote that the "discussion covered collective negotiations" and that "resolving the grievance was inextricably linked with the collective bargaining issues." She also

expressed the view that the discussion would have been exempted from the Open Meetings Law, citing the attorney-client privilege.

In this regard, I offer the following comments.

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

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

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

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". Whether the initiation of a grievance or grievance proceeding could be characterized as "litigation" is, in my opinion, questionable. From my perspective, litigation involves a contest between opposing parties in a court. A grievance proceeding is not conducted before a court. For that reason, I do not believe that a discussion relating to a grievance could be characterized as a matter pertaining to litigation.

It is also noted that the scope of the so-called litigation exception is narrow. As stated judicially:

> "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 Yorketown, 83 AD d. 612, 613, 441 N.S. d. 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" [Weatherwise v. Town of Stony Point, 97 AD d. 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. Assuming that litigation strategy can be separated from

consideration of policy matters, such a distinction must be made in my opinion in order to give effect to public policy considerations reflected in the Open Meetings Law.

Next, I note that the term "personnel" does not appear in the Open Meetings Law. Further, the exception that is typically cited to discuss personnel matters would not, in my opinion, have been applicable in conjunction with the facts that you presented. Section 105(1)(f) permits a public body to enter into executive session to discuss:

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

While the grievance might have been brought by a single individual, its outcome presumably would affect all employees subject to the policy. Further, it does not appear that the matter would have involved a specific individual in relation to the subjects enumerated in §105(1)(f).

The remaining basis for entry into executive session of significance, §105(1)(e), permits a public body to discuss: "collective negotiations pursuant to article fourteen of the civil service law..." Stated differently, a public body is permitted to hold an executive session to discuss collective bargaining negotiations involving a public employee union. As I understand the situation, the grievance related to the manner in which the City's snow emergency policy should be applied, and despite the City Attorney's contention, it is not entirely clear how the matter related to collective bargaining negotiations.

Lastly, as suggested by the City Attorney, there is a separate vehicle that may authorize a public body to engage in a private discussion. Section 108 of the Open Meetings Law pertains to "exemptions." If an exemption applies, the Open Meetings Law does not. One of the exemptions, §108(3), concerns "any matter made confidential by federal or state law." When an attorney-client relationship has been invoked, the communications between the attorney and the client are confidential under §4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

Insofar as a public body 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 neither the litigation nor any other exception for entry into executive session would 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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mariette Geldenhuys
Jane Marcham

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2841

ommittee Members

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Executive Director

Robert J. Freeman

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February 25, 1998

Mr. John J. 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 30 in which you questioned the propriety of certain action taken by the Binghamton City Council.

According to your letter, "[t]he City Council of Binghamton recently took a vote by phoning each member of Council and asking the councilpersons to vote over the phone in regard to limiting speakers who appear before Council to speak on agenda items only."

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 may be 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council

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March 2, 1998

Mr. John J. 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 February 6 in which you sought an opinion concerning the propriety of a meeting held by the Binghamton City Council.

According to your letter, the Council met at 7 p.m. "in a small room off the City Clerk's Office and Council Members were polled" with respect to a certain issue. You added that you attended the meeting in question, that all Council members were present, and that a vote was taken concerning the issue. Notwithstanding the presence of the entire Council and yourself, you indicated that "[t]here was no advance notice of this meeting."

In this regard, I offer the following comments.

First, 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 Council 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 city council. 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.

Third, if a public body reaches a consensus upon which it relies, I believe that minutes reflective of a decision 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).

In my opinion, if the Council reached a "consensus" that is reflective of a final determination of an issue, minutes must be prepared that indicate its action, as well as the manner in which each member voted [see Freedom of Information Law, §87(3)(a)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 2, 1998

Ms. Ralene R. Adler
[redacted]

The staff of the Committee on 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. Adler:

I have received your letter of January 31, as well as the materials attached to it.

In your capacity as a Trustee of the Great Neck Library (hereafter "the Library"), you wrote that it is "an incorporated free association library, functioning pursuant to provisions of the Education Law, and is [a] type B Corporation under the Not-for-Profit [Corporation] Law." You have questioned the status of the Library's Nominating Committee, which is a creation of the Library's by-laws. According to Article VIII of the by-laws, the Nominating Committee consists of "seven members of the Association, five of whom shall be elected by the membership at the annual meeting, and two of whom shall be appointed by the Board of Trustees." Four members of the Nominating Committee constitute a quorum.

In my view, the Nominating Committee is not subject to the Open Meetings Law. As you may be aware, that statute is applicable 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."

Based on the foregoing, as a general matter, the Open Meetings Law pertains to governmental bodies.

While it is clear that the Board of Trustees is required to comply with the Open Meetings Law, its duty to do so is not because it is a governmental entity; in my view, it is not a governmental entity. Rather, the requirement to do so is due to the direction provided by §260-a of the Education Law. Based on §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former is a governmental entity; the latter typically is not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the status of an association library was rendered by the Appellate Division, Second Department, which includes Great Neck within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library.

The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to boards of trustees of public and association libraries pursuant to §260-a of the Education Law, which states that:

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

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with that statute.

From my perspective, boards of trustees of libraries that are governmental entities, such as school district public libraries, as well as committees consisting of members of those boards, would constitute "public bodies" subject to the Open Meetings Law even if §260-a of the Education Law had not been enacted. Association libraries, however, are typically not-for-profit corporations which, as indicated in the judicial decision cited above, are "private organizations" separate from government. As such, absent the enactment of §260-a of the Education Law, I do not believe that they would be required to comply with the Open Meetings Law.

As §260-a refers to committees and subcommittees of boards of trustees, the only coverage by the Open Meetings Law pertains to those committee and subcommittee meetings "of any such board of trustees in cities have a population of a million or more." Since Great Neck is not such a city, the Open Meetings Law, in my opinion, would not apply to the Nominating Committee.

The foregoing is not intended to suggest that the Nominating Committee cannot conduct meetings in public; on the contrary, I believe that the Board of Trustees would have the authority, as the governing body, to direct the Committee to carry out its duties in public and follow the Open Meetings Law as a guide for the performance of its duties.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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March 3, 1998

Ms. Laurie Stuart
Editor
The River Reporter
P.O. Box 150
Narrowsburg, NY 12764

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

Dear Ms. Stuart:

I have received your letter of February 5 in which you requested an advisory opinion concerning "the matter of the Narrowsburg Central School Board of Education and their habitual use of Executive Session."

According to your letter, the Board has engaged in ongoing consideration of the renewal of the contract between the District and the Superintendent, but "[t]he nature of the discussions have been a policy change from a full-time Superintendent to a part-time one." You added that the contract was approved in executive session. Additionally, you referred to executive sessions held prior to open meetings and the claim that "anything that has to do with 'personnel' can be slated for a closed meeting."

In this regard, I offer the following comments.

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

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

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

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].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule or hold an executive session in advance of a meeting, 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.

Second, 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 whether a position should be full-time or part-time, 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).

In the context of the situation as you described it, consideration of whether a position should be full-time or part-time involves an issue of policy; the nature of the position would presumably be the same irrespective who might hold it. Only insofar as the Board discussed the Superintendent's performance would the executive sessions have been appropriately held. The remaining aspects of the discussions concerning the nature of the position and whether it should be full or part-time, in my view, would not have qualified for deliberation in executive session.

I note, too, that it has been held 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.

Further, 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; 207 AD 2d 55 (1994)].

Lastly, 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

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March 6, 1998

Mr. Robert W. Kendall
Assistant Superintendent
Pittsford Central Schools
42 W. Jefferson Road
Pittsford, NY 14534-1978

Dear Mr. Kendall:

As you are aware, your letter of November 19 addressed to James A. Kadamus, Deputy Commissioner of the State Education Department, has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized by statute to provide opinions concerning the Open Meetings Law (see Public Officers Law, §109). It is noted that your letter reached this office on February 10.

You sought clarification concerning the obligation of a "prekindergarten policy advisory board" to conduct meetings in accordance with the requirements of the Open Meetings Law. You added that "[i]t has been [y]our practice, based on [y]our attorney's advice, that advisory committees need not be open meetings."

While I am in general agreement with the attorney's opinion, in this instance, because the entity in question is a creation of statute and performs a necessary function in the decision-making process, I believe that it constitutes a "public body" required to comply with the Open Meetings Law. In this regard, I offer the following comments.

First, a newly enacted provision of the Education Law, §3602-e, pertains to the "universal prekindergarten program" and states in part in paragraph (a) of subdivision (3) that:

> "During the nineteen hundred ninety-seven--ninety-eight school year each school district shall form a prekindergarten policy advisory board (herein referred to as advisory board) appointed by the superintendent which shall include but not be limited to members of the board of education, teachers employed by the school district as selected by the collective bargaining unit, parents of children who attend such district, community leaders and child care and early education providers."

The ensuing provisions of subdivisions (3) and (4) indicate that each advisory board must conduct a public hearing "to determine what recommendation it will make to the board of education", that its recommendation must consider certain factors, that it must develop a prekindergarten program plan if it recommends the implementation of such a program, and that the board of education must consider the recommendations of the advisory board before its action to "adopt, modify or reject such recommendation and/or plan."

Second, 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, an advisory board clearly performs a necessary and integral function in the implementation of §3602-e of the Education Law, for a board of education cannot carry out its duties until it considers the recommendations of an advisory board.

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 §3602-e, since the advisory board 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. An advisory board 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.

In sum, based on the rationale offered in preceding analysis, it is my view that a prekindergarten policy advisory board is a "public body" required to comply with the Open Meetings Law.

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: James A. Kadamus
Kathy A. Ahearn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 6, 1998

Mr. Harry Kovsky
Cedarlawn Road
Irvington, NY 10533

The staff of the Committee on 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. Kovsky:

I have received your letter of February 5 in which you referred to a copy of an advisory opinion sent to you that focused on the most commonly cited grounds for entry into executive session. Although you distributed copies of the opinion to members of the Irvington Board of Education, the Board President, according to your letter, indicated that its attorney advised that since the opinion was addressed to the Mayor of the City of Geneva, not the School Board, it "did not have to comply."

You have asked that I "re-address" the "Geneva letter" to the President of the Board.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect the Open Meetings and Freedom of Information Laws. Entities of government are not required to "comply" with the opinions rendered by this office. The opinions are based on the language of the law and judicial decisions, and it is my hope that they are educational and persuasive. To attempt to enhance compliance with and understanding of the Open Meetings Law, I will respond to you directly and send copies to the President of the Board and the District's attorney. In responding to you, portions of the opinion previously rendered will be reiterated; additional commentary will be included relating to your views as expressed to the District's attorney.

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 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 Irvington School District."

You suggested that a public body cannot enter into executive session to discuss a matter that "may lead" to litigation. In my opinion, that may not be so in every instance. While the possibility of litigation alone is not sufficient to justify an executive session, there can be situations in which no

litigation has been commenced in which there would be a proper basis for entry into executive session. For example, a public body might discuss its litigation strategy in terms of the pro's and con's of bringing a lawsuit; similarly, it might discuss litigation strategy in the event that it is sued. Both of those situations pertain to matters that may lead to litigation. However, insofar as a public body's discussions involve litigation strategy, I believe that an executive session could properly be held.

Since you referred to a matter involving a possible real estate transaction, I direct your attention to §105(1)(h) of the Open Meetings Law. As in the case of the "litigation" exception in which the court considered the effects of public discussion as the basis for their determinations, the ability to conduct an executive session under §105(1)(h) is dependent upon the effect of public discussion. That provision permits a public body to enter into an executive session to consider:

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

Based on the foregoing, if indeed publicity would preclude the government from engaging in an optimal arrangement on behalf of the taxpayers (i.e., if publicity would substantially affect the value of real property), an executive session in my opinion could properly be held.

Next, 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.

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 teachers union."

At the end of your letter, you referred to a fact finder's report and asked whether a "FOI [is] required when a document is made public" and whether you can be charged for copies of such a document.

In this regard, the Freedom of Information Law pertains to all agency records [see Freedom of Information Law, §86(4)]. While an agency may accept oral requests or respond informally to requests, I believe that it may require that a request be made in writing. Similarly, although an agency may provide copies of records at no charge, under §87(1)(b)(iii) of the Freedom of Information Law, the agency may charge up to twenty-five cents per photocopy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Penny Delaney, President
Phyllis Jaffe, Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 9, 1998

Ms. Kathleen E. Feeney
Executive Secretary
NYS Department of Health
433 River Street, Suite 303
Troy, NY 12180-2299

The staff of the Committee on 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. Feeney:

I have received your letter of February 10 concerning the status of "TAG" meetings under the Open Meetings Law.

By way of background, you wrote that TAGs operate under the umbrella of the New York State Emergency Medical Services Council, a statutory body created by §3002 of the Public Health Law that has specific powers and duties. Meetings of the Council are held in accordance with the Open Meetings Law, as are those of its subcommittees. You wrote that "[a]t times, TAGs (technical advisory groups) are formed by a subcommittee to focus on resolution of a specific issue." You added that the TAGs "are constituted by members of the respective SEMSCO subcommittee as well as 1-2 employees of [y]our Bureau within the Department of Health" and that the DOH employees who serve on the TAG "are not voting members of the Council."

As I understand the matter, the TAGs do not consist exclusively of members of the Council or any subcommittee consisting of Council members; rather, they appear to consist of a combination of members of a subcommittee and staff of the Department. From my perspective, whether a TAG is subject to the Open Meetings Law would be dependent on its composition. In this regard, I offer the following comments.

First, by way of background, judicial decisions indicate generally that ad hoc entities that do not consist solely members of public bodies and which have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642

(1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

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

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 public body, 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, for example, since the Council consists of thirty-one members, its quorum would be sixteen; in the case of a subcommittee consisting of seven, a quorum would be four.

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)].

In the context of your question, if a TAG consists of a majority of a subcommittee, which would otherwise be subject to the Open Meetings Law , I do not believe that the addition of one or two Department employees would change its character or its obligation to comply with the Open Meetings Law. On the other hand if a TAG includes less than a majority of members of a subcommittee, the Open Meetings Law, in my view, would not apply.

When the Open Meetings Law is applicable, §104 imposes notice requirements 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.

With regard to reimbursement for Council members who wish to attend TAG meetings, that kind of issue is beyond the jurisdiction or expertise of this office, and it is suggested that you contact the appropriate bureau within the Department of Health.

Lastly, even if a TAG meeting is not required to be conducted open to the public, certainly it could choose to hold open meetings or to enable members of the Council who are not members of the TAG to attend.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2848

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March 9, 1998

Mr. Jerry Brixner
[redacted]

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

Dear Mr. Brixner:

I have received your letter of February 5 addressed to the Comptroller, the Attorney General and myself in which you raised questions concerning the legal notice requirements relating to hearings held by a town board.

In this regard, as you are aware, the advisory jurisdiction of the Committee on Open Government pertains to the Open Meetings Law. That statute pertains to meetings of public bodies, which must be preceded by notice given in accordance with §104 of that statute. A meeting, however, is different from a hearing, and the notice requirements differ.

A meeting is generally a gathering of quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A hearing is generally held to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter involving land use. Hearings are usually required to be preceded by the publication of a legal notice. In contrast, §104(3) of the Open Meetings Law specifies that notice of a meeting must merely be "given" to the news media and posed. Further, there is no requirement that a newspaper, for example, publish a notice given regarding a meeting to be held under the Open Meetings Law.

There is no general provision that relates to legal notice that must be given prior to hearings. Those requirements are usually found in the sections of law dealing with the subject or activity at issue. For example, while towns, villages and school districts all must hold public hearings on their proposed budgets, there are separate provisions in the Town Law, the Village Law and the Education Law dealing with each. In short, notice requirements may differ, depending on the nature of the hearing.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carl M. McCall, Comptroller
Dennis Vacco, Attorney General

STATE OF NEW YORK
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March 9, 1998

Ms. Betty Friedland
[redacted]

The staff of the Committee on 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. Friedland:

I have received your letter of February 10, which reached this office on February 17.

According to your letter, at a meeting of the Board of Trustees of the Village of Monticello, the President of the local chapter of the Million Man March Community Action Group (the MMMCAG) distributed invitations to the Mayor, the Trustees and the Village Manager to attend its meeting of February 5 to address community issues and concerns. You indicated that the Village officials invited attended the meeting in question and the "officers of the MMMCAG sat at one table and the members of the Village Board sat at another table", and that a "[l]engthy discussion took place between members of the MMMCAG and Village Board concerning minorities, police department issues, conditions of the roads, and drugs." You indicated that the Board did not provide notice of the meeting, and you asked "whether or not the Village of Monticello Board violated New York State's Open Meetings Law."

From my perspective, assuming that the facts that you presented are accurate, the gathering in question constituted a meeting of the Board of Trustees that should have been preceded by notice given pursuant to §104 of the Open Meetings Law. In this regard, I offer the following comments.

First, it is emphasized that the definition of "meeting" [see Open Meetings Law, §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, even though it was asked to attend by a person other than a member of that body [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the gathering in question might have been held at the request of the MMMCAG, I believe that it was a meeting, for a quorum of the Board would have been present for the purpose of conducting public business.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Village Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 9, 1998

Mr. Gerald C. Crowell
Superintendent of Schools
Beaver River Central Schools
P.O. Box 179
Beaver Falls, NY 13305-0179

The staff of the Committee on 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. Crowell:

I have received your letter of February 13 in which you sought an advisory opinion concerning the Open Meetings Law.

According to your letter, the Board of Education of the Beaver River Central School recently interviewed candidates for the position of athletic director, but no notice was given prior to those gatherings. Thereafter, a candidate was selected and appointed at an ensuing meeting.

In conjunction with the foregoing, you have asked whether the Board was required to have given notice prior to the meeting held to interview the candidates, and if so, whether a failure to have done so would invalidate the Board's subsequent appointment. In addition, had the Board given notice, you asked whether the interviews could have been conducted in executive session.

In this regard, I offer the following comments.

First, in a landmark decision rendered in 1978, the Court of Appeals, that 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 terms of the Open Meetings Law and its judicial interpretation, if a majority of the Board gathered to conduct public business, any such gathering would, in my opinion, have constituted a "meeting" subject to the Open Meetings Law.

Second, 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. 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.

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". If indeed the Board's failure to provide notice was inadvertent and unintentional, such failure would not serve as basis for invalidating the Board's action.

Lastly, had the Board fully complied with the Open Meetings Law, I believe that it could have conducted the interviews in private. 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.

Relevant to the matter 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 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 circumstances, I believe that the Board would have considered the employment history of the candidates, and that the session would have involved a matter leading to the employment of a particular person.

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

STATE OF NEW YORK
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March 9, 1998

Ms. Joanne A. Leddy
[redacted]

The staff of the Committee on 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. Leddy:

I have received your letter of February 9 and appreciate your kind comments concerning my presentation in Delhi a few months ago. Enclosed, as you requested, is a supply of "Your Right to Know", which may be distributed as you see fit.

You have asked that I support your contentions relating to access to minutes of meetings of the Village of Delhi Board of Trustees, which are not disclosed until they are approved, and to the status of meetings of committees of Delaware County Board of Supervisors. According to your letter, officials have disagreed with you based on statements from their attorneys, and you were informed that I am not an attorney.

In this regard, while I am an attorney, that factor is not especially relevant. What is relevant is that the Committee on Open Government is the agency specifically designated by statute (see Public Officers Law §109) to provide advice and opinions concerning the Open Meetings Law. Perhaps most pertinent, however, is the language of the law, its history and its judicial interpretation.

Section 106 of the Open Meetings Law pertains to minutes of meetings of public bodies and states that:

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

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

Subdivision (3) deals specifically with the time within which minutes must be prepared and made available, a period of two weeks with respect to minutes of open meetings, and one week when action is taken during executive sessions.

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

With respect to meetings of meetings of committees of the Board of Supervisors, when a committee consists solely of members of a public body, such as a county legislature , 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 county legislature 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 fifteen, its quorum would be eight; 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), which dealt with a committee of a county board of supervisors].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Village Attorney
Board of Supervisors
County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 11, 1998

Hon. Joan M. Caruso
Supervisor
Town of Woodbury
P.O. Box 1004
Highland Mills, NY 10930

The staff of the Committee on 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 Caruso:

I have received your letter of February 23 in which you asked that I confirm in writing an opinion offered during a telephone conversation.

You referred to a special meeting held by the Woodbury Town Board "to discuss a water improvement project." You added that "[i]t was advertised as such, along with the time, date and place of the meeting." However, during the meeting, the Board added items that led to certain actions taken. At an ensuing meeting, a member of the public "suggested this was an illegal meeting as [you] did not advertise" that you were going to take those additional actions. You indicated that the Board has no rule requiring the disclosure of an agenda prior to meeting, and you asked whether the Board must "advertise an agenda" in advance of its meetings.

In this regard, I offer the following comments.

First, there are two statutes that relate to notice of special meetings held by town boards. The phrase "special meeting" is found in §62(2) of the Town Law. That provision, from my perspective, deals with unscheduled meetings, rather than meetings that are regularly scheduled, 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".

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

Both statutes require that notice of the time and place of a meeting be given; neither contains a requirement that notice include an agenda or reference to the subject matter of a meeting.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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March 17, 1998

Mr. Rodney Bordeaux
[redacted]

The staff of the Committee on 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. Bordeaux:

I have received your undated letter, which reached this office on March 3.

You referred to a meeting of the Wyandanch Public Library Board of Trustees held on January 21. According to your letter, during the meeting, one of the members submitted a letter of resignation. You added that an "absent board member...accepted her letter by proxy and also moved to appoint" a new member "by proxy." You have sought an opinion concerning the matter.

In this regard, I offer the following comments.

First, it is clear that a library board of trustees is required to comply with the Open Meetings Law (see Education Law, §260-a).

Second, §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 Board of

Trustees. While nothing in the Open Meetings Law refers to the capacity of a member to delegate his or her authority or to vote by means of a proxy, it has consistently been advised that a member of a public body cannot participate unless he or she is physically present at a meeting of the body.

Similarly, I believe that the absence of a member from a meeting, a physical convening of a majority of a public body's membership, precludes that person from voting, for the absent person is not part of the "convening."

In short, I do not believe that a member of a public body can introduce a motion or cast a vote unless the member is physically present at a meeting of the body.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Wendell Cherry, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
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March 17, 1998

Mr. Warren J. Ingham
[redacted]

The staff of the Committee on 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. Ingham:

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

According to your letter, meetings were held by the Town Board of the Town of Erin on February 2 and February 3 without notice being given to the news media or by means of posting. You expressed the belief that the subject matter of meetings related to the appointment of an assessor.

In this regard, I offer the following comments.

First, in a landmark decision rendered in 1978, the Court of Appeals, that 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 terms of the Open Meetings Law and its judicial interpretation, if a majority of the Board gathered to conduct public business, any such gathering would, in my opinion, have constituted a "meeting" subject to the Open Meetings Law.

Second, 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. 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, 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.

Of possible relevance to the matter 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 any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

If the Town Board met to discuss the merits of those under consideration for the position of assessor, I believe that the Board could validly have conducted an executive session. However, it is emphasized 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. Therefore, even if the Board could have held an executive session, such a session could properly have been held only after convening a meeting open to the public that was preceded by notice given in accordance with §104 of the Open Meetings Law.

If the discussions did not focus on particular candidates for the position, but rather on the procedure for selection or the criteria that should be met to hold the position, I do not believe that there would have been any basis for entry into executive session.

As you requested, in an effort to enhance compliance with and understanding of the Open Meetings Law, 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
Sandra J. Bonci, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2855

41 State Street, Albany, New York 12231
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March 17, 1998

Mr. Michael Davidoff
Village Attorney
Village of Monticello
P.O. Drawer 1040
Monticello, NY 12701

The staff of the Committee 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. Davidoff:

I have received your letter of March 16 in which you referred to an advisory opinion addressed to Ms. Betty Friedland on March 9.

The issue in that opinion involved the status of a gathering held on February 5 by the Sullivan County Million Man March Community Action Group (MMMCAG). Both the minutes of a meeting held by the Village of Monticello Board of Trustees and Ms. Friedland's letter to me indicate that a member of MMMCAG distributed an invitation at an open meeting of the Board to each Board member to attend the upcoming gathering. Ms. Friedland wrote that "officers of the MMMCAG sat at one table and the members of the Village Board sat at another table", and that a "lengthy discussion took place between members of the MMMCAG and the Village Board..." Further, attached to her letter was a copy of a news article that included a photograph depicting members of the Board of Trustees at one table, and representatives of the MMMCAG at another. The article also includes a statement by a member of the Board who said: "I thought the reason we were here was to build a better bridge in the community."

On the basis of the information provided by Ms. Friedland, it was advised that the gathering in question constituted a "meeting" of the Village Board of Trustees. It was also stated that a meeting of a public body must be preceded by notice given in accordance with §104 of the Open Meetings Law.

You wrote that: "[i]t is your understanding that when members of the Board of Trustees of the Village of Monticello were invited, it was their belief that they were invited, not as participants in the meeting, but as part of the audience." You added that "[i]n such a capacity, as solely members

of an audience, there would not have to be any compliance with the Open Meetings Law." Further, you cited an opinion rendered by this office that stands for that proposition (OML-AO-2540).

In this regard, §102(1) of the Open Meetings Law defines the term "meeting" to mean the convening of a public body for the purpose of conducting public business. Inherent in the definition is the notion of intent. To constitute a meeting, I believe that there must be an intent on the part of the members of a public body to convene for the purpose of conducting public business collectively as a body.

If, for example, a majority of the members attends a gathering also attended by others and is there merely as part of an audience, the presence of a majority would not in my view result in the conclusion that the members conducted a meeting. As part of an audience, there would be no intent on the part of the members to conduct public business collectively as a body.

If indeed the members of the Board of Trustees expected to be part of an audience at a gathering held or sponsored by the MMMCAG, and if the members had no intention to conduct public business as a body, their presence at the gathering would not in my opinion have constituted a "meeting" subject to the Open Meetings Law. Moreover, absent an intent to conduct a "meeting", there would have been no requirement that notice be given pursuant to §104 of the Open Meetings Law.

I hope that you understand that responses to inquiries are offered in good faith, and, as indicated at the beginning of opinions, are based on the information presented. I hope that you will also appreciated the fact that Ms. Friedland included published material that suggested that the Board conducted a meeting that fell within the coverage of the Freedom of Information Law.

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 Trustees
Betty Friedland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2856

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March 19, 1998

E-Mail

TO: Doug Clemens <[redacted]>

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on 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. Clemens:

I have received your e-mail communication of March 4. You have asked whether county democratic committee meetings are open to the public.

In this regard, that statute that generally requires that meetings be held in public is the Open Meetings Law. That statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to include:

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

As such, the Open Meetings Law pertains to meetings of governmental bodies, such as a county legislature, a city council, a town board, or the State Senate and Assembly. It is emphasized, however, that §108(2)(a) of the Open Meetings Law exempts from its coverage "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

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

> the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations..."

Based on the foregoing, political party meetings would not be covered by the Open Meetings Law.

I note that some "caucuses" must be held open to the public pursuant to the Election Law. Specifically, §1-104(28) of the Election Law states that:

> "The term 'caucus' shall mean an open meeting held in a political subdivision to nominate the candidates of a political party for public office to be elected in such subdivision at which all the enrolled voters of such party residing in such subdivision are eligible to vote."

To obtain additional information regarding political party committee meetings, the only source of which I am aware that might offer guidance would be the State Board of Elections.

Lastly, I am unable to e-mail copies of advisory opinions to which you referred because they were prepared before this office used electronic information systems. If you want copies, please provide your address.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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March 20, 1998

Mr. Bill VanAllen
Member
Kingston Pulibc Access Commission
[redacted]

Ms. Susan Ronga
Chairman
Kingston Public Access Commission
[redacted]

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

Dear Mr. VanAllen and Ms. Ronga:

I have received your letters, which are respectively dated March 5 and March 10. In both, the primary question is whether the Kingston Public Access Commission is subject to the Open Meetings Law.

The Commission consists of nine members, five of whom represent the City of Kingston, and one member each designated by four towns in the coverage area of the public access channel. If the Commission is required to comply with the Open Meetings Law, Mr. VanAllen expressed the belief that "all policy votes taken so far by the Commission are invalid and must be recast at a future meeting that is in compliance with the Open Meetings Law." Ms. Ronga indicated that all meetings of the Commission have been taped and aired in their entirety, and that notice of the Commission's meetings have been advertised on the public access channel and given to the local newspaper. Both of you raised questions concerning the notice requirements that may be applicable.

From my perspective, because it was created pursuant to regulations promulgated by the New York State Commission on Cable Television, the Kingston Public Access Commission is subject to the Open Meetings Law. I note that the New York State Commission on Cable Television was abolished, but that its functions were preserved and merged into the Department of Public Service. In this regard, I offer the following comments.

First, the regulations, 9 NYCRR §595.4 entitled "Minimum standards for public, educational and governmental (PEG) access", state in subdivision (c) as follows:

> "*Administration and use.* The use of the channel capacity for PEG access shall be administered as follows:
>
> (1) The public access channel shall be operated and administered by the entity designated by the municipality or, until such designation is made, by the cable television franchisee; provided, however, that the municipality may designate such entity at any time throughout the term of a franchise by a resolution adopted by the legislative body thereof.*
>
> (2) The educational and governmental access channel shall be operated and administered by a committee or a commission appointed by local government and shall include appropriate representation of local school districts within the service area of the cable television system and may include for purposes of coordination any employee or representative of the cable television franchisee.**
>
> (3) The entity responsible for administering and operating the public access channel shall provide notice to the general public of the opportunity to use such channel which notice shall include (i) a character-generated message transmitted at least hourly on such channel between the hours of 6 p.m. and 10 p.m. each day and (ii) written notice to subscribers at least annually. Notices shall include the name, address and telephone number of the entity to be contacted for use of the channel. All access programming shall be identified as such.
>
> (4) Channel time shall be scheduled on the public access channel by the entity responsible for the administration thereof on a first-come, first-served, nondiscriminatory basis..."

Pertinent is the first asterisk (*) appearing at the end of paragraph (1), which states in relevant part that: "If a single public access channel is shared by more than one municipality, a single entity shall be jointly designated by the local legislative bodies of each franchising municipality in the system."

Second, 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."

By viewing the definition of "public body" in terms of its components, the Commission is, in my view, a "public body". It is an entity consisting of nine members; it is required in my opinion to conduct its business subject to quorum requirements (see General Construction Law, §41); and, pursuant to the regulations cited earlier, it conducts public business and performs a governmental function for five public corporations, the City of Kingston and four towns.

As a public body, meetings of the Commission must be held in accordance with the Open Meetings Law's presumption of openness. Stated differently, meetings of the Commission must be conducted open to the public, except to the extent that an executive session may properly be held in accordance with §105(1).

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

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

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

In my view, a notification of a meeting appearing on the cable channel would not constitute notice. However, I believe that the notices sent to the local newspaper would satisfy the requirement that notice be given to the news media. Since the Law refers to posting in "one or more" designated

locations, the Commission in my opinion should designate a particular location or locations where notice will consistently be posted. As such, the Commission could choose to post in a central location within the coverage area, or it could transmit notice to be posted in each of the municipalities.

Lastly, even if the Commission may not have fully complied with the Open Meetings Law to date, there would be no automatic invalidation of its actions. Moreover, it is doubtful in my opinion that a court would upset or invalidate the actions taken by the Commission to date. Subdivision (1) of §107 of the Open Meetings Law deals with the enforcement of that statute and 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."

Based upon the facts provided, it is doubtful in my opinion that "good cause" could be shown to invalidate action taken by the Commission, because the meetings of the Commission have been televised, and because notice of its meetings appear on television and apparently were sent to a local newspaper. It is also noted that §107(1) states that:

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

Under the circumstances, due to what appears to have been uncertainty concerning the application of the Open Meetings Law, again, it is unlikely from my perspective that a court, should a challenge be initiated, would invalidate actions taken to date by the Commission.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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March 23, 1998

Mr. Richard L. Taczkowski
Councilman
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, unless otherwise indicated.

Dear Mr. Taczkowski:

As you are aware, I have received your letter of March 3 in which you raised a variety of issues relating to the implementation of the Open Meetings Law by the Town of North Collins, and particularly a joint meeting held by the Town Board and the Library Board of Trustees. I note that in an effort to learn more of the matter, I discussed your concerns with the Town Clerk, Ms. Margaret Orrange.

One of the issues involves the designation of a location where notice of meetings is posted in accordance with §104 of the Open Meetings Law. According to Ms. Orrange, the Town Board, years ago, by resolution designated the place for the posting of notice. She indicated that there is no town hall and that notice is posted in her office, which is located in her home. From my perspective, that would not be an unreasonable location for the posting of notice, for most transactions with residents involve the Town Clerk, and her office may be the most likely location for residents and others to see the notice.

Notwithstanding the preceding point, Ms. Orrange indicated that a schedule of meetings is adopted by the Board at its organizational meeting, and that the schedule is given to the local newspaper. Further, with respect to the meeting with the Library Board, she informed me that the time and place of that meeting were announced at an open meeting of the Town Board, that notices of the meeting were posted in several locations, and that the local newspaper published an article pertaining to the meeting before the meeting was held. Based on her information, it would seem that adequate notice was given and that those interested in attending were clearly given an opportunity to do so.

You referred to "secret agendas" and what may have been an absence of notice regarding the topics to be considered at a meetings. In this regard, the two statutes of which I am aware that pertain to notice of meetings, §104 of the Open Meetings Law and §62 of the Town Law pertaining to special meetings of town boards, both require notice of the time and place of meetings; neither includes any requirement that the notice include reference to the subject matter of a meeting.

It is also noted that there is nothing in the Open Meetings Law or any other law of which I am aware that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. Similarly, the Open Meetings Law does not require that a prepared agenda be followed.

With respect to minutes of meetings, as you are aware, §106 of the Open Meetings Law requires that minutes be prepared and made available within two weeks of the meetings to which they pertain. In my discussion of the matter with the Town Clerk, she indicated that she is unaware of any request that you have made in which the minutes were not disclosed in a timely manner consistent with law.

Lastly, you referred to the status of the Public Safety Advisory Committee, which consists of yourself, the highway superintendent, the code enforcement officer and "half a dozen private citizens." You added that the committee can only offer recommendations to Town officials. In my view, the committee in question would not be subject to the Open Meetings Law.

That statute is applicable 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."

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, again, it appears that the committee would not be subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Margaret Orrange, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
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March 25, 1998

Mr. Robert Wallace
Assistant to the Ombudsperson
The City College of the City University
of New York
Convent Avenue & 138th Street
New York, NY 10031

The staff of the Committee on 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. Wallace:

I have received your letter of March 6. You have questioned the propriety of the actions of the Auxiliary Enterprise Corporation (AEC), a not-for-profit corporation associated with the City College at the City University of New York (CUNY).

In a memorandum of February 17, Nathan Dickmeyer, Chair of AEC and Vice President of the City College, contended that "[a]s a corporation separate from the College, we [the AEC] are not under any open records obligations." In addition, he wrote that an upcoming meeting of the AEC would be closed to the public. You have sought an opinion concerning the AEC's actions, as well as "possible remediative actions."

In this regard, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information and Open Meetings Laws. The Committee is not empowered to compel compliance with either of those statutes. Nevertheless, it is my hope that the opinions rendered by this office are educational and persuasive, and that they serve to encourage entities to carry out their duties in accordance with open government statutes when those statutes are applicable.

In this instance, due to the means by which the AEC was created, I believe that it is subject to both the Freedom of Information Law and the Open Meetings Law. I am mindful of the decision rendered in Smith v. City University of New York [661 NYS 2d 599, ___ AD 2d ___ (1997)], which apparently has been cited by Mr. Dickmeyer as the basis for his contentions. That decision involved the status of a student government association under the Open Meetings Law, and I believe that it is clearly distinguishable from the instant situation.

Among the attachments to your letter is a copy of "Notes to Financial Statements" prepared in 1993 regarding the AEC, which states in relevant part that:

> "The City College Auxiliary Enterprises Corporation (the Corporation) was formed in compliance with the City University of New York's Bylaws, Section 16.10, as adopted by the Board of Trustees of the City University of New York. The purpose of the Corporation is to provide oversight, supervision and review of all auxiliary enterprises serving the students, faculty, administrative staff, alumni and others in the college community of the City College of The City University of New York.
>
> "The Corporation was organized exclusively for charitable, educational, or scientific purposes..."

In addition, in Mr. Dickmeyer's memo, he referred to the by-laws of the Corporation and its "Purposes", which include the following:

> "Through the provision of auxiliary enterprise services and the use and allocation of auxiliary enterprise revenues, to assist in developing, improving and increasing the programs, resources and facilities of The City College to enable it to provide more extensive educational opportunities and services to its students, faculty, administrative staff, alumni, and others in the college community."

He also cited Article V, Section 1, concerning the authority of the President of the College in relation to the AEC, which states that:

> "The Corporation shall operate consistent with the By-laws, policies and regulations of the City University of New York and any policies, regulations and orders of The City College. The President of The City College shall have review authority over all actions taken by the Corporation's Board. Said review authority shall be exercised in the manner prescribed under Article 16 of the By-laws of the Board of Trustees of the City University of New York."

Based on the foregoing, it is clear that the AEC is a creation of CUNY and the City College and that it exists for the purpose of carrying out functions for the City College or which the College would otherwise perform itself.

There are precedents indicating that when a not-for-profit corporation is essentially an arm of government, it falls within the scope of open government laws, despite its corporate status.

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, an "agency" generally is an entity of state or local government. Typically, a private entity or a not-for-profit corporation would not constitute an agency, for it would not be a governmental entity.

In the first decision in which it was held that a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law, [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 State's highest 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].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality,

> there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for, in the context of the facts presented, there appear to be "considerable crossover" in the activities of certain persons, notably Mr. Dickmeyer, in the performance of their duties for the AEC and the College.

More recently, in Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates 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 (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). 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...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).

Perhaps most analogous to the situation described is a decision in which it was held that a community college foundation associated with a CUNY institution was subject to the Freedom of Information Law, despite its status as a not-for-profit corporation. In so holding, it was stated that:

> "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, that entity, and, in this instance, the AEC, would not exist but for their relationship with CUNY. Due to the similarity between the situation you have described and that presented in Eisenberg, as well as the goals of the AEC and its relationship to the College, I believe that it is subject to the Freedom of Information Law.

Also pertinent is a determination rendered by the State's highest court in which it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency.

In this instance, it would appear that all records kept or produced by the AEC would be maintained for CUNY and the City College. Therefore, I believe that its records would fall within the scope of the Freedom of Information Law.

If the AEC 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 AEC 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. In view of the degree of governmental control exercised by and its nexus with CUNY, I believe that it conducts public business and performs a governmental function for a governmental entity, CUNY.

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 those identified at the end of your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: President Yolanda Moses
Vice President Nathan Dickmeyer
Martha Flores, Chair, Graduate Student Council
Eduardo Hernandez, President, Student Government

STATE OF NEW YORK
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March 25, 1998

Mr. Jay M. Gubernick
[redacted]

The staff of the Committee on 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. Gubernick:

I have received your letter of March 10, as well as the materials attached to it. You have sought clarification concerning the status under the Open Meetings Law of a "regular town board meeting, special meeting, work session, special work session, etc." You also raised issues concerning notice of the subject matter to be considered at meetings and requirements relating to following agendas.

From my perspective, the differences in characterization of the gatherings to which you referred are largely semantic in nature, for each is a "meeting" equally subject to the Open Meetings Law. In this regard, I offer the following comments.

First, there are two statutes that relate to notice of special meetings held by town boards. The phrase "special meeting" is found in §62(2) of the Town Law. That provision, from my perspective, deals with unscheduled meetings, rather than meetings that are regularly scheduled, and states in relevant part that:

> "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to 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 imposed by §62 are separate from those contained in the Open Meetings Law.

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 post 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."

Both statutes require that notice of the time and place of a meeting be given; neither contains a requirement that notice include an agenda or reference to the subject matter of a meeting.

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

Third, based on the judicial interpretation of the Open Meetings Law, there is no legal distinction between a "work session" and a meeting. By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law. Further, unless the Town Board has adopted a rule to the contrary, nothing would preclude the Board from taking action at a work session. Similarly, the Board is subject to the same requirements pertaining to notice, openness, and the ability to enter into an executive session relative to a work session as a regular meeting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
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March 25, 1998

E-Mail

TO: Donald Kearney<[redacted]

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on 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. Kearney:

I have received your letter of March 9. You have asked whether minutes of meetings must be "addressed and approved" at an ensuing meeting.

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

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

> minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Subdivision (3) deals specifically with the time within which minutes must be prepared and made available, a period of two weeks with respect to minutes of open meetings, and one week when action is taken during executive sessions.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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March 26, 1998

Mr. David Searles
[redacted]

The staff of the Committee on 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. Searles:

I have received your letter of March 12 in which you sought an opinion concerning the application of the Open Meetings Law to a certain entity.

According to your letter, the Ulster BOCES Special Education Advisory Council meets monthly and consists of chairpersons of the Committees on Special Education in the BOCES district. You suggested that the Council was not created through any "regulatory or statutory provision" and that it appears to have no "real authority other than to eat lunch on the public tab." You have asked what "the acid test [is] for determining when the Open Meetings [Law] applies."

In this regard, 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. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for the purpose of conducting public business. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists solely of members of a particular public body, it, too, would constitute a public body. For instance, in the case of a board of education consisting of seven members, four would constitute a quorum, and a

gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that board designates a committee consisting of three members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

Several judicial decisions indicate generally that advisory bodies other than those consisting of members of a governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie 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)]. In one of the decisions, Poughkeepsie Newspaper, supra, 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 the context of your inquiry, while the Council consists of members of several public bodies, it apparently does not include a majority of any particular public body. Further, based on your remarks, the Council has no authority to take any final and binding action for or on behalf of a Committee on Special Education. If those assumptions are accurate, the Council, in my view, would not constitute a public body and, therefore, would not be obliged to comply with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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March 30, 1998

Mr. William Towne
[redacted]

The staff of the Committee on 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. Towne:

I have received your letter of March 13. In your capacity as a member of the Board of Trustees of Fulton-Montgomery Community College, you have questioned the propriety of certain actions of the Board.

You referred initially to an executive session held to discuss "work histories." You wrote that when you sought an explanation of the basis for the proposed executive session, the Chairman stated that the Board would "discuss salary increases and adjustments (we had previously agreed to a range for each administrator's position) we were going to fix an exact amount for each administrator based upon that administrator's individual work history." With that explanation, you voted to enter to enter into executive session, as did the other members. Nevertheless, once in an executive session, the Board, according to your letter, "did not discuss any work histories." You indicated that:

> "[f]irst, we discussed an across the board salary increase for all the administrators. Then, we discussed the adjustment of salary issue for each individual administrator, without discussing each individual's work history. A lengthy discussion then ensued about the economic and political ramifications of our proposed actions given the total dollar amount for all the administrators together."

In this regard, as a general matter, the Open Meetings Law is based on presumption of openness. Stated differently, meetings of public bodies must be conducted in public, except to the extent that the discussion falls within one or more of the grounds for entry into executive session listed in paragraphs (a) through (h) of 105(1) of the Open Meetings Law.

The only ground for entry into executive session of apparent relevance would have been §105(1)(f), which 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..."

From my perspective, the language quoted above is largely intended to protect personal privacy. Based on its specific terms, to qualify for consideration in executive session, the issue must focus on a "particular person" in conjunction with one or more of the topics appearing in §105(1)(f), i.e., the employment history of a particular person. If a discussion pertains to persons "across the board", or if it pertains to a position, irrespective of who might hold the position, I do not believe that an executive could properly be held. In the context of your remarks, in my view, only to the extent that the discussion involved a particular administrator in relation to his or her employment history would the executive session have been justifiable.

The second area of inquiry pertains to an agenda and its inclusion of the following statement: "AN EXECUTIVE SESSION FOR THE WHOLE BOARD WILL BE HELD TO DISCUSS WORK HISTORIES" (emphasis on the agenda).

It is unclear whether the agenda is intended to be used or is distributed only to Board members, or whether it is disseminated to the public as well. If it is for internal use only, I note that there is nothing in the Open Meetings Law, or any other law of which I am aware, that requires that an agenda be prepared or followed. In short, an agenda may serve as a guide, but I do not believe that it is in any way binding upon a public body, unless that entity has adopted rules to the contrary. For the purpose of clarity, however, I offer the following comments.

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

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

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

It has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the 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 fully appropriate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Trustees
Priscilla Bell, President

STATE OF NEW YORK
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March 31, 1998

Mr. Joel Tyner
The Progressive Coalition of Dutchess County
RR 1 Box 366
Staatsburg, NY 12580

The staff of the Committee on 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. Tyner:

I have received your letter of March 19 in which you raised two questions relating to the scope of the Open Meetings Law.

First, you asked whether "a town's public access television committee meeting [may] be closed to the public." In this regard if the committee was created pursuant to regulations promulgated by the New York State Commission on Cable Television, based on the following analysis, I believe that it would be subject to the Open Meetings Law. I note that the New York State Commission on Cable Television was abolished, but that its functions were preserved and merged into the Department of Public Service.

First, the regulations, 9 NYCRR §595.4 entitled "Minimum standards for public, educational and governmental (PEG) access", state in subdivision (c) as follows:

> "*Administration and use.* The use of the channel capacity for PEG access shall be administered as follows:
>
> (1) The public access channel shall be operated and administered by the entity designated by the municipality or, until such designation is made, by the cable television franchisee; provided, however, that the municipality may designate such entity at any time throughout the term of a franchise by a resolution adopted by the legislative body thereof.*
>
> (2) The educational and governmental access channel shall be operated and administered by a committee or a commission appointed

> by local government and shall include appropriate representation of local school districts within the service area of the cable television system and may include for purposes of coordination any employee or representative of the cable television franchisee.**
>
> (3) The entity responsible for administering and operating the public access channel shall provide notice to the general public of the opportunity to use such channel which notice shall include (i) a character-generated message transmitted at least hourly on such channel between the hours of 6 p.m. and 10 p.m. each day and (ii) written notice to subscribers at least annually. Notices shall include the name, address and telephone number of the entity to be contacted for use of the channel. All access programming shall be identified as such.
>
> (4) Channel time shall be scheduled on the public access channel by the entity responsible for the administration thereof on a first-come, first-served, nondiscriminatory basis..."

Second, 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."

By viewing the definition of "public body" in terms of its components, a committee created pursuant to the regulations cited earlier is, in my view, a "public body". It is an entity consisting of at least two members; it is required in my opinion to conduct its business subject to quorum requirements (see General Construction Law, §41); and, pursuant to the regulations cited earlier, it conducts public business and performs a governmental function for a public corporation, a town.

As a public body, meetings of such a committee must be held in accordance with the Open Meetings Law's presumption of openness. Stated differently, meetings of the committee must be conducted open to the public, except to the extent that an executive session may properly be held pursuant to §105(1).

Second, you asked whether it is "legal for a county legislative committee meeting to be closed to the public." From my perspective, when a committee consists solely of members of a public body, such as a county legislature, 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).

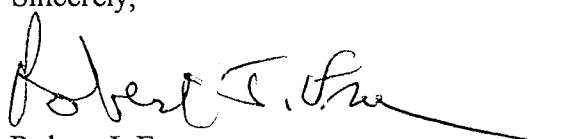
Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body", which was quoted earlier. 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 county legislature, 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 legislature 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)].

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-2865

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 31, 1998

Ms. Shirley Heller
Central Square Central School District
642 South Main Street
Central Square, NY 13036

The staff of the Committee on 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 letter of March 18, as well as copies of materials related to it. In your capacity as a member of the Central Square School District Board of Education, you wrote that Mrs. Kim Clark, President of the Board, asked you seek an advisory opinion on her behalf concerning the Open Meetings Law.

According to your letter, the District has eight buildings that are accessible to the physically handicapped where meetings can be held, and "every attempt" has been made to hold meetings in those buildings. The only meetings that have been held in the District Office, which is not handicapped accessible, "have been closed meetings for just Executive Session to discuss negotiations, student hearings or personnel." You wrote that "[t]hese meetings have been special and not a regular board meeting."

One of the items sent with your letter is the following "disclaimer" that appears on an "agenda, invitation, etc." relating to meetings held in the District Office: "Anyone with a handicapping condition requiring access to this meeting should contact the Superintendent's office forty-eight hours before the meeting..." Also included is a letter addressed to the Superintendent on February 3 of this year in which the writer complained that people in attendance at a Board meeting could not hear the Board, and that the same issues were raised by a group known as Citizens for Quality Education in 1995 and 1996. In fact, I prepared an advisory opinion at the request of that writer on February 27, 1996. Several of the points made in that response will be reiterated in the ensuing comments.

First, the Open Meetings Law pertains to meetings of public bodies. In brief, any gathering of a majority of the Board of Education or other public body subject to the requirements of that statute (I.e., the shared decision making committee or the site based committees created pursuant to

regulations promulgated by the Commissioner of Education) for the purpose of conducting public business constitutes a "meeting" falling within the scope of that statute. It is emphasized that the characterization of a gathering, as a work session, for example, or the absence of an intent to take action, are irrelevant. If a majority of a public body convenes to discuss public business, such a convening is meeting subject to the Open Meetings Law. A gathering of staff or administrators, or a meeting between the President of the Board and Department heads would not fall within the coverage of the Open Meetings Law, for such a convening would not involve a majority of the membership of a public body, such as the Board of Education.

Second, every meeting of a public body must be convened open to the public. 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. Further, as you are aware, §105(1) requires that a public body accomplish certain procedural steps in public before it may enter into an executive session.

Third, §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.

From my perspective, while the disclaimer referenced earlier may be well-intended, if it relates to a meeting subject to the Open Meetings Law, I believe that it would be inadequate to comply with that statute. There may be any number of reasons why a person may be precluded from notifying the Superintendent of his or her intent to attend a meeting forty-eight hours in advance of a meeting. For instance, an individual may not be aware of a meeting until less than forty-eight hours prior to the meeting; a person may not know so far in advance that he or she would want to attend; a handicapped person may not know if transportation can be arranged, etc. In short, to fully comply with the Open Meetings Law, I believe that every meeting subject to that statute should be convened and held in one of the District's barrier-free accessible facilities, even if the Board intends to enter into an executive session immediately after convening.

With respect to the other element of the complaint, the inability of the public to hear the Board's discussions at meetings, as I did in the opinion prepared in 1996, 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 basic requirement of the Open Meetings Law.

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

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

cc: Kim Clark
Walter Doherty

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 1, 1998

Dr. Walter J. Doherty
Superintendent
Central Square Central Schools
642 South Main Street
Central Square, NY 13036-4220

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

Dear Dr. Doherty:

I have received your letter of March 17, which deals with essentially the same subject as that raised in a letter received prior to yours sent by Ms. Shirley Heller, a member of the Board of Education, on behalf of Mrs. Kim Clark, President of the Board. A copy of that opinion has been sent to you, and I believe that it is responsive, in principle, to the questions raised in your letter. Nevertheless, for the purpose of clarification, I offer the following brief remarks.

In the letter addressed to Ms. Heller, it was advised, in sum, that any meeting of a public body required to be held in accordance with the Open Meetings Law, should be held, in its entirety, in one of the District's many facilities that permit barrier-free access to physically handicapped persons. Several of the gatherings to which you referred involve meetings of public bodies, such as work sessions held by the Board of Education, meetings of the shared decision making committee, and if I interpret the matter correctly, meetings of the Committee on Special Education.

The other gatherings to which you referred do not appear to be meetings of public bodies. For instance, meetings of elementary school principals or curriculum coordinators would not involve the convening of a public body (i.e., a quorum of the Board of Education), and, consequently, the Open Meetings Law would not apply. In those situations, I believe that the meetings could be held at the location of your choice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kim Clark
Shirley Heller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 1, 1998

Ms. Catherine Colon
[redacted]

The staff of the Committee on 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. Colon:

I have received your letter of March 18, which pertains to the actions of the Russell Town Supervisor, Robert Best.

You referred initially to an organizational meeting "advertised and posted" to begin at 7:30 p.m. on January 14. Although many residents arrived at that time, the meeting had taken place earlier in the day. You indicated that "Mr. Best took it upon himself to change the time of the meeting to 1:00 p.m.", perhaps due to weather conditions, "rather than postpone the meeting and failed to post it or to inform any one in the town...of the change." At the next meeting, at which time the matter was questioned, the Supervisor said that "there was a state of emergency and he had the right as the Town Supervisor to hold any emergency meeting that he felt was necessary." You and others agreed that emergency meeting might justifiably be called to deal with "emergency issues". Nevertheless, you contended that only matters related to the emergency should have been considered at that unscheduled meeting, and that the topics that would ordinarily have been considered as part of the organizational meeting should have been postponed and held at a scheduled time and place. You also referred to the manner in which the Supervisor comports himself at meetings and treats members of the public.

In this regard, I offer the following comments.

First, I concur with your view that if indeed there was an emergency, the Town Board should have dealt only with those issues that required immediate attention. The other issues upon which the Board acted involved matters which did not need to be resolved instantly and which, in my view, should have been considered later, after the emergency had passed, at meeting preceded by notice that could have been attended by interested persons.

As you may be aware, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, including a town board. 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 or faxing notice of the time and place of a meeting to 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.

Second, based on a provision of the Town Law, the Supervisor cannot call a meeting of the Town Board immediately or at his whim. Section 62 of the Town Law deals with special meetings, those meetings that are not regularly scheduled, and states in relevant part that: "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to the members of the board of the time when and the place where the meeting is to be held." Based on the foregoing, if an unscheduled special meeting is to be held, at least two days notice must be given to members of the Town Board, in addition to the notice given to the public and the news media pursuant to the Open Meetings Law.

Lastly, while a town supervisor is the chief executive officer of a town and presides at meetings of a town board, that person is one of five members on a town board, and he or she has one of five votes. I note that §63 of the Town Law states that "Every act, motion or resolution shall required 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, a town board should determine its course of action collectively, not a supervisor acting unilaterally.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Robert Best, Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 3, 1998

Mr. J. Michael Mancini
[redacted]

Mr. Barry Wallace
[redacted]

Mr. Michael Murphy
[redacted]

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

Dear Messrs. Mancini, Wallace and Murphy:

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

You have asked for an investigation concerning alleged wrongdoing on the part of the Town of Oneonta Board of Fire Commissioners and particularly the manner in which the chairperson of the Board "has handled the election of members held on Dec. 9, 1998 [sic] and the subsequent course of events."

In this regard, the Committee on Open Government is authorized to provide advice and opinions relating to the Open Meetings Law. It is not empowered to conduct investigations or resolve issues arising under the Election Law. Consequently, the ensuing comments will be limited to matters pertaining to the Open Meetings Law.

Based on the correspondence and a conversation with Mr. Mancini, the Board of Fire Commissioners consists of five members. Further, as I understand the matter, two of the members

have refused to recognize three new members, even though those new members have taken oaths of office from an official authorized to administer the oaths. It also appears that action was taken on behalf of the Board by two of the members.

From my perspective, if the three individuals have taken valid oaths of office and are indeed members of the Board, they have the ability, by means of a majority vote of the Board taken at a meeting preceded by notice given to all of the members, to take action, as the Board, irrespective of whether the other two members "recognize" them.

It is noted that the definition of "meeting" appearing in §102(1) of the Open Meetings Law had 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" subject to the Open Meetings Law that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

Second, a public body is empowered to act only by means of an affirmative vote of a majority of its total membership. Additionally, 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. Pertinent 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 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. Further, according to §41, an affirmative vote by two of five members of the Board, whether or not each of the five members validly holds office, would be insufficient to take action; since the Board consists of five, three affirmative votes would be needed to take any action.

In sum, if the Board purportedly took action by means of two affirmative votes, or if meetings were held without reasonable notice to all the members, no action, in my view, could validly have been taken. Conversely, if a majority of the Board convenes at a meeting preceded by reasonable notice to all the members, I believe that the Board can carry out its duties and take action by means of an affirmative vote of a majority of its total membership.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Clayton Utter, Chairperson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 6, 1998

Dr. Peter C. Paciolla
Superintendent of Schools
Mount Sinai Union Free School District
North Country Road
Mount Sinai, NY 11766

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

Dear Dr. Paciolla:

I have received your communication in which you sought clarification relating to comments attributed to me by a member of the Mount Sinai Union Free School District Board of Education.

In a memorandum sent to you by Board member Linda Towler, she wrote that I "told" her that "the superintendent's contract can be discussed in public because it is a public document." While I do not recall the specifics of our conversation of March 31, I do not believe that I would have so stated.

It is clear that a superintendent's contract, like any other contract between a school district and an individual, a firm or an employee organization, is accessible to the public under the Freedom of Information Law. However, it does not follow that a discussion relating to record accessible to the public must, of necessity, be conducted in public or that there may no basis for entry into executive session. I note that the grounds for withholding records under §87(2) of the Freedom of Information Law and the grounds for entry into executive session are not consistent in every instance; in some situations, a record may be withheld, but a discussion of the record must be conducted in public and *vice versa*. For instance, if you, in your capacity as Superintendent, prepare a memorandum in which you recommend a change in policy, that record could be withheld as "intra-agency material" under §87(2)(g) of the Freedom of Information Law. Nevertheless, when the Board discusses a change in policy at a meeting, there would likely be no basis for entry into executive session.

In the context of the matter at hand, again, I believe that a superintendent's employment contract is accessible to the public. However, a discussion pertaining to that person in relation to the contract might justifiably be considered in executive session under §105(1)(f) of the Open Meetings Law. That provision permits a public body to enter into executive session to discuss:

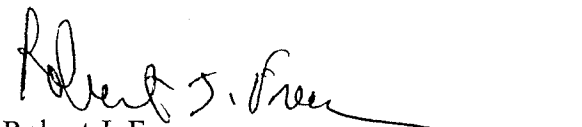
> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

In short, even though the contract is public, a discussion of one's employment history, for example, could clearly be conducted during an executive session.

Lastly, although a matter may be discussed in executive session, there is no requirement that it must be discussed in executive session. In this regard, 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. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, 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 hope that the foregoing serves to clarify the matter and 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
Executive Director

RJF:jm

STATE OF NEW YORK
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April 6, 1998

Mr. Seth Abrams
Associate Attorney
NYS Department of Health
Division of Legal Affairs
ESP, Corning Tower, Rm. 2438
Albany, NY 12237

The staff of the Committee on 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. Abrams:

I have received your recent communication in which you sought my views concerning the consistency with the Open Meetings Law of draft by-laws of the Health Research Science Board.

By way of background, the Health Research Science Board ("the Board") was created by statute in 1996. Its composition is described in §2410 of the Public Health Law, and its powers and duties in §2411. From my perspective, as a statutory body with a specific membership and legally imposed duties, the Board clearly constitutes a "public body" subject to the Open Meetings Law. The phrase "public body" is defined by §102(2) of the Open Meetings Law to mean:

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

Considering the Board in terms of the components of the definition quoted above, the Board consists of eleven members (as well as two *ex officio* non-voting members); subdivision (5) of §2410 of the Public Health Law indicates that "A majority of the voting members of the board shall constitute a quorum for the transaction of any business or the exercise of any power or function of the board"; and via the powers and duties conferred by §2411, the Board clearly performs a governmental

function for the State Department of Health specifically, and for the State generally. As such, each of the ingredients necessary to determine that the Board is a "public body" is present.

With respect to the draft by-laws, §VII pertains to "Ad Hoc Review Panels" to be designated to review applications for grants and offer recommendations to the Board regarding the merit of the applications. The draft states that "[t]he Board and DOH staff will establish one or more ad hoc review panels, each of which shall be composed of one or more Board members, at least one breast cancer survivor, and experts in breast cancer research and/or education."

Assuming that the ad hoc panels include less than a majority of the voting members of the Board, those panels, based on judicial decisions, would not be subject to the Open Meetings Law. Several 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 an ad hoc panel described in the draft by-laws, would not in my opinion fall within the requirements of the Open Meetings Law. This is not to suggest that it could not hold open meetings, but rather that there is no obligation to do so.

I note, however, that if the Board designates committees consisting solely of its own members, any such committee consisting of two or more Board members would, according to legislative history of the Open Meetings Law and its judicial construction, constitute a public body required to comply with the Open Meetings Law [see e.g., Glens Falls Newspapers, Inc. V. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993) and County of Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997].

Section VII of the draft by-laws also includes reference to "Responsibilities of the Board" and states in relevant part that "Board or committee meetings, or portions thereof, at which Board or committee members consider, rank, discuss or vote on proposals received by the Board may be conducted in executive session as authorized by the Open Meetings Law." It appears that the "proposals" involve applications for grants described in paragraph (e) of 2411(1) of the Public Health Law, and that executive sessions could properly be conducted to consider specific proposals pursuant to §105(1)(f) of the Open Meetings Law. That provision permits a public body to enter into executive session to discuss:

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

Insofar as the Board or committee of the Board discusses the application or proposal of particular person or corporation [i.e., under the terms of §2411(1)(e), a private ac ion or a

qualified research institution] in conjunction with its financial, credit or employment history, an executive session could in my view properly be held. As I understand the grant application review process, it would, of necessity, involve consideration of an entity's financial history and what is essentially its employment history, its experience and resources as measures of its ability to perform duties associated with receipt of a grant.

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
Executive Director

RJF:jm

STATE OF NEW YORK
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OML-AO-2871

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April 6, 1998

Ms. Lynne Bernstein
Trustee
Byram Hills School District
[redacted]

The staff of the Committee on 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. Bernstein:

I have received your letter of March 24. In your capacity as a member of the Board of Education of the Byram Hills School District, you have requested an opinion "concerning informal meetings of a school board."

According to your letter, the PTA has sought "an opportunity for its executive board to meet with the school board to discuss matters of mutual concern regarding the district including but not limited to the budget, the budget process and communication between the board and the community..." You added that the meeting would be held in "the district's administration building, immediately preceding a regularly-scheduled board meeting", and that it "is intended that there would be a quorum of school board members present but that no voting would be conducted."

You have asked whether the gathering in question would "qualify as a 'meeting' under the open meetings law." Additionally, you asked "[u]nder what circumstances could a majority of the school board meet, either alone or with a group of constituents, in a private meeting other than to discuss those matters specifically reserved for executive session or exempted from the open meetings law."

In this regard, I offer the following comments.

First, the gathering of the Board with representatives of the PTA would, in my view, clearly fall within the coverage of 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 public body, such as a board of education, 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 city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the Council was asked to attend by a person who was not a member of the city council [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though the gathering in question might be held at the request of the PTA, I believe that it would constitute a meeting, for a quorum of the Board would be present for the purpose of conducting public business.

As you may be aware, 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.

Second, due to the breadth of judicial decisions, I do not believe that a majority of the school board may meet, as a group, with constituents or others in private to discuss matters of public business, unless there is a basis for entry into executive session or an exemption from the Open Meetings Law.

With respect to social gatherings or chance meetings, it was found in Orange County Publications, supra, that:

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to point just short of ceremonial acceptance'" (id. at 416).

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

according to the courts, constitute "meetings" subject to the Law. If, at a social gathering or chance meeting, a majority of members, due to their common interests, begins to discuss public business despite an absence of any intent to do so, my hope is that at least one member is sufficiently knowledgeable and vigilant to suggest that the discussion of public business end and that it be resumed at a meeting held in accordance with the Open Meetings Law.

Lastly, as inferred in the preceding commentary, inherent in the definition of the term "meeting" and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body convene for the purpose of conducting public business, such a gathering would constitute a meeting subject to the requirements of the Open Meetings Law. However, if a majority of the membership of a public body attends an event for the purpose of gaining education, training, or to listen to a speaker as part of an audience or similar group, I do not believe that the Open Meetings Law would be applicable. I point out that 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, but rather as part of an audience, the Open Meetings Law, in my opinion, did not apply.

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-10740
OML-AO-2872

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April 7, 1998

Mr. David D. Stone
[redacted]

The staff of the Committee on 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. Stone:

I have received your recent undated letter in which you sought "documentation" concerning a variety of questions.

The first involves "tape recorder as a back up only at a meeting and clerk to take minutes." If I understand your comment correctly, it is common for a clerk to tape record meetings as an aid in the preparation of minutes. While a tape recording would likely contain the elements of minutes, minutes should be nonetheless reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, a municipality often might need a permanent written record readily accessible to its officials who must refer to or rely upon the minutes in the performance of their duties. I point out, too, that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

Second, the State Archives and Records Administration, pursuant to provisions of the Arts and Cultural Affairs Law, develops schedules indicating minimum retention periods for various kinds of records. A town or village clerk, in that person's capacity as "records management officer", would have a copy of the retention schedule, which indicates that tape recordings of meetings must be retained for a minimum of four months. The retention schedule may also be obtained from the State Archives and Records Administration by calling (518)474-6926.

Third, you sought a basis for a statement that minutes must be available within two weeks following a meeting. In this regard, subdivision (3) of §106 of the Open Meetings Law states that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information

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

As such, a public body has two weeks from a meeting to prepare minutes and make them available.

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

The next statement is that "monthly financial statements given to board also available to public on request." Here I direct your attention to the Freedom of Information Law. That statute, 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. From my perspective, a monthly financial statement, i.e., a statement detailing revenues and expenditures, would be available for none of the grounds for denial would apply.

You asked whether a village attorney is required "to provide the local laws and answer legal questions proposed by residents in a timely manner." If a person is seeking copies of local laws, they would be available under the Freedom of Information Law. Those kinds of records can generally be obtained from a municipal clerk. I believe that a village attorney is designated or appointed to perform legal work for a village board of trustees and other village officials. I know of no requirement that a village attorney answer questions raised by residents.

Similarly, although the Freedom of Information Law requires that agencies respond to requests for and grant access to records and the Open Meetings Law provides a right to attend meetings of public bodies, neither law requires that government officials answer questions. This is not to suggest that government officials cannot answer questions, but rather that they are not required to do so under the two statutes cited. It is also noted that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides in part that an agency is not required to create a record in response to requests.

You referred to efforts in obtaining salary information. While the nature of your inquiry is not completely clear, I point out that a payroll list must be maintained by each agency. Specifically, §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...

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

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed.

Of relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

Lastly, you referred to a requirement that you must fill out "the correct form" and to delays in responses to requests. In this regard, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), 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" [§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 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 processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

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

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

Moreover, 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

STATE OF NEW YORK
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April 13, 1998

Mr. Michael J. Fury
Office of the Town Attorney
Town of Orangetown
Town Hall
Orangeburg, NY 10962

The staff of the Committee on 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. Fury:

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

According to your letter, the Planning Board of the Town of Orangetown is involved in litigation, and "in an effort to settle this matter, an Executive Session was scheduled to meet with the legal counsel and agents of the litigant." Because certain members of Board contended that the executive session could not be legally held, it was canceled. You referred to an opinion of the State Comptroller in which it was that the Board has discretionary authority to permit the participation of members of the public during an executive session.

From my perspective, the Board could not validly conduct an executive session with litigants or their representatives. In this regard, I offer the following comments.

First, the opinion of the Comptroller to which you referred was rendered in 1963, some fourteen years prior to the effective date of the Open Meetings Law.

Second, I would generally agree that a public body has the authority to permit persons other than its own members to attend an executive session. Section 105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Nevertheless, a judicial decision rendered by the Appellate Division indicates that a public body cannot conduct an executive session to discuss litigation with its adversary in the litigation.

As you are aware, §105(1)(d) of the Open Meetings Law permits a public body to enter into executive session to discuss "proposed, pending or current litigation." In construing that provision, it has been held that:

> "The purpose of the foregoing exception was to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (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; appealed dismissed 54 NY 2d 957 (1981)].

It is noted that the Concerned Citizens decision involved facts analogous those described in your letter, for it pertained to an executive session held for the same purpose, to discuss the possibility of settling litigation with the Town's adversary in litigation.

While I believe that the Board clearly has the ability to conduct an executive session to discuss its litigation strategy, once the adversary in litigation joins in the discussion, the Board, according to the decision cited above, loses the authority to engage in an executive session.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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April 13, 1998

Ms. Susan L. Hillock
[redacted]

The staff of the Committee on 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. Hillock:

I have received your letter of March 27, as well as related materials. You have sought an advisory opinion concerning the propriety of an executive session held by the Town of Grand Island Planning Board on February 23 and a request for a list of properties to which reference was made at that meeting.

First, you wrote that "no formal motion [was] made, nor was there a vote taken prior to entering executive session." You added that prior to the executive session, the Board discussed a "list of business properties" and indicated that the matter involved "pending litigation."

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.

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

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

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

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

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

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

> "...the public body must identify the subject matter to be discussed (see, Public Officers Law § 105 [1], and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsbrugh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see,

> Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of 'a personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person' (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to 'a personnel issue' is the functional equivalent of identifying 'a particular person' " [Gordon v. Village of Monticello, 207 AD 2d 55,58 (1994)].

Based upon the foregoing, there is judicial authority indicating that motions for entry into executive session cannot validly be as general or vague as that described in your letter.

Lastly, although you apparently requested the list of properties in February, as of the date of your letter to this office, the request had been neither granted nor denied.

Since there appears to be some question relating to the existence of the list, I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of that statute defines the term "record" broadly to include:

> "...any information kept, held, filed, produced or 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 list exists, I believe that it would constitute a Town 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.

It is also noted 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 enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, copies of this response will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Planning Board
Nancy J. Samrany, Town Clerk
Betty Lantz, Deputy Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO- 2875

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April 15, 1998

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 March 25, which deals largely with the status of library boards of trustees under the Freedom of Information and Open Meetings Laws.

It is emphasized at the outset that many libraries are characterized as "public", in that they can be used by the public at large. Nevertheless, some of those libraries are governmental in nature, while others are not-for-profit corporations. The latter group frequently receives significant public funding. Because they are not governmental entities, they would not be subject to the Freedom of Information Law. Boards of trustees of all such libraries would, however, be subject to the Open Meetings Law.

In this regard, I offer the following comments.

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

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

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Valley Cottage within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to association libraries has arisen in several instances, perhaps because its companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with that statute.

Since you referred to the absence of notice of meetings, I point out that §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. 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 the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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April 17, 1998

Ms. Catherine Antioco
[redacted]

The staff of the Committee on 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. Antioco:

I have received your letter of March 30. You wrote that you have asked your school board to make minutes of its meetings available "prior to the following month's meeting." In response to that request, the Board indicated that it would refuse to disclose minutes that had not been approved.

You asked whether "this refusal violate[s] Section 106 of the Public Officers Law."

In this regard, the provision to which you referred is part of the Open Meetings Law, and subdivision (3) of §106 states that:

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

Based on the foregoing, it is clear that a public body has two weeks from a meeting to prepare minutes and make them available.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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April 21, 1998

Mr. Richard J. Klein
[redacted]

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

Dear Mr. Klein:

I have received your letters of April 3 and April 13 and the news articles attached to them. You have raised a series of questions in relation to both articles.

According to the first article, the Allegany County Administrator sent a letter to members of the Allegany County Legislature directing them to vote on a certain resolution by mail. The second article indicates that: "With an 8-6 tally from a confidential survey - the same number who voted against in February, - Allegany County lawmakers once again rejected the $14 a ton offer made in October..."

In this regard, first, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone or via mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting held by means of a telephone conference, or a vote taken by mail would in my opinion be inconsistent with law. From my perspective, voting and action by a public body may only be only be carried out at a meeting during which a quorum has physically convened.

As you may be 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 or mail, 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.

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."

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 or by mail.

Second, the letter sent to the members of the Legislature by the County Administrator would constitute "intra-agency material" that falls within the scope of §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. As described in the newspaper, while I do not believe that members of the Legislature could be characterized as "staff", it would appear that portions of the letter analogous to "instructions to staff that affect the public" should likely be disclosed.

Third, with respect to the "tally from a confidential survey", 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 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 Legislature 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. I note that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: County Legislature
John Margeson, County Administrator

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April 22, 1998

Kendall R. Pirro, Esq.
[redacted]

The staff of the Committee on 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. Pirro:

I have received your letter of April 2 and the materials attached to it. In your capacity as the attorney for the Rotterdam Junction Volunteer Fire Company, you have asked whether the Company is subject to the Open Meetings Law. Based on your analysis of the matter, it is your view that volunteer fire companies do not fall within the requirements of that statute. I respectfully disagree.

It is true that there are no judicial decisions that have dealt specifically with the issue. Nevertheless, there are several decisions, including a decision rendered by the Court of Appeals, indicating that volunteer fire companies are "agencies" subject to the Freedom of Information Law, despite their status as not-for-profit corporations. As you may be aware, §86(3) of the Freedom of Information Law defines the term "agency" to mean a "governmental entity performing a governmental or proprietary function". Based on those decisions, I believe that volunteer fire companies are also subject to the Open Meetings Law. In this regard, I offer the following comments.

In general, volunteer fire companies are not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was questionable for the purpose of determining the applicability of the Freedom of Information Law whether they conducted public business and performed a governmental function. Nevertheless, 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 corporate status, 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)].

Another decision rendered locally confirmed in an expansive manner that volunteer fire companies are required to be accountable. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court stated that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:

> '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or 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...
>
> "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 on the decisions cited above, it is clear in my view that volunteer fire companies conduct public business and perform a governmental function.

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

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

By reviewing the components in the definition of "public body", I believe that each is present with respect to the membership meetings and meetings of the board of a volunteer fire company. Either would consist of two or more members. I believe that either would be required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law and by-laws. Further, for reasons expressed earlier, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined in §66 of the General construction Law to include a municipality, such as a town or village, for example. Since each of the elements int he definition of "public body" pertains to a volunteer fire company, I believe that either the board or the membership, when it acts as a governing body, would constitute a "public body" subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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April 22, 1998

Ms. L.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 your letter of March 31, as well as the materials attached to it. You have raised a series of questions concerning executive sessions held by the Ossining Village Board of Trustees either prior to or during work sessions.

In this regard, first, it is unclear on the basis of your letter what you intend to mean by the phrase "work session." In general, that term is refers to a gathering of a public body for the purpose of discussing public business, but with no intent to take action. I note that it was held twenty years ago that a "work session" analogous to that described was found to be a "meeting" that falls within the coverage of the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Based upon that decision, it has been clear that any convening of a majority of a public body for the purpose of conducting public business collectively, as a body, constitutes a "meeting" that falls within the coverage of the Open Meetings Law.

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

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

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

It has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the 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 fully appropriate.

Third, there is no restriction on the number of executive sessions that may be held during a single meeting. Frequently, a board will discuss public business at the beginning of the meeting, enter into executive session for a valid purpose, return to the open meeting to resume public discussion,

and then for an unforeseen reason conduct another executive session. In short, there is no limit to the number of executive sessions that may be held during a meeting.

Lastly, §104 of the Open Meetings Law requires that notice of meetings be given to the news media and posted in one or more designated, conspicuous public locations. If a meeting is scheduled at least a week in advance, the notice must be given and posted not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given "to the extent practicable" at a reasonable time prior to the meeting.

As you suggested, copies of this opinion will be forwarded to the Mayor and the Village board of Trustees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor Cambariere
Village Board of Trustees

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April 23, 1998

Ms. Carol L. Chur
League of Women Voters of the
Greater Buffalo Area
[redacted]

The staff of the Committee on 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. Chur:

I have received your letter of March 29, and I appreciate your kind words regarding my presentation in Clarence last month.

Due to the inability of several members of League of Women Voters to attend, you have raised a variety of questions relating to the Freedom of Information and Open Meetings Laws. In the following paragraphs, I will attempt to respond to each.

You asked whether a reason or "legitimate purpose" must be given when seeking access to "an ethics code financial disclosure statement." As a general matter, when records are accessible under the Freedom of Information Law, it has been held that 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)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, the status or interest of the applicant, is in my opinion irrelevant.

Next, you referred to the ability of an agency to withhold records when disclosure would constitute an "unwarranted invasion of personal privacy." By way of brief background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. One of the grounds for denial, §87(2)(b), specifies that an agency may withhold records to the extent that disclosure would result in such an invasion of privacy. In addition, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and subject to conflicting or subjective interpretations, 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 those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee 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 items relating to public officers or employees are irrelevant to the performance of their 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, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

There are frequently situations in which a single record includes both public and deniable information, in which case an agency may delete certain portions and disclose the remainder. For example, following my trip to Clarence, I submitted a voucher for reimbursement that included the purpose of the trip, the destination, mileage, cost of meals, tolls, etc. Each of those items clearly related to the performance of my duties. However, to be reimbursed, I am required to include my social security number. The social security number is irrelevant to the performance of my duties and, therefore, could be deleted from the voucher on the ground that disclosure would result in an unwarranted invasion of privacy prior to disclosure of other aspects of that record.

In another area involving privacy, you asked whether a "whistleblower", a person who reports a "violation of an ethics code", for example, has any right to privacy. It has long been advised that identity of a whistleblower or complainant may be withheld to protect that person's privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

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

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted.

You asked whether advisory opinions rendered by an ethics board must be disclosed. In my view, they may be withheld under §87(2)(g). That provision permits an agency to withhold records that:

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

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

You questioned whether a town government may charge a fee for any reason other than copying records. The specific language of the Freedom of Information Law [§87(1)(b)(iii)] and the

regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Moreover, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Next, you raised questions concerning the contents of minutes of an executive session during which a town board determined to fine an elected official $10,000 and remove that person from office. In this regard, the Open Meetings Law provides direction concerning the contents of minutes of both open meetings and executive sessions. Pertinent to your inquiry would be §106, which states in relevant part that:

> "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, the identity of the person disciplined, and the nature of the discipline (i.e., the fine, the amount, and removal from office) would in my view have to be included in minutes prepared and made available within one week of the executive session. The Board's action would be a final agency determination available under §87(2)(g)(iii); further, the action would clearly be relevant to the performance of one's official duties. As such, disclosure would not result in an unwarranted invasion of personal privacy.

With respect to related documentation acquired or developed during the investigation of the matter or the proceeding leading to disciplinary action, I cannot offer specific guidance, for the contents of the documentation and the effects of disclosure would be pertinent in determining the extent to which the materials must be disclosed or may be withheld. For instance, there may be privacy considerations relating to the subject of the action, that person's family, witnesses, whistleblowers, other town officials, etc.

With respect to the Open Meetings Law generally, you asked whether a motion for entry into executive session must include a "specific reason" and, "if the session involves a personnel matter, can the person's name be revealed." As you are likely 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 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 could but 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 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)". Again, such a motion could but 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.

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 Town of X."

Since you asked when litigation involving a municipality "can" be discussed in an open meeting rather than an executive session, I note that both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has 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)].

With regard to quorum requirements, §41 of the General Construction Law, which is entitled "Quorum and majority", 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 quorum of a public body is a majority of its total membership, notwithstanding absences or vacancies. Further, 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 the case of a board consisting of five members, a quorum or majority would be three, and three affirmative votes would be needed to carry any motion or take any action.

With respect to notice of meetings, §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 or faxing notice to the local news media and by posting notice in one or more designated locations.

I point out that §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 a town board in Erie County 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.

Lastly, you asked whether meetings "may be held at a time when most members of the public cannot attend -- for example in the morning hours when people are at work, versus in the evening hours." While there is nothing in the Open Meetings Law that specifies when meetings should or must be held, I believe that public bodies must implement the law in a reasonable manner. 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 a meeting scheduled for 7 a.m. or 11 p.m. would may represent unreasonable times, I believe that meetings scheduled to be held during what may be characterized as regular business hours would be found by a court to be reasonable, even though many people work during those hours. Numerous public bodies conduct meetings during regular business hours, including the State Senate and Assembly, the Board of Regents, the Public Service Commission and the Committee on

Open Government. In short, not everyone's schedule can be accommodated, and if a meeting is held during traditional business hours or the evening, a court, in my view, would find those times to be reasonable.

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-2881

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April 27, 1998

Mr. Rich 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. Taczkowski:

I have received your letter of April 2. As I understand your remarks, they focus primarily on the notice requirements imposed by the Open Meetings Law.

In this regard, as you are aware, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

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

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

posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make specific reference to special or emergency meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

It is emphasized that notice must be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

As you requested, enclosed is a copy of your letter of March 3 addressed to me. Please forgive the notes appearing on the copy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Margaret Orrange, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 27, 1998

Mr. Jeffrey D. Honeywell
Ruberti, Girvin & Ferlazzo, P.C.
120 State Street
Albany, NY 12207-2829

The staff of the Committee on 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. Honeywell:

I have received your letter April 8, you referred to communications sent to this office in January by a member of the Albany City School District Board of Education concerning the propriety of holding executive sessions to discuss certain issues. You described the issues and contended that each could validly have been considered in executive session.

From my perspective, while many of the topics or perhaps certain aspects of those topics could properly have been discussed in private, others should have been discussed in public.

It is noted at the outset 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.

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

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

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

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (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 you, as its attorney, and you render 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.

With respect to the grounds for entry into executive session that appear to have been pertinent, 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 Board of Education."

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, Third 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)].

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 "contract negotiations", the only ground for entry into executive session that mentions that term is §105(i)(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." As you are aware, 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 only to discuss collective bargaining negotiations involving a public employee union; not all negotiations or other matters relating to contract fall within §105(1)(e). I note, however, that §105(1)(f) refers to certain matters as they relate to a "particular corporation." That provision might validly be cited to enter into executive session to discuss some issues relating to contracting that do not involve collective bargaining.

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."

In sum, several topics that you identified, or perhaps elements of them, could in my opinion have been considered in private based on an exemption form the Open Meetings Law involving the assertion of the attorney-client privilege or an executive session. However several of the items in my view should have been considered in public, for neither an exemption nor any ground for entry into executive session would appear to have applied.

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:tt

STATE OF NEW YORK
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April 27, 1998

Councilman Angelo P. Ferrara
Town of North Hempstead
Town Hall
P.O. Box 3000
Manhasset, NY 11030

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

Dear Councilman Ferrara:

I have reviewed your letter of April 8. You wrote that you learned that the Town of North Hempstead "regularly conducts Department Head meetings", and that you "have been advised that the town supervisor is the only elected official that is legally entitled to attend these meetings."

You have asked "if this is correct or if a Town Council person has the authority to attend and partake in these Department Head Meetings."

In this regard, unless the Town Board has enacted local law or established a rule or policy conferring a right upon council persons to attend the meetings in question, I do not believe that you would have the right to do so. Further, the gatherings in question would not fall within the coverage of the Open Meetings Law.

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 of the state or for an agency or department thereof, or for a public corporation as defined in §66 of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, a town board or other legislative or governing body, or a body created by law, such as a planning board or a zoning board of appeals, would constitute a public body required

to comply with the Open Meetings Law. The staff or department heads of an agency would not constitute a public body and the Open Meetings Law would not be pertinent or applicable.

In my view, the only basis for a right to attend the meetings in question, again, would involve a right conferred by a local enactment.

I hope that the foregoing serves to provide clarification and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. May W. Newburger, Supervisor

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May 8, 1998

Ms. Peggy Menzies
[redacted]

The staff of the Committee on 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. Menzies:

I have received your letter of April 16 in which you raised issues relating to the notice requirements imposed by the Open Meetings Law, particularly as they pertain to "special" or "emergency" meetings.

In this regard, as you are aware, the Open Meetings Law requires that notice be posted and given to the news media 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. 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 or faxing notice of the time and place of a meeting to 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

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May 11, 1998

Hon. Douglas Irish
Councilman
Town of Queensbury
[redacted]

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

Dear Councilman Irish:

I have received your letter of April 21 and a copy of Chapter 3 of the Town Code of the Town of Queensbury entitled "Advisory Boards."

According to your letter, there is a "debate" in the Town concerning "whether a Town Board member can be excluded from executive sessions of the Recreation Commission." You added that the Commission was established by a resolution of the Town Board.

In this regard, I direct your attention to §105(2) of the Open Meetings Law. That provision states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." As such, only the members of a public body have the right to attend an executive session of that body. If a member of the Town Board is not a member of an advisory board, he or she ordinarily would not have the right to attend an executive session of such a body. However, §3-7.B. of the Town Code specifies that:

> "All meetings of the advisory board shall be held on notice to the Town Board, which shall receive the same notice as is given members of the advisory board, and the members of the aforesaid Town Board shall be entitled, as of right to attend any meeting called, whether the same is open or in executive session; provided, however, that members of the Town Board shall not be considered members of the advisory board and shall not be entitled to vote on any matter before the advisory board.

Based on the foregoing, any Town Board member would have the right to attend an executive session of an advisory board subject to §3 of the Code.

I note that I am unaware of whether the Recreation Commission is an advisory board that falls within the coverage of §3 of the Code. Frequently recreation commissions are created in accordance with §243 of the General Municipal Law, and as I understand that statute, those entities are not advisory in nature; rather, they have authority to act on behalf of the municipalities that created them. Subdivision (1) of §243 states that:

> "If the board of estimated apportionment, or if there be no such board, the common council, board of aldermen, or corresponding legislative body, or the governing board of any such county, town or village shall determine that the power to equip, operate and maintain playgrounds and recreation centers shall be exercised by a recreation commission, they may, by resolution, establish in such municipality a recreation commission, which shall possess all the powers and be subject to all the responsibilities of local authorities under this article."

If the Recreation Commission is not an advisory board, and if the Town Board has conferred no special legal right on the part of its members to attend executive sessions of the Commission, I believe that the Commission could exclude any person, including a member of the Town Board, from its executive sessions. In that circumstance, in accordance with §105(2) of the Open Meetings Law, the Commission could choose to authorize a Town Board member or others to attend its executive sessions, but it would not be obliged, in my opinion, to do so.

It is suggested that you confer with the Town Attorney in order to ascertain whether the Recreation Commission is an "advisory board" that falls within the scope of §3 of the Town Code.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Town Attorney

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May 12, 1998

Mr. Albert P. Roberts
Vergilis, Stenger, Roberts & Pergament
1611 Rte 9
Wappingers Falls, NY 12590

The staff of the Committee on 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. Roberts:

I have received your letter of April 20. You have raised a series of questions concerning minutes of meetings of town boards and sought a "formal determination" from this office.

In this regard, the Committee on Open Government is authorized to advise with respect to the Open Meetings Law; the Committee is not empowered to render any determination that is binding on a public body. Further, for reasons that I hope will be evident, I do not believe that unequivocal guidance can be offered.

The questions involve who determines the contents of minutes, how a correction of minutes should be recorded, and whether a town board has the authority to require that verbatim minutes of town board meetings be prepared.

To attempt to put the issues in perspective, I believe that four provisions are pertinent. First, §106 of the Open Meetings Law deals specifically with 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 meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session. ..."

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. 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 (11) of §30 of the Town Law provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". And fourth, §63 of the Town Law states in part that a town board "may determine the rules of its procedure".

In my opinion, inherent in each of the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate. While a town board's rules or 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 a rule or 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 any particular town, but rather that policies or procedures, although apparently reasonable, may be carried out in a manner inconsistent with their intent.

What if a 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 of four to one 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 board you represent 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 a particular 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 or procedures 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.

Lastly, I know of no judicial decision dealing with the issue of verbatim minutes. Nevertheless, I respectfully disagree with your view that a town board may require a clerk to prepare a verbatim account of the entirety of a meeting. As indicated earlier, subdivision (3) of §106 of the Open Meetings Law requires that minutes of meetings be prepared within two weeks of a meeting. From my perspective, in view of that time limitation, it would be unreasonable, notwithstanding the language of §30(11) of the Town Law, for a town board to require that verbatim minutes be prepared. Such a requirement, particularly if meetings are frequent or lengthy, would essentially preclude a town clerk from carrying out his or her other duties, which are numerous.

If there is concern regarding the accuracy of minutes or a desire to have a verbatim account of statements made at a meeting, it has been suggested that a public body direct that a meeting be tape recorded. Further, having discussed the issue of verbatim minutes with others, review of such lengthy documents months or perhaps years after meetings is time consuming, and it is often difficult for the public and government officers in need of information to locate the material that is desired or needed.

This is not to suggest that a board could not direct that certain elements of a meeting be recorded verbatim by a clerk, i.e., when the board, by means of a vote of a majority of its membership, specifies that a certain statement, text of a resolution, agreement, etc., be prepared verbatim in minutes. However, for reasons described above, I believe that it would be unreasonable and essentially ultra vires for a town board to require that minutes consist of a verbatim account of the entirety of every meeting.

I recognize that the foregoing does not offer clear answers to your questions. It is my hope, however, that my comments will be considered to be helpful and constructive.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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May 13, 1998

Ms. Bonnie Meisner
[redacted]

The staff of the Committee on 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. Meisner:

I have received your undated letter, which reached this on April 27.

You referred to an article in the April 8 edition of the Kingston Daily Freeman quoting me in relation to an executive session pertaining to a private company, and you asked whether the article accurately reflected my views. In addition, you asked whether there is a source containing "a complete list of subjects or topics which Owners Associations organized under NYS Not-For-Profit Corporation Law normally or usually discuss only in closed or executive sessions."

In this regard, since I did not see the article appearing in the Kingston Daily Freeman and have no specific recollection of the conversation that I had with its reporter, I cannot suggest to you that the article did or did not accurately reflect my views. Nevertheless, I believe that my comments would have pertained to the ability of a public body, a governmental entity, to enter into an executive session. I note that the Open Meetings Law pertains 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."

Based upon the foregoing, the Open Meetings Law pertains to governmental bodies; it does not apply to private or not-for-profit corporations, such as a homeowners association.

I do not believe that there is any state law that requires that meetings of not-for-profit associations be conducted upon to the public or that there is a law specifying the subjects that those kinds of organizations can discuss in private. It is suggested that the source of any such information, if it exists at all, would be the organization's by-laws.

Lastly, the quotation from the news article appears to have pertained to the ability of a governmental body to enter into an executive session to discuss certain issues relating to a private company under §105(1)(f) of the Open Meetings Law. That provision 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..."

The Open Meetings Law contains eight grounds for entry into executive session, and a copy of the entirety of that statute is attached.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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May 13, 1998

Ms. Geraldine Richtmyer
[redacted]

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

Dear Ms. Richtmyer:

I have received your letter of April 27. You have questioned the ability of the Watkins Glen Central School District Board of Education to enter into an executive session from a "workshop."

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

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public

> official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

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

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

Based upon the direction given by the courts, if a majority of the Board gathers to discuss public business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, irrespective of its characterization as a "workshop." In short, there is no distinction between a meeting and a workshop; when a workshop is held, a public body has the same obligations in terms of notice, openness and the ability to conduct executive sessions as in the case of regular meetings. Since the Open Meetings Law applies equally to workshop and regular meetings, confusion might be eliminated by referring to each as "meetings", rather than distinguishing them in a manner that is artificial.

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

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May 14, 1998

Mr. Ian Alterman
[redacted]

The staff of the Committee on 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. Alterman:

As you are aware, I have received your letter of April 27 in which you sought an "updated opinion" concerning the status of community boards under the Open Meetings Law and the ability of members of those boards to elect their officers by secret ballot. You have contended, in brief, that community boards are not public bodies because their functions are advisory and that the creation of a record of votes of the members conflicts with "logic, common sense, history, practice and, ultimately, each person's right to privacy with respect to the election process."

Having reviewed earlier opinions on the subjects of your concern, I respectfully disagree with your contentions. 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."

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)].

Each of the entities at issue in the decisions cited above were ad hoc in that they were charged with a narrow task to be performed within a limited duration; following the performance of the task, the entities would cease to exist. In contrast, community boards are creations of law, specifically Chapter 70 the New York City Charter, §§ 2800 and 2801; their existence is ongoing, and only an amendment to the City Charter would terminate their authority to carry out their duties.

In those decisions, 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).

As I understand the provisions of the City Charter, community boards perform a variety of what might be characterized as advisory functions. However, in at least one area of responsibility, they perform a legally necessary step in the decision making process. Paragraph (17) of §2800(d) states that each community board shall:

> "Exercise the initial review of applications and proposals of public agencies and private entities for the use, development or improvement of land located in the community district, including the conduct of a public hearing and the preparation and submission to the city planning commission of a written recommendation..."

Based on the foregoing, before the City Planning Commission can act with respect to land use, a community board must conduct a public hearing and submit a written recommendation to the Commission. Although a community board does not render a final and binding decision, it performs an obligatory function in the process leading to a determination.

In addition, under paragraphs (f) and (g) of §2800, a community board has the power to hire a district manager and others. As such, it enjoys the authority to make certain decisions in order to carry out its duties.

In sum, because community boards perform necessary functions pursuant to the City Charter, I continue to believe and advise that they constitute public bodies required to comply with the Open Meetings Law.

Second, I do not believe that voting by members of community boards in the performance of their official duties can be equated with citizens casting votes in a general election. In the former situation, the members are essentially representatives of the public appointed by a borough president

to carry out governmental duties in the public interest. In the latter, voters can make choices, as individuals, not as representatives of others, as a means of expressing their views.

In terms of the law, §87(3)(a) of the Freedom of Information Law provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency", which is defined to include a state or municipal board [see §86(3)], such as a community board, a record must be prepared that indicates the manner in which each member who voted cast his or her final 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 have voted with respect to particular matters. 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."

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, 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); aff'd 72 NY 2d 1034 (1988)].

If, in the context of your remarks, a vote to elect an officer does not result in a majority for any candidate, and the vote is not "final", I do not believe that the votes of each member must be recorded. Under §87(3)(a), the members' votes must be memorialized only in the case of a "final" vote.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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May 18, 1998

Mr. Blay Tarnoff
Chair, pro tem
The Thomas Paine Chapter of the
Libertarian Party of New York
[redacted]

The staff of the Committee on 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. Tarnoff:

I have received your letter of April 24. According to your letter, a meeting was held by the Board of Legislators of Westchester County on April 14 "by invitation only." You asked that a "formal investigation" be conducted.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Open Meetings Law. The Committee has neither the resources nor the jurisdiction to conduct an investigation. Nevertheless, I offer the following comments.

First, 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.).

I note that it has also been 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.

Lastly, 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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. George Latimer, Majority Leader

STATE OF NEW YORK
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May 20, 1998

Kendall R. Pirro, Esq.
[redacted]

The staff of the Committee on 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. Pirro:

I have received your letter of April 28 in which you referred to the opinion of April 22 addressed to you. In brief, it was advised that the records and meetings of volunteer fire companies are subject, respectively, to the Freedom of Information Law and the Open Meetings Law.

You noted that the opinion did not address decisions cited in your letter "which hold, in effect, that the Open Meetings Law does not encompass bodies which have no authority to make governmental decisions or exercise the power of the sovereign, etc." You asked whether it is my view that the principles expressed in the Westchester-Rockland decision are distinguishable from those that you cited involving the Open Meetings Law and whether volunteer fire companies "exercise the power of the sovereign" and are involved in "the making of governmental decisions."

In this regard, I did not focus on or address the decisions that you cited, because they involved ad hoc bodies created to offer advice or recommendations concerning particular issues, and their existence ended when they completed their tasks. In contrast, the Court of Appeals in Westchester-Rockland characterized a volunteer fire company as "an organization on which a local government relies for performance of an essential public service." Similarly, in the S.W. Pitts Hose Company decision, the court emphasized that volunteer fire companies provide "an essential public service." Those courts concluded that volunteer fire companies are "agencies" that fall within the scope of the Freedom of Information Law because they are governmental in nature and carry out a governmental function for one or more municipalities. In short, in my view, volunteer fire companies are in no way analogous to the advisory bodies that were the subjects of the decisions that you cited.

Further, if, as the State's highest court held, a volunteer fire company is an agency that performs a governmental function, I believe that it may fairly be concluded for purposes of the Open meetings Law that it conducts public business, performs a governmental function and, therefore, is a public body required to comply with that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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May 20, 1998

Mr. Arthur M. Hirsch
[redacted]

The staff of the Committee on 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. Hirsch:

I have received your letter of May 1, as well as the correspondence attached to it.

You wrote that you are "a vested member of the Transport Workers-Suburban Bus Authority (Long Island Bus) Employees' Pension Trust" ("the Trust") and that you and other members of the Trust "are or were employed by the Metropolitan Suburban Bus Authority, which is part of the Metropolitan Transit Authority", and that you "are considered 'Public Employees'." One of the attachments to your letter, a memorandum of March 16 addressed to retired members of the Trust, appears to confirm your contention, for it was stated that "because the MSBA was a division of the State of New York...pensions paid by the State to its former employees were totally State tax exempt."

Notwithstanding the foregoing, you have been informed by the manager of the Trust that you cannot attend meetings of the its Board of Trustees and that the "TWU MSBA Employees Pension Trust is not subject to Freedom of Information statutes." You have sought assistance in gaining access to records of the Trust and to meetings of its Board of Trustees.

From my perspective, if indeed all members of the Trust are present or former public employees, and if the only employers of those persons have been governmental entities, I believe that the Trust would be required to give effect to the Freedom of Information Law and that meetings of its Board of Trustees would fall within the coverage of the Open Meetings Law.

In this regard, 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."

A public authority is a public corporation. Therefore, any public authority in New York State is an "agency", a governmental entity, that is subject to the Freedom of Information Law.

In my opinion, if the Trust would not exist but for its relationship with a public authority, and it if carries out its duties solely for or on behalf of present or former public employees, it, too, would constitute an "agency" required to comply with the Freedom of Information Law. I note that similar entities, such as the New York State Retirement System, the New York State Teachers' Retirement System and various New York City public employee trusts are subject to and have complied with the Freedom of Information Law since the enactment of that statute.

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 point out that salary information regarding agency employees is clearly accessible, for §87(3)(b) of the Freedom of Information Law requires that each agency maintain and make available a record "setting forth the name, public office address, title and salary of every officer or employee of the agency."

If the preceding assumptions and conclusions are accurate, the Board of Trustees of the Trust would be subject to the Open Meetings Law. That statute is applicable to public bodies, and §102(2) defines the phrase "public body" to include:

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

Again, assuming that the Trust carries out its duties solely for or on behalf of public employees, I believe that its Board of Trustees constitutes an entity that conducts public business and performs a governmental function for a public corporation, i.e., a public authority. If that is so, it is a public body that falls within the coverage of the Open Meetings Law.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be conducted in accordance with §105(1) of the Open Meetings Law.

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

In an effort to enhance compliance with and understanding of the issue, copies of the same materials and this response will be forwarded to the manager of the Trust.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Joan Engert, Manager

STATE OF NEW YORK
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May 22, 1998

Mr. Hans Luebbert
[redacted]

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

Dear Mr. Luebbert:

I have received your letter of May 1. You have requested an advisory opinion concerning the use of the phrase "executive privilege" as it appears in the context a news article that you enclosed. In addition, you sought my views relating to a local law adopted by the Town of Newburgh Town Board that enables the Supervisor to "call meetings of the board on an hour's notice."

In this regard, I offer the following comments.

First, I am unfamiliar with the use of the phrase "executive privilege" in relation to the duties of a municipal board or one of its members. As I interpret the article, it appears that, historically, supervisors in the Town of Newburgh took action without the consent of other members of the Town Board, who later essentially ratified the action.

Assuming that the actions could have been taken only by the Town Board, I do not believe that a supervisor could validly have taken action outside of a meeting held by the Board. Most relevant to the issue 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.

In sum, if a matter involves action that only the Town Board may take, I believe that the Supervisor is incapable of taking the action unilaterally. It is also noted that §63 of the Town Law states in part that "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board."

With respect to the second issue, several provisions of law may be pertinent to an analysis of the matter. As you may be aware, two statutes involve notice. Section 62 of the Town Law deals with notice of special meetings 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 the 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 the place where the meeting is to be held."

Section 104 of the Open Meetings Law deals with notice of meetings that must be given to the news media and to the public 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. 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 or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

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

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

From my perspective, unless there is a true emergency or need that would justify convening a meeting within an hour's time, members of the public would be effectively precluded from asserting their statutory right to attend a meeting of a public body. I am mindful of the Town Board's general authority under §10 of the Municipal Home Rule Law to enact local laws that may differ from the direction provided in state statutes. However, in view of the clear statement of legislative intent that appears in §100 of the Open Meetings Law, it is possible that the local enactment in question may involve a matter of state concern that limits the Town's ability to diminish the public's right to attend meetings of the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Richard Drake, Town Attorney

STATE OF NEW YORK
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May 29, 1998

Ms. Judy Wessler
Policy Coordinator
Commission of the Public's Health
System in New York City
215 W. 125th St., Rm. 400
New York, NY 10027-4426

The staff of the Committee on 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. Wessler:

I have received your letter of May 5 in which you sought an advisory opinion concerning "the conduct and authority of actions taken at a public meeting held by the Health and Hospitals Corporation of New York City on February 26, 1998."

At that meeting, members of the public, as well as members of the State Legislature and New York City Council, attended and sought to express their views concerning possible closings of clinic facilities. Some were provided an opportunity to speak; others "were abruptly cut off." Prior to adjournment, the Chairperson, Rosa Gil, announced that she had "developed criteria for managing the process", specifically, in your words, "the process of who speaks on what issues at Board meetings." She indicated that at future meetings, members of the public would "only be permitted to speak on the Agenda's Action Items being voted on that day." She added that:

> "The Community Relations Committee of the Board, whose purpose is to address the ongoing concerns of the community, will now begin to permit a reasonable number of members of the public to testify formally before the Committee, whenever the Agenda permits, and at the discretion of the Chairperson of the Board and the Chairperson of the Committee."

You indicated that:

> "The new criteria described by Dr. Gil at the February meeting, require that anyone wishing to speak at open Board meetings give two weeks advance notice and indicate the agenda item to which they will direct their comments. Agendas for these meetings have normally been released only two days before the meeting itself, making the described criterion impossible to meeting."

You have questioned the propriety of the new rules and questioned whether:

> "promulgating new rules for the conduct of Board meetings can be used as the legitimate basis for closing an open Board meeting and going into executive session? Is it not rather required that rules changes be voted on in a Board meeting with a full quorum? Is establishing new rules even a legitimate basis for calling an executive session of the Board?"

In this regard, I offer the following comments.

First, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak or otherwise authorize public participation, 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. By means of example, 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 determined 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 the context of the facts that you presented, if indeed members of the public can only speak regarding agenda items by providing two weeks advance notice, but agendas are generally available only two days prior to a meeting, the rule creates an impossibility. In that circumstance, I believe that

the rules would be unreasonable and invalid. Further, if the rule enables the Chairperson to authorize some to speak while prohibiting others from doing so, or enables the Chairperson to permit one to speak for ten minutes and another for two minutes or not at all, again, I believe that the rule would be unreasonable.

Considering the matter from a different vantage point, it is unlikely that the Chairperson has the authority to adopt policy or rules unilaterally. Pertinent to the matter are requirements involving a quorum and the ability to take action. Specifically, §41 of the General Construction Law states that:

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

Based upon the foregoing, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body. In addition, when the Open Meetings Law is read in conjunction with §41 of the General Construction Law, I believe that action may be taken only at a meeting during which a majority of the total membership of a public body is present.

In my view, unless there is some statutory basis to do so, the chairperson has no authority to render a decision or make policy unilaterally. Policy can be made by the Board of the Health and Hospitals Corporation only by means of a majority vote of its total membership taken at a meeting conducted in accordance with the Open Meetings Law.

Third, from my perspective, the promulgation of new rules concerning the conduct of meetings would not represent a valid topic for entry into executive session. Section 105(1) of the Open Meetings Law specifies and limits the subjects that may properly be considered during an executive session. A discussion of the kind of policy or rules that are the subject of your inquiry in my opinion would not fall within any of the grounds for entry into executive session.

Lastly, since you mentioned that it "has taken some time to obtain the minutes of the meeting", I point out that §106(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to Chairperson Gil and General Counsel to the Corporation, Elizabeth St. Clair.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Rosa Gil, Chairperson
Elizabeth St. Clair

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2895

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June 2, 1998

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 11 in which you sought a "determination" relating to a matter involving the Open Meetings Law.

According to your letter, the Halfmoon Town Board held a meeting on May 5 at 2 p.m. during which all of the Board members and 29 residents attended. The meeting lasted for fifteen minutes, at which time the Supervisor asked if there were questions, and there being none, the meeting was adjourned. You wrote that you remained "to see what was going to happen next and then proceeded to the Town Clerk's office to ask a few questions." After being there for a few minutes, you went back to the meeting room, where "[t]he Town Board opened the meeting again and passed a resolution..." Following that meeting, you asked two of the Board members "if it was legal to open the meeting again after it was already adjourned and everybody left", and they answered affirmatively.

In this regard, I offer the following comments.

First, from my perspective, since the meeting that began at 2 p.m. was adjourned, the latter gathering in my view constituted a separate meeting that should have been preceded by notice given in accordance with §104 of the Open Meetings Law, convened open to the public, and conducted open to the public to the extent required by law.

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.).

I note that it has also been 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 gathered to conduct public business, any such gathering would, in my opinion, have constituted a "meeting" subject to the Open Meetings Law. Further, §104 of the Open Meetings Law requires that every meeting be preceded by notice given to the news media and to the public by means of posting.

Second, the Committee on Open Government is authorized to render advisory opinions; it is not empowered to issue "determinations" that are binding. It is my hope, however, that the opinions rendered by this office are educational and persuasive, and that they serve to enhance compliance with and understanding of law. With those goals in mind, 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 2, 1998

E-Mail

TO: Abrown6th<[redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Council President Brown:

I have received your communication of May 6 in which you sought an opinion concerning "the First Amendment Free Speech."

Although you did not identify the municipality that you serve, you wrote that you recently sought and gained approval of a change in the "procedure for public speaking at [y]our business meeting", but that since the change, the Council "has been accused of violating the Constitution of the United States." You wrote that in the past, members of the public were given up to five minutes to speak "on City business"; "the change made now allows five minutes for agenda items only." As I understand your remarks, any matter of City business may be raised at the Council's work sessions, which are conducted differently from its business meetings.

In this regard, while individuals may have the right to express themselves and to speak, I do not believe that they necessarily have the right to do so at meetings of public bodies. It is noted that there is no constitutional right to attend meetings of public bodies. Those rights are conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, I do not believe that the public would have the right to attend.

In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, as you are aware, that

right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, it is reiterated that, in my opinion, there is no constitutional right to attend meetings.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which I am aware provides the public with the right to speak during meetings, I do not believe that a public body is required to permit the public to do so during meetings. Certainly a public body may in my view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally. From my perspective, a rule authorizing any person in attendance to speak for up to five minutes on agenda items, and those items only, would be reasonable and valid, so long as it is carried out reasonably and consistently.

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
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COMMITTEE ON OPEN GOVERNMENT

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June 4, 1998

Mr. Thomas Clark
Councilman
Town Board of Oyster Bay
Town Hall
Oyster Bay, NY 11771-1592

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

Dear Councilman Clark:

I have received your letter of May 15, as well as your letter addressed to Attorney General Vacco, in which you wrote that " the Hicksville School Board conducts closed door business sessions where they discuss school business." You offered the view that the Board's activities may be "a violation of the Sunshine Law" and expressed the belief that "the school board must operate under the Sunshine Law the same as the any [sic] town board." You have sought a "ruling" on the matter.

In this regard, the Committee on Open Government, a unit of the Department of State, is authorized to offer advice and opinions concerning the Open Meetings Law (see Public Officers Law §109). The Committee cannot issue a ruling that is binding. Nevertheless, in an effort to respond to your concerns, I offer the following comments.

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

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

Based on the foregoing, a board of education, like a town board, clearly constitutes a "public body" required to comply with the Open Meetings Law.

Second, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1) of the Open Meetings Law. As such, as public body cannot enter into an executive session to discuss the subject of the choice; on the contrary, the law specifies and limits the subjects that may properly be considered in private.

Enclosed for your consideration are copies of the Open Meetings Law and "Your Right to Know", which describes that statute and the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education, Hicksville Union Free
School District

encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 4, 1998

E-Mail

TO: Dekmm [redacted]

FROM: Robert J. Freeman

The staff of the Committee on 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. Menzies:

I have received your communications of May 12 and 13.

In the first, you wrote that the Mayor of the Village of Fleischmanns videotaped a meeting of the Village Board of Trustees. You asked whether taping the meeting was "legal" and whether a copy of the tape must be made available to the public. In the second, you wrote that it is your understanding that the Mayor has contended that the tape is his property and he is not required to provide a copy.

In this regard, I offer the following comments.

First, so long as recording equipment is used in a manner that is not disruptive to a meeting, any person may audiotape or videotape an open meeting of a public body.

I point out that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. However, there 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."

Similarly, 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).

Second, assuming that the Mayor recorded the meeting in order to have an accurate rendition of statements made at the meeting for the purpose of enhancing the performance of his duties, I believe that the recording would constitute a "record" that falls within the coverage of the Freedom

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

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

Based on the foregoing, again, if the meeting was taped by the Mayor in furtherance of his duties, the recording, in my view, would be a Village record subject to the Freedom of Information Law.

In terms of rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since any person could have attended the meeting and could have seen and heard the content of the tape, there would be no basis for a denial of access, and it was held some twenty years ago that a tape record of an open meeting is a "record" available under the Freedom of Information Law (Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor, Village of Fleischmanns
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 4, 1998

Mr. Edward Szymkowiak
Citizens For Fiscal Responsibility
[redacted]

The staff of the Committee on 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. Szymkowiak:

I have received your letter of May 14 in which you raised a series of questions concerning meetings of committees of the Delaware County Board of Supervisors.

As you are aware, it has been advised by the Committee on Open Government and held by the courts that a committee consisting of members of a legislative body is a "public body" required to comply with the Open Meetings Law. Consequently a committee has the same obligations under the Open Meetings Law as a governing body with respect to notice, the preparation of minutes, openness, and the ability to conduct executive sessions as a governing body.

With regard to notice, the Open Meetings Law requires that notice be posted and given to the news media 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. 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.

The Open Meetings Law also provides direction concerning the preparation and content of minutes. Specifically §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 session s of any action that is taken by formal vote which shall consists of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week form the date of the executive session."

Based on the foregoing, reference must be made in minutes to all motions, including motions to enter into executive session. If action is taken during an executive, minutes must be prepared in accordance with subdivisions (2) and (3) of §106.

Lastly, the use of the phrase "personnel matters" is inadequate to describe the subject of an executive session. 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 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, Third 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)].

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2900

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June 8, 1998

Mr. James J. McLoughlin
Counsel
City of Buffalo Charter Revision Commission
City Hall, Room 221
Buffalo, NY 14202

The staff of the Committee on 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. McLoughlin:

I have received your letter of May 11 in which you sought advice in relation to the Open Meetings Law.

You wrote that the Mayor of the City of Buffalo recently created a City Charter Commission pursuant to §36 of the Municipal Home Rule Law. Paragraph (f) of subdivision (6) of that statute provides that:

> "The commission shall conduct public hearings. It shall conduct such public hearings at such times and at such places within the city as it shall deem necessary. The commission shall also have power to conduct private hearings, take testimony, subpoena witnesses and require the production of books, papers and records."

In conjunction with the foregoing, you raised the following questions:

> "(1) What impact, if any, does §105 of the Public Officers Law (conduct of executive sessions) have on the Commission's authority to conduct private hearings?
>
> (2) What are the limitations, if any, upon the Commission's authority to conduct private hearings? The Commission is concerned that city officers and employees may be reluctant to express themselves freely before it on governmental operations in a public hearing.

(3) Is there any legislative history or experience of other Charter Revision Commissions which may throw light on the way in which the Municipal Home Rule Law provision should be interpreted?"

In this regard, I know of no judicial decisions or other interpretations that are directly pertinent to the issues that you raised. However, from my perspective, most relevant is the distinction between a meeting and a hearing. As you may be aware, a meeting, according to §102(1) of the Open Meetings Law, involves a gathering of a majority of a public body for the purpose of conducting public business. Further, the statement of intent appearing in §100 and judicial decisions indicate that the statute is intended to open the deliberative process of public bodies [see e.g., Orange County Publications v. City of Newburgh, 60 AD2d 409, affirmed 45 NY2d 947 (1978)]. In short, meetings typically involve discussion and deliberation by members of public bodies and often the taking of action.

In contrast, hearings generally involve either providing members of the public with an opportunity to speak with respect to a given issue or enabling a person or body, such as the Commission, to elicit testimony, opinions or information from individuals, particularly those with certain knowledge or expertise.

From my perspective, the functions of meetings and hearings differ, and the difference between the two determines whether the gathering is a meeting subject to the requirements of the Open Meetings Law, or a hearing held in accordance with §36 of the Municipal Home Rule Law.

When the Commission gathers to discuss and deliberate collectively, as a body, the gathering in my view would constitute a "meeting". As you are likely aware, meetings of public bodies are presumptively open to the public and must be conducted in public, except to the extent that a discussion may be held during an executive session. Section 102(3) of the Open Meetings Law states that an executive session is a portion of an open meeting during which the public may be excluded, and paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session. In my view, in consideration of the kind of function performed by a charter revision commission, it is unlikely that the grounds for entry into executive would be pertinent or applicable.

However, when the Commission determines to authorize the public to express its opinions or, perhaps more importantly, when it seeks to elicit the testimony or views of individuals due to their special knowledge or expertise, I believe that §36 would apply. In those circumstances, the events would be "hearings", and the Commission, in my view, would have the authority to conduct them in public or in private. Insofar as private hearings are held for the purposes described above, §36, a statute conferring specific authority, would, in my opinion, supersede the Open Meetings Law [see Open Meetings Law, §110].

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO--10855
OML-AO-2901

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June 15, 1998

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:

As you are aware, I have received your fax of May 19. Due to the possibility that a library board of trustees may be subject to the Open Meetings Law but not the Freedom of Information Law, you have asked whether minutes of meetings and a record of the votes of the members must be prepared and made available.

From my perspective, in view of the remedial nature of the Freedom of Information and Open Meetings Laws, and the clear intent of §260-a of the Education to require accountability on the part of library boards of trustees, all such boards must prepare and disclose their minutes in a manner consistent with the both the Open Meetings and Freedom of Information Laws. Further, based on a judicial decision, I believe that they must include an indication of the manner in which board members cast their votes.

As you may recall, §260-a of the Education Law states that:

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

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

Section 106 of the Open Meetings Law pertains to minutes and provides that:

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

While some library boards of trustees may not be subject to the Freedom of Information Law because they serve as the governing bodies of not-for-profit corporations separate from government, it would be anomalous in my view to be subject to the Open Meetings Law but exempt from critical requirements of that statute, specifically, those pertaining to minutes of their meetings. For that reason, because of the obvious intent of §260-a of the Education Law, and because of the general nature of the libraries subject to that statute and the Open Meetings Law, I believe that the entities falling within the scope of those provisions must prepare and generally disclose minutes of meetings as described above.

Lastly, although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I note 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)].

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

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June 17, 1998

Ms. Jeannie H. Basini
[redacted]

The staff of the Committee on 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. Basini:

I have received your letter of May 18 in which you questioned the validity of a policy adopted by The Renaissance School, a public school in Jackson Heights.

In a letter sent to you that was jointly signed by the Principal and two PTA Co-Presidents, it was stated that:

> "...we still stand by our policy which is as follows: 1) Meetings will be open to all parents and guardians of children currently attending The Renaissance School. 2) Community members may attend by official invitation only. 3) The Executive Board and CSG may go into closed sessions when discussing personnel issues."

Reference was also made in that letter that the information upon which you relied was based upon an opinion rendered by this office, and that it was merely a "staff advisory opinion, not law."

This response also consists of a staff advisory opinion. I note that the Open Meetings Law, §109, specifies that the Committee on Open Government is authorized to render advisory opinions, and that the statement appearing above indicates that the staff is authorized to respond on behalf of the Committee. While it is true that the opinions are not binding, it is my hope that they are educational and persuasive. Further, the courts have in many instances cited and relied upon opinions rendered by this office.

Notwithstanding the foregoing, the focal point of my commentary is not reflective of an opinion but rather is based upon the language of the Education Law. From my perspective, the Open Meetings Law applies to governmental bodies; it does not apply to a civic organization, such as a PTA. Nevertheless, depending upon its purpose, certain events held on school property are required

to be conducted in public, even though they do not involve a public body or the Open Meetings Law. The Education Law enables a board of education to authorize that school property be used for various purposes, including:

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

Therefore, if an entity, such as a PTA, or perhaps a citizens' committee, meets on school property for a "civic" purpose, or for a purpose "pertaining to the welfare of the community", its meetings would be open to the public, even though the Open Meetings Law does not apply.

Again, while this response may be characterized as an advisory opinion, the opinion is based upon the clear language of a statute.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be sent to the individuals identified in your correspondence.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Monte Joffee, Principal
Toni Ceaser, PTA Co-President
Francine Smith, PTA Co-President
Dr. Angelo Gimondo, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 17, 1998

Mr. John Kwasnicki
[redacted]

The staff of the Committee on 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. Kwasnicki:

I have received your letter of May 20 and the materials attached to it. You have questioned the legality of a failure by a public body to include a time during a meeting in which the public may speak.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 24, 1998

Ms. Mary E. Carton
[redacted]

The staff of the Committee 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. Carton:

As you are aware, I have received your letter of June 2 and a variety of related materials. In addition, in good faith, it is noted that I have engaged in conversations relating to your correspondence with Ms. Peggy Theis, who serves with you as a member of the Hicksville School Board, and Gregory J. Guercio, the District's attorney.

You asked that I review a letter addressed to the Board of Education signed jointly on June 1 by yourself and another Board member, Robert Pavacic, as well as a memorandum sent to the Board on May 15 by Mr. Guercio. I have read those items and the others that you have forwarded, all of which pertain to the use of a school building by Solomon Schechter, which has leased the building for the past five years. In conjunction with those materials, you have asked for an opinion concerning:

"1. Confidentiality and the need for board trustees and the public to know.
2. The rules of open government.
3. Any malfeasance or misfeasance on the part of any participant."

In this regard, it is emphasized that the Committee on Open Government is authorized to prepare advisory opinions pertaining to the Open Meetings and Freedom of Information Laws. While issues involving confidentiality and the need for board members and the public to know of the operations of the District relate to the "rules of open government", you have not raised a question in relation to item 1 that I can address. Similarly, it is not the role of this office to address matters of "malfeasance or misfeasance." If you pose a question that pertains to either of the statutes within the Committee's advisory jurisdiction, I would be pleased to respond. The materials do, however, raise issues relating to the Open Meetings Law, and the ensuing remarks will be limited to those matters.

First, the Open Meetings Law pertains to meetings of public bodies, and the application of that statute is not triggered until a quorum, a majority of the total membership of a public body, has convened for the purpose of conducting public business [see definition of "meeting", Open Meetings Law, §102(1)]. The gathering of May 14 to which you referred in your letter of June 1 that was attended by the District's attorney, certain District administrators, and representatives of the Solomon Schechter school would not have been subject to the Open Meetings Law. In short, there was no quorum of the Board.

Second, the gathering of May 21 in my view clearly constituted a meeting, for a quorum was present. The issue, in my opinion, involves the extent to which the meeting could justifiably have been conducted in private.

As a general matter, 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 basis for entry into executive session that appears to have been relevant 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 that identified in the materials 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 point out that there is a second vehicle that may authorize a public body to discuss public business in private. In addition to the limited ability to enter into executive session, §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 facts presented is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

Insofar as the Board seeks legal advice from its attorney and the attorney renders legal advice, I believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. Therefore, even though there may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to §108. For example, legal advice may be requested even though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, often at some point in a discussion, the attorney has stopped giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting.

Lastly, although it is not my intent to be overly technical, 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 as you are aware, a motion to enter into executive session must be made in public indicating the subject to be discussed, and the motion must be carried by a majority vote of the total membership of the Board. In the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. Nevertheless, it is suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, a matter made confidential by law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Gregory J. Guercio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-2905

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June 26, 1998

Mr. Jerry Brixner
[redacted]

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

Dear Mr. Brixner:

I have received your letter of June 2. You have questioned whether a board of assessment review is subject to the Open Meetings Law, and if so, whether you can tape record or photograph the proceedings.

In this regard, it is clear in my opinion that a board of assessment review is 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 and, therefore, could be conducted in private. It is emphasized, however, that even though 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)].

Consequently, 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"for purposes of the Freedom of Information Law [see §86(3)], 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.

With respect to the use of audio or photographic equipment at open meetings, it has been held that audio and video tape recorders may be used at such meetings, so long as their use is not disruptive or obtrusive [Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985) and Peloquin v. Arsenault, 616 NYS 2d 716 (1994)]. I am unaware of any judicial decisions involving the use of still cameras. The principle, however, would in my opinion be the same. If a camera needs special lighting or if a photographer must be close to the subject, that kind of activivity might be disruptive and could likely be prohibited. On the other hand, if use of a camera requires no special equipment or lighting and can be used at a distance, such use would be not be disruptive and a public body could not likely prohibit that kind of activity.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-2906

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June 26, 1998

Mr. Gregory F. Yakaboski, Esq.
Southold Town Attorney
Town Hall, 53095 Main Road
P.O. Box 1179
Southold, NY 11971

The staff of the Committee on 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. Yakaboski:

As you are aware, I have received your letter of June 5. You have questioned the obligation of a public body to disclose minutes of meetings sought pursuant to the Freedom of Information Law prior to being "settled" or approved.

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.

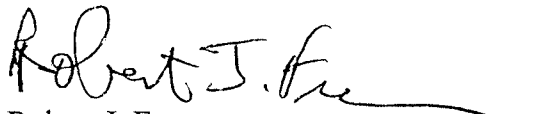
Lastly, viewing the issue from a different vantage point, the Freedom of Information Law makes no distinction between drafts as opposed to "final" documents. The Law pertains to all agency records, and §86(4) defines the term "record" to mean:

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

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2967

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 29, 1998

Ms. Virginia M. Trombley
[redacted]

The staff of the Committee on 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. Trombley:

I have received your letter of June 8 in which you sought an advisory opinion concerning meetings held in the Plattsburgh City School District. You referred to several situations in which you questioned the extent of compliance with the Open Meetings Law.

You referred first to the Board of Education's adoption of "the new 'School Based Planning & Shared Decision Making Plan", an "action [that] surprised [you] since [you] had not seen any public notification that the district wide committee was holding its biannual review of the Shared Decision Making Plan." In my view, meetings of the Shared Decision Making Committee, which was created pursuant to regulations promulgated by the Commissioner of Education, are subject to the requirements of the Open Meetings Law. By attending its meetings, the public should have the ability to learn of its practices and recommendations.

By way of background, §100.11(b) of the regulations states in relevant part that:

> "By February 1, 1994, each public school district board of education and each board of cooperative educational services (BOCES) shall develop and adopt a district plan for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking. Such district plan shall be developed in collaboration with a committee composed of the superintendent of schools, administrators selected by the district's administrative bargaining organization(s), teachers selected by the teachers' collective bargaining organization(s), and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by their

> peers in the manner prescribed by the board of education or BOCES, provided that those portions of the district plan that provide for participation of teachers or administrators in school-based planning and shared decisionmaking may be developed through collective negotiations between the board of education or BOCES and local collective bargaining organizations representing administrators and teachers."

Section 100.11(d) provides in part that:

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

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

> "In the event that the board of education or BOCES fails to provide for consultation with, and full participation of, all parties in the development of the plan as required by subdivisions (b) and (d) of this section, the aggrieved party or parties may commence an appeal to the commissioner pursuant to section 310 of the Education Law. Such an appeal may be instituted prior to final adoption of the district plan and shall be instituted no later that 30 days after final adoption of the district plan by the board of education or BOCES."

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

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

Several decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of

advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

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

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

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

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

While the Commissioner's regulations make reference to "school-based" committees, there is no statement concerning their specific role, function or authority. It is my understanding, based upon a discussion with a representative of the State Education Department, that school-based

committees carry out their duties in accordance with the plans adopted individually by boards of education in each school district, and that those plans are intended to provide the committees in question with a role in the decision making process. When, for example, a plan provides decision making authority to school-based committees within a district, those committees, in my opinion, would clearly constitute public bodies required to comply with the Open Meetings Law. Similarly, when a school-based committee performs a function analogous to that of the shared decision-making committee, i.e., where the school-based committee has the authority to recommend, and the decision maker or decision making body must consider its recommendations as a condition precedent to taking action, I believe that the committee would be a public body subject to the Open Meetings Law, even when the recommendations need not be followed.

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

I note, too, that §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.

Reference was also made to a meeting between a City police officer and School District staff to discuss issues relating to violence that would not be open to the public. Based on the content of the news article, that gathering would not be subject to the Open Meetings Law. No public body would be present, and the Open Meetings Law, therefore, would not be applicable.

Lastly, you alluded to an executive session held by the Board of Education and indicated that when you contacted the District to inquire about the gathering, you were "told by the secretary that there was no public meeting to held that evening; only the executive session."

In this regard, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Dr. George Amedore, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2908

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July 1, 1998

Mr. Jay M. Gubernick
[redacted]

The staff of the Committee on 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. Gubernick:

I have received your letter of June 15 in which you sought an opinion concerning compliance with the Open Meetings Law by the Woodbury Town Board.

As I understand the matter, the Board changed the scheduled times of two meetings from 7:30 p.m. to 7:00 p.m. without having given the news media notice of the change. Further, in response to your request for a copy of "proof of publication" of notice of those meetings, the Town Clerk wrote that "there was no legal notice advertising the worksession meetings held on Monday, April 12, 1998 and Monday, May 4, 1998 began [sic] at 7:00PM instead of the usual 7:30PM."

From my perspective, if notice was given indicating that the meetings would begin at 7:30 p.m., the Board should have waited until that time to begin conducting its business. Alternatively, if there was a need to convene earlier than the time specified in the original notice, I believe that the Board should have given additional notices to the news media and at the location where notice is posted to reflect the actual time when the meetings would begin. If no notice was given of the actual time that the meetings convened, it would appear that the beginning of the meetings were held, in effect, in private.

As indicated in previous correspondence, §104 of the Open Meetings Law pertains to notice of meetings. In brief, 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 subdivision (3) of §104 specifies that a legal notice need not be given prior to a meeting. Stated differently, to comply with the Open Meetings Law, a public body is not required to pay to place a legal notice in a newspaper or to "advertise" that a meeting will be held at a certain time and place; a public body must merely "give" notice to the news media and post the notice. In some circumstances, public bodies have given notice to the news media, and the newspapers or radio stations in receipt of the notices have chosen not to print or publicize the meetings to which the notices relate. In those cases, despite the failure of a notice to be publicized, a public body would have complied with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Kathleen Locey, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2909

41 State Street, Albany, New York 12231
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July 8, 1998

Ms. Lauren Stanforth
Towns Reporter
Ithaca Journal
123 W. State Street
Ithaca, NY 14850

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

Dear Ms. Stanforth:

I have received your letter of June 19 in which you sought a "judgment" concerning the propriety of publication of a legal notice by a town in "what appears to be a pennysaver and not a newspaper." You referred specifically to a legal notice relating to a report of a fiscal examination published pursuant to §35 of the General Municipal Law.

In this regard, it is emphasized that the Committee on Open Government is not empowered to render a "judgment" that is binding; on the contrary, the Committee is authorized to issue advisory opinions concerning matters involving open government.

While your inquiry does not relate directly to the Open Meetings Law, I believe that the following remarks will be pertinent to the implementation of that statute as well as the situation to which you referred.

First, in most situations in which there is a requirement that a legal notice be published, publication must be in a newspaper of general circulation in the municipality. Under §35 of the General Municipal Law, for example, notice must be published "in the official newspaper, or if there be no official newspaper, in a newspaper having general circulation in the municipal corporation" (i.e., the town, village, city, school district, etc.).

Second, not every publication that is distributed and contains news is a newspaper. §79-h(a)(1) of the Civil Rights Law defines the term "newspaper" to mean:

> "'Newspaper' shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at [so in original] United States post-office as second-class matter."

Based on the foregoing, there must be a "paid circulation" to be a newspaper. If a publication is circulated or mailed at no charge to recipients, I do not believe that it would constitute a "newspaper" or, therefore, that a legal notice could be published in that kind of publication.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board, Town of Groton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2910

41 State Street, Albany, New York 12231
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July 8, 1998

Ms. Barbara R. Keller
Deputy Counsel
New York City Health and Hospitals
Corporation
125 Worth St. - Rm. 527
New York, NY 10013

The staff of the Committee on 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. Keller:

I have received your letter of June 16 and appreciate your thoughtful comments, which relate to an opinion of May 29 that I prepared at the request of Ms. Judy Wessler of the Commission of the Public's Health System in New York City. Having reviewed your remarks and my opinion, I believe that the matter involves essentially two points.

First, as my remarks pertained to public participation at meetings of the Board of the Health and Hospitals Corporation, there was no suggestion or conclusion that the Board violated the Open Meetings Law. It was stated that the Open Meetings Law is silent with respect to public participation, and that the issue involved the reasonableness of the Board's rules. My comments were directed to Ms. Wessler's contention that the Board's rules essentially represented a "catch-22." Specifically, based on the information that she provided, I wrote as follows:

> "...if indeed members of the public can only speak regarding agenda items by providing two weeks advance notice, but agendas are generally available only two days prior to a meeting, the rule creates an impossibility. In that circumstance, I believe that the rules would be unreasonable and invalid."

In your letter, you indicated that speakers must request to be heard no later than one week prior to the Board meeting." It is unclear from your comment whether the ability to speak is limited to items appearing on an agenda. While you inferred that the public can know in most instances whether an item will appear on an agenda, you also inferred that that may not be so in every instance,

for you wrote agendas are "finalized approximately one week" before Board meetings. If your practice ensures that the public can know of agenda items with sufficient time to have the ability to ask to speak, I would agree that it is appropriate. However, insofar as it "creates an impossibility", I would continue to advise that it is unreasonable.

The second point was intended to advise that one member of a public body cannot unilaterally adopt or amend rules or procedures as he or she moves through or presides at a meeting. In my view, a rule or policy may be adopted only by the Board by means of a majority vote of its total membership.

If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2911

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July 13, 1998

Hon. Lee J. Konkle
Supervisor
Town of Kinderhook
P.O. Box P
Niverville, NY 12130

The staff of the Committee on 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 Konkle:

I have received your letter of June 23 and appreciate your interest in compliance with the Open Meetings Law. You referred to a variety of commissions and committees within the Town of Kinderhook, none of which includes a majority of the Town Board. You added that the entities in question have "no authority to make final decisions as to town government on behalf of the citizens."

From my perspective, several of the entities to which you referred would not be subject to the Open Meetings Law; however, I believe that it is likely that two, the Water District Commission and the Recreation Commission, are required to comply with the Open Meetings Law. In this regard, I offer the following comments.

As you are aware, the Open Meetings Law is applicable to meetings of public bodies, and §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 the context of your inquiry, the Code Committee and the Town Park Feasibility Committee, both of which are likely temporary and consist of citizens, or perhaps a combination of citizens and Town officials, would appear to fall outside the scope of the Open Meetings Law.

If the Water District Commission is essentially the governing body for the Water District, which is itself a public corporation created in conjunction with law, that body would constitute a "public body" subject to the Open Meetings Law. Similarly, if the Recreation Commission was created pursuant to §243 of the General Municipal Law, as a creation of the Town Board pursuant to statute, it, too, would constitute a "public body." Subdivision (1) of §243 states that:

> "If the board of estimate and apportionment, or if there be no such board, the common council, board of alderman, or corresponding legislative body, or the governing board of such county, town or village shall determine that the power to equip, operate and maintain playgrounds and recreation centers shall be exercised by a recreation commission, they may, by resolution, establish in such municipality a recreation commission, which shall possess all the powers and be subject to all the responsibilities of local authorities under this article."

If indeed the Town's Recreation Commission was created to carry out "all the powers" and "all the responsibilities" of a local authority, it would be not either temporary or solely advisory in nature, and it would, in my opinion, constitute a public body required to comply with the Open Meetings Law.

I hope that the foregoing serves to provide clarification. If you have questions on the matter, please feel free to contact me.

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-2912

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July 13, 1998

Mr. Todd Ceisner
The Patriot
Cuba Industrial Mall
34 Water Street
Cuba, NY 14727-1490

The staff of the Committee on 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. Ceisner:

I have received your letter of June 26 and related materials. You have sought clarification concerning certain activities of the Town of Allen relative to the Open Meetings Law.

You referred to recent notices of "Special Board Meetings" that indicate that such meetings were "To be held at the Town Hall, Town of Allen" on certain dates "at 7 P.M. for an executive session." You added that no agenda was available and that "as soon as the board members showed up, there was an immediate motion to go into executive session to discuss a 'personnel matter'". The minutes of one of the meetings indicates that following the executive session, action was taken concerning the policy relative to reimbursements to Town employees in conjunction with the use of personal vehicles, telephone use, as well as the completion of time sheets.

In this regard, I offer the following comments.

First, §104 of the Open Meetings Law requires that every meeting be preceded by notice indicating the time and place of a meeting. Although notice of the time and place of a meeting must be given to the news media and posted, there is no requirement that the notice describe the subjects to be considered. Similarly, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires the preparation or use of an agenda.

Second, it is noted that the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. 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, a public body 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.

Third, while the issues identified earlier based on the minutes related to personnel, I do not believe that they could validly have been discussed in 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.

In the context of the situation at issue, since the matters involved policy that would be applied to employees generally, I do not believe that there would have been a basis for discussion in executive session. Even though those kinds of subjects might be reflective of "personnel" issues, they would not have focused on any particular person and, therefore, in my opinion, should have been discussed in public.

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 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; AD 2d 207 AD2d 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 Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2913

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 14, 1998

Ms. Shirley Dunkle
[redacted]

The staff of the Committee on 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. Dunkle:

I have received your undated letter, which reached this office on June 30.

You referred to recent action taken by the Genoa Supervisor and the Town Board concerning the "Rules of Order." When you asked that Robert's Rules of Order be adopted, the Supervisor, according to a news article, rejected the suggestion. Instead, the Board adopted rules governing public participation at meetings. You added that the new procedure "had been adopted and passed before the meeting even was called to order." You have sought my views on the matter.

First, Robert's Rules is not law, and I know of no one who fully understands Robert's Rules. It may provide guidance concerning the procedures followed by a public body. However, there is no requirement that a public body adopt or follow Robert's Rules. Further, to the extent that Robert's Rules may conflict with a law, or perhaps with a rule adopted by a public body, Robert's Rules would, in my opinion, be of no effect.

Second, 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. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a town board may "determine the rules of its procedure" (see Town Law, §63), in a case in which a school

board's rules 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.

Third, if the Board adopted the rules in private, prior to or outside of an open meeting, I believe that it would have failed to have complied with the Open Meetings Law. From my perspective, a public body can take action only at a meeting held in accordance with that statute. 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.).

I note that it has also been 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.

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. In my view, there would have been no basis for discussing policy or the adoption of rules regarding public participation in private.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Hans Pecher, Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-2914

41 State Street, Albany, New York 12231
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July 15, 1998

Mr. Jim Damon
International Association
of Fire Fighters
[redacted]

The staff of the Committee on 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. Damon:

I have received your letter of June 27 and the materials attached to it. You have complained with respect to a delay in the disclosure of minutes of meetings of the Hartsdale Fire District Board of Fire Commissioners. You were informed by the Board's Secretary that "minutes are not official until they have been approved by the Board", and that they are not disclosed until approved.

In this regard, §106 of the Open Meetings Law pertains to minutes of meetings of public bodies, such as boards of fire commissions, 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 meeting except that

> minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Subdivision (3) deals specifically with the time within which minutes must be prepared and made available, a period of two weeks with respect to minutes of open meetings, and one week when action is taken during executive sessions.

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

It is also noted that if a public body conducts an executive session but takes no action during the executive session, 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, a copy of this opinion will be forwarded to the Board of Fire Commissioners.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2915

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 16, 1998

MEMORANDUM

TO: Bob Shaw

FROM: Bob Freeman

SUBJECT: Temporary Commission to Study Financial Aid

I have received your inquiry regarding the status under the Open Meetings Law of a temporary commission designated to study financial aid. Based on its composition and its functions, I believe that the Commission would constitute a "public body."

Section 102(2) of the Open Meetings Law defines the phrase "public body" to mean:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section 66 of the general construction law, or committee or subcommittee or other similar body of such public body."

By viewing the definition in terms of its components, each ingredient necessary to find that the entity is a public body is present. First, it will consist of two or more members ("nationally and internationally renowned individuals"); second, in view of its charge, it clearly will conduct public business; third, although there is no specific reference to a quorum in the legislation, I believe that §41 of the General Construction Law would impose quorum requirements on the Commission; and finally, subdivision 7 of the legislation authorizes the Commission "to make and sign agreements, and to do and perform any acts that be necessary" in carrying out its duties and meeting its objectives. As such, I believe that it will be performing a governmental function for the state.

Enclosed are copies of two opinions that may be useful to you. One dealt with a similar issue that was addressed to you just over ten years ago; the other pertains to the Commission's authority to conduct "public and private hearings."

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 10949
OML-AO - 2916

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July 20, 1998

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 July 4 in which you raised issues concerning the inclusion of various libraries within the coverage of the Freedom of Information Law and Open Meetings Laws.

Materials were sent to you previously which, in my view, offered the basis for distinguishing between the variety of libraries that may be characterized as "public". While all provide services for the general public, some among them are not governmental entities but rather are private not-for-profit corporations.

As you are aware, the Freedom of Information Law pertains to agencies, and §86(3) of that statute defines the term "agency" to mean, in brief, an entity of state or local government. Since some public libraries and library systems are not part of government, they are not likely subject to the Freedom of Information Law. While there is no judicial decision that deals squarely with the issue in terms of the Freedom of Information Law, as referenced in an opinion sent to you on April 15, an Appellate Division decision involving a so-called free association library indicated that such a library, as a not-for-profit corporation rather than a public corporation, was not subject to certain requirements imposed upon governmental entities [see French v. Board of Education, 72 AD2d 196 (1980)]. Based on that decision, it appears that the same conclusion would be reached regarding the coverage of the Freedom of Information Law.

In contrast, §260-a of the Education Law specifies that virtually all public libraries, irrespective of their corporate status, are required to comply with the Open Meetings Law.

Consequently, depending on their nature, some libraries are subject to both the Freedom of Information Law and the Open Meetings Law; others, the not-for-profit non-governmental entities, are required to comply only with the Open Meetings Law due to the direction provided by §260-a

of the Education Law. I note that the not-for-profit non-governmental entities would not be subject to the Open Meetings Law but for the enactment of §260-a of the Education Law.

With respect to the work of this office, since you have been communicating with the Committee on Open Government for many years, you know that its function involves offering advice and opinions based on the law and its judicial interpretation in a manner that gives greatest effect to the intent of open government statutes. The Committee is not empowered to change the law; that can be accomplished only by the State Legislature.

If you wish to communicate with the members of the Committee, you may do so through this office, which is the Committee's only office. At the moment, there is no meeting of the Committee that is scheduled.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-2917

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 20, 1998

Mr. Anthony M. Cerreto
Village Attorney
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 Mr. Cerreto:

I have received your letter of July 6 in which you requested a "ruling" concerning a matter relating to the Open Meetings Law.

You wrote that the Village of Port Chester "is subject to a special state statute that provides that a police officer subject to disciplinary action in Westchester County has the right to a public hearing and trial before the Board of Trustees." Specifically, §18 of Chapter 306 of the Unconsolidated Law states in part that a village board of trustees or other municipal board "acting as police commissioners" have the authority to adopt "rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police force..." The same provision provides a board of trustees with the authority to render a determination on the charges.

In conjunction with the foregoing, you have raised the following questions:

> "1) may the officer waive the right to such public hearing since the statute is for his benefit?
>
> 2) whether the Open Meeting Law would require such a public hearing?"

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to offer advice and opinions concerning the statutes within its jurisdiction; the Committee is not empowered to issue a ruling that it is binding on an entity of government.

The first question is unrelated to the Open Meetings Law, and I cannot offer any comment of substance. It is suggested that if an officer is subject to a collective bargaining agreement, there may be reference to the ability to waive the right to a hearing in the agreement.

With respect to the second, the Open Meetings Law, in my view, would not apply to the hearing. 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 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 hearing may be conducted outside the coverage of the Open Meetings Law.

It is emphasized that even when a hearing conducted by a public body is 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)].

Based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting held in accordance with the Open Meetings Law.

Lastly, I note that there is a decision rendered by the Court of Appeals in which it was held that certain quasi-judicial proceedings were presumptively open to the news media and, therefore, by implication, to the public [see Herald Company, Inc. v. Weisenberg, 59 NY2d 378 (1983)]. Whether the principles expressed in that decision would be applicable to disciplinary hearings is conjectural.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2918

41 State Street, Albany, New York 12231
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July 22, 1998

Mr. Charles J. Kershner
President, Courier Enterprises, Inc.
P.O. Box 294, 4 Meadow Street
Clinton, NY 13323-0294

The staff of the Committee on 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. Kershner:

I have received your letter of July 13 concerning an "informal discussion" by the members of the Town Board of the Town of New Hartford.

According to your letter, the Town Supervisor, the other four Board members and other Town officials met in a playground in a park following a dedication ceremony. You added that documents were circulated, that a matter of Town business was considered and that you were told in advance of the event that the Supervisor had contacted Board members and asked to meet with them after the ceremony. When a reporter approached the Board, he was told that it was a "private meeting." When you later questioned the Supervisor on the matter, he said "We didn't have a meeting. We had a discussion." You contend that the gathering was "hardly a chance meeting or a social gathering, but an organized meeting for the purpose of discussing Town business..."

Based on the language of the Open Meetings Law and its judicial interpretation, assuming that the members of the Board convened by design, I believe that the gathering constituted a "meeting" that should have been held in accordance with the requirements of the Open Meetings Law.

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

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

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

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

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

With respect to social gatherings or chance meetings, it was found that:

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to point just short of ceremonial acceptance'" (id. at 416).

In view of the foregoing, if members of a public body meet by chance or at a social gathering, for example, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body. However, if, by design, the members of a public body seek to meet to discuss public business, formally or otherwise, I believe that a gathering of a majority would trigger the application of the Open Meetings Law, for such a gathering would, according to judicial interpretations, constitute "meetings" subject to the Open Meetings Law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2919

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July 23, 1998

Ms. Maureen Nolan
The Syracuse Newspapers
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. Nolan:

I have received your letter of July 14 in which you raised several questions concerning the Open Meetings Law and the practices of the Syracuse Board of Education.

The first question involves how specific a school board must be in providing a reason for entering into executive sessions to discuss certain "personnel matters." In this regard, 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. As you are aware, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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 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; 207AD 2d 55, 58 (1994)]

In the context of your question, a motion to enter into executive session to consider "a personnel matter 'to discuss a professional service retainer agreement'", would not provide information adequate to know whether the subject may properly be discussed in private. The issue might involve how a school district will engage in a search for a professional service organization (i.e., through advertisements, in the Syracuse Newspapers or the Sunday New York Times, how much should be spent, etc.). That kind of issue would not in my view qualify for consideration in executive session. On the other hand, if the Board is discussing the strengths and weakness of certain law firms that it is considering retaining, I believe that such a subject could be discussed in executive session. A proper motion might refer to a discussion of a matter leading to the employment of a particular law firm, or a similar phrase.

The second question is whether "it [is] legal for a school board to schedule an executive session prior to a public meeting." As you my be aware, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Therefore, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. Further, as indicated earlier, §105(1) requires that a motion to enter into an executive session must be made during an open meeting and carried by a majority vote of the total membership of a public body.

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.

As an alternative method of achieving the same 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.

Lastly, you questioned the propriety of a member of a school board telephoning other members individually to discuss board business privately, thereby limiting the open discussion of an issue. In this regard, 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 may be 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.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 24, 1998

Mr. Rodney Bordeaux
[redacted]

The staff of the Committee on 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. Bordeaux:

I have received your letter of July 14 in which you requested an advisory opinion concerning certain actions of the Board of Trustees of the Wyandanch Public Library.

According to your letter, at a recent meeting, the Director of the Library "went to collect...paper ballots for offices of the President and Vice President from each elected board member." After doing so, he "read out the final tally." You expressed the view that "voting by paper ballots does no give the true determination for what each elected member voted" and that the Board "should hold the nomination for seats such as President and Vice President out in the open for the public to view."

First, as you may be aware, §260-a of the Education Law specifies that library boards of trustees are required to comply with the Open Meetings Law.

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

In my opinion, discussions regarding the election of officers would not ordinarily fall within any of the grounds for entry into executive session. The only provision that appears to be relevant to the possibility of engaging in a private discussion, §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..."

Although the discussion and election of officers involves consideration of particular individuals, it is unlikely that any of the specific subjects included within §105(1)(f) would have been applicable in conjunction with deliberations involving the selection of school board officers. In short, while "matters leading to" certain actions relating to specific persons may be discussed during executive sessions, matters leading to the election of officers is rarely among them.

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

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

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

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, 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); aff'd 72 NY 2d 1034 (1988)]. If a vote to elect an officer does not result in a majority for any candidate, and the vote is not "final", I do not believe that the votes of each member must be recorded. Under §87(3)(a), the members' votes must be memorialized only in the case of a "final" vote.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Wendell Cherry, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 30, 1998

Ralph P. Kerr, Ed.D.
Superintendent of Schools
Arkport Central School
35 East Avenue
Arkport, NY 14807-0070

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

Dear Dr. Kerr:

I have received your letter of July 17 in which you sought an opinion concerning the activities of the Board of Assessment Review of the Town of Hornellsville.

According to your letter, the Board deliberated with respect to grievances in executive session and did not return to open session "to record the vote on the grievances." You have sought my views on the matter.

In this regard, I believe that a board of assessment review is 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, 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 though 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:jm

cc: Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 31, 1998

Hon. Richard E. Slagle
Mayor
Village of Celoron
21 Boulevard Avenue
Celoron, NY 14720

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

Dear Mayor Slagle:

I have received your letter of July 20 in which you sought clarification of the Open Meetings Law as it relates to a recent gathering of the Southwestern Central School Board of Education.

According to your letter and a news article, you recently questioned the propriety of a gathering that began at 6:30 p.m., an hour before the scheduled start of a meeting. The Superintendent characterized the event as a "last-minute" informal gathering with a consultant who was in the vicinity of the district. The news article indicates that District officials met with "a public relations expert for advice on how to market their plans to community residents." In response to your question concerning the status of the gathering and the absence of any notice, the attorney for the District stated that: "In order to be an open meeting, you need not only a quorum, but the meeting must be formally convened for the purpose of officially transacting public business. There was no purpose at all for conducting public business. There was no intention at all to conduct public business." You also referred to an executive session held later in the evening to discuss "litigation" and asked whether a description as brief as that or as "personnel" would be consistent with law.

In this regard, I offer the following comments.

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

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

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

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

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

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

Under the circumstances described, if a quorum of the Board attended the gathering that began at 6:30, the gathering, in my view, would clearly have constituted a "meeting", for the members convened for the purpose of considering a matter within and in pursuance of the performance of their duties.

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

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

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

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

Lastly, 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 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 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 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; 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 Open Meetings Law, copies of this opinion will be forwarded to School District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Edmund J. Harvey, Superintendent
William Wright, Jr., Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2923

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 4, 1998

Ms. Alice Knapik
[redacted]

The staff of the Committee on 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. Knapik:

I have received your letter of July 23. You have sought an opinion concerning your right as a member of the Board of Directors of the Fulmont Community Action Agency to tape record its meetings.

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

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

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..."

While it is unclear that the Open Meetings Law applies to meetings of the Board, federal Law 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." Moreover, 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 its proceedings. It has been suggested that the provisions of the Open Meeting Law serve as a guide with respect to the openness of meetings. For instance, 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.

If the Board of Directors is a "public body" subject to the Open Meetings Law, I note that in the leading decision regarding the use of tape recorders at open meetings, the Appellate Division 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).

If the Board of Directors is not a public body, it would have the authority, in my opinion, determine to permit or preclude the use of recording devices at its meetings.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Robert Van Heusen
Dennis Wilson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2923A

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August 4, 1998

Hon. Leonard P. Stavisky
New York State Senate
Legislative Office Building
Room 711-B
Albany, NY 12247

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

Dear Senator Stavisky:

I have received your letter of July 24 and the materials attached to it. You wrote that a constituent has asked whether the Queens Public Television Corporation ("QPTV") is subject to the Open Meetings Law and must conduct its meetings open to the public. You have sought my views on the matter.

Based on my understanding of the situation, QPTV is not a governmental entity and therefore is not required to conduct its meetings in public in accordance with the Open Meetings Law.

As you may be 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, as a general matter, a "public body" is an entity that performs its duties for or on behalf of a government organization, such as a state agency or a municipality.

Having spoken with the attorney in the New York City Office of Corporation Counsel most familiar with the issue and with Mr. Stuart Domber, President of QPTV, I do not believe that QPTV

is a public body subject to the Open Meetings Law. QPTV is an independent not-for-profit corporation that was created to administer public access television in Queens pursuant to an agreement between Time-Warner and New York City. It is a tax exempt organization for purposes of taxation and it receives its funding not from any governmental entity, but rather from cable television companies. QPTV's Board of Directors is self-perpetuating, While the Borough President has the authority to veto an individual's membership on the Board, no government official or entity is authorized to select any member; on the contrary, as members of a private, not-for-profit corporation, the Board chooses its own members.

In short, due to absence of any substantive governmental control over QPTV, it is my view that it is not a "public body" required to comply with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2924

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August 12, 1998

Ms. Viki De Jong
Chair, CCAA
[redacted]

The staff of the Committee on 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. De Jong:

I have received your letter of August 4, as well as the correspondence relating to it.

You have questioned the status of the Nassau County Jail Advisory Committee under the Open Meetings Law. You wrote that the committee was formed by the County Executive to deal with "jail related issues affecting the residents who live and work in surrounding communities." You added that you were denied access to meetings of the committee because one of the members indicated that he "would be upset" by your presence.

While being upset by the presence of the public from meetings is not, in my opinion, a valid basis for precluding public attendance, as I understand the matter, the committee in question would not be required to comply with the Open Meetings Law.

In this regard, 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. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for the purpose of conducting public business. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists solely of members of a particular public body, it, too, would constitute a public body. For instance, in the case of a legislative body consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that legislative body designates a committee consisting of three members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

However, several judicial decisions indicate generally that advisory bodies other than those consisting of members of a governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie 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)]. In one of the decisions, Poughkeepsie Newspaper, supra, 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 the context of your inquiry, it does not appear that the committee consists solely of members of a public body (i.e., a county legislature). Further, by virtue of its title, as an advisory body, the committee apparently has no authority to take any final and binding action for or on behalf of the County. If those assumptions are accurate, the committee, in my view, would not constitute a public body and, therefore, would not be obliged to comply with the Open Meetings Law.

The foregoing is not intended to suggest that the committee cannot conduct its meetings or perhaps portions of meetings in public. On the contrary, many advisory bodies encourage public attendance and participation. Nevertheless, based on my understanding of the matter and the judicial decisions cited above, the committee, because it is not a "public body", would not be required to comply with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Howard Y. Taylor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-11001
OML-AO-2925

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August 13, 1998

Mr. Robert E. 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, unless otherwise indicated..

Dear Mr. Smith:

I have received your letter of August 7 in which you raised a variety of issues pertaining to access to records of the Margaret Reaney Memorial Library and to meetings of its Board of Trustees and committees.

You described your first area of concern as follows:

> "Committees of the Board, Investments, Museum, Personnel, Fundraising and Planning do not announce their meeting dates, times and locations to the public. These committees are chaired by Trustees or the Director. With one or two exceptions, the committee members are all Trustees as well. At Board meetings, when it is divulged that a committee meeting has taken place, no written report is presented which would then be available under the Freedom of Information Law. Frequently, these committee meetings take place in restaurants at a table just large enough for committee members. It is very intimidating to try to attend and take notes, when the committee is sharing a pizza."

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable 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."

Based on the foregoing, as a general matter, the Open Meetings Law pertains to governmental bodies. In addition, that statute, which is codified as Article 7 of the Public Officers Law, is applicable to boards of trustees of public libraries pursuant to §260-a of the Education Law, which states that:

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

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including public libraries that are not-for-profit corporations, must be conducted in accordance with that statute.

Based on the foregoing, it is clear that a library board of trustees is required to comply with the Open Meetings Law. Whether the Margaret Reaney Memorial Library (the Library) could be characterized as a governmental entity is, in my opinion, somewhat unclear. In an effort to learn more of the matter, I contacted the Director of the Library, Ms. Dawn Capece. She indicated that the Library is a not-for-profit corporation. However, she added that the members of its Board of Trustees are designated by the governing body of the Village, its Board of Trustees, and that a substantial portion of the Library budget is derived from a school district tax levy. In view of those factors, I believe that the Library Board of Trustees is essentially governmental in nature and that it would constitute a "public body" subject to the Open Meetings Law, even if §260-a of the Education Law had not been enacted.

Similarly, since other aspects of your inquiry pertain to access to records, the Library would also, in my opinion, be subject to the Freedom of Information Law. In a situation in which a government agency maintains significant control over a not-for-profit corporation, the state's highest court held that the not-for-for profit entity is an agency required to comply with the Freedom of Information Law [see Buffalo News v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994)].

With respect to the committees to which you referred, I believe that those consisting solely of Board members would be subject to the Open Meetings Law; the others would not.

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 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. 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 public body, 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)].

The Open Meetings Law requires that notice be posted and given to the news media 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. 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.

The primary requirement relating to a record of a meeting involves the preparation of minutes, and §106 of the Open Meetings Law provides that:

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

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

Based on 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. Further, if none of the events described in §106 occurs, technically, there would be no requirement that minutes be prepared.

With regard to the location of meetings, there is nothing in the Open Meetings Law that specifies where meetings must be held. The only provision that deals somewhat directly with the issue is §103(b), which states that public bodies must make or cause to made reasonable efforts to hold meetings in locations that offer barrier-free access to physically handicapped persons. Perhaps equally pertinent is §100 of the Open Meetings Law, the Legislative Declaration, which 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 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. Whether a meeting is held on public or private property, to give reasonable effect to the law, I believe that meetings should be held in locations in which those likely interested in attending and observing the deliberative process have a reasonable opportunity to do so. Since people are expected to purchase food in a restaurant, that kind of site would, in my view, be inappropriate for conducting a meeting of a public body.

With regard to the designation of a "records access officer", §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of an agency to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

Based on the foregoing, I believe that the records access officer has the duty of coordinating responses to requests.

In addition, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

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..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such 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.

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be forwarded to the Director of the Library.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dawn Lamphere Capece

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2926

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August 13, 1998

Mr. Doug Craig
Ms. Eileen Hawkes
FSR/PAC 93
New Reporters
P.O. Box 239
Ogdensburg, NY 13669

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

Dear Mr. Craig and Ms. Hawkes:

I have received your letter of August 11 in which you indicated that on August 3 the "Sales Tax Redistribution Sub Committee of the Saint Lawrence County Legislature met" without notifying the news media or the public of its meeting. You have asked that an opinion be rendered and sent to the County Legislature advising that "this practice is illegal and unconstitutional."

Having discussed the matter with the County Attorney, William F. Maginn, Jr., his description of the facts is somewhat different from those that you presented in your letter and our conversations. Mr. Maginn indicated that the gathering in question was not a meeting of a standing committee of the County Legislature, but rather that the entity, which is solely advisory in nature, was created by the Chair of the Finance Committee, on his own initiative, not by or at the direction of the County Legislature. The advisory body includes himself, two other County Legislators, the County Administrator and the County Attorney. If that is so, it appears that Open Meetings Law would not have been applicable.

In this regard, the Open Meetings Law pertains to 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."

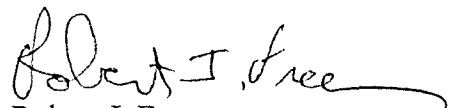
The last clause of the definition refers to any "committee or subcommittee or similar body of [a] public body." Based on that language and judicial decisions, when a public body, such as a county legislature, creates or designates its own members to serve as a committee or subcommittee, the committee or subcommittee would constitute a public body subject to the requirements of the Open Meetings Law. Therefore, committees of the County Legislature consisting solely of its own members would have the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions as the governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)].

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

Lastly, since you contended that the practice at issue is "unconstitutional", I note that, even in the case of meetings of entities that are clearly public bodies, there is no constitutional right to attend their meetings; the right to attend is statutory.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: St. Lawrence County Legislature
William F. Maginn, Jr., County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2927

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 14, 1998

Mr. Francis Casier
Ms. Audrey Casier
[redacted]

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

Dear Mr. and Ms. Casier:

I have received your letter of August 10 and the materials attached to it.

You described a series of events relating to the sale and use of a particular parcel of real property in Saranac Lake. According to your letter, as the sellers of the property, on July 22, you asked the Village Clerk whether opposition to the home being constructed on the property would be considered at a meeting of the Planning Board to be held that night. You wrote that the Clerk responded by stating that there was no Planning Board meeting scheduled for that night and that the matter of your interest was not on the agenda.

In this regard, I offer the following comments.

First, §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.

It is emphasized that the requirements imposed by the Open Meetings do not include an obligation to provide special or individual notice to those who might be affected by events occurring at a meeting. Similarly, there is no obligation to include reference to the topics to be discussed at a meeting. I note, too, that there is nothing in the Open Meetings Law or any other law of which I am aware that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. Moreover, the Open Meetings Law does not require that a prepared agenda be followed. However, a public body on its own initiative may adopt rules or procedures concerning the preparation and use of agendas.

Lastly, you contended that your civil rights may have been violated. Since that issue falls outside the scope of the Open Meetings Law, it is beyond the jurisdiction or expertise of this office. To obtain guidance concerning that issue, it is suggested that you consult with an attorney.

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: Planning Board
Edwin K. Randig

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2928

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August 19, 1998

Mr. Anthony C. Zacharakis
[redacted]

The staff of the Committee on 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. Zacharakis:

I have received your letter of August 12 and a copy of a resolution adopted on January 5 by the Town Board of the Town of Orangetown. The resolution states in relevant part as follows:

> "RESOLVED, that the 1998 Executive Sessions start at 6:30 P.M.; Regular town Board Meetings at 7:30 P.M.; and Town Board Workshops at 8:00 P.M. Audit Meetings shall begin immediately before the regularly scheduled Regular Town Board or Workshop Meeting."

The remainder of the resolution consists of a schedule by date of executive sessions, workshops, audit meetings and regular town board meetings.

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

First, in my view, there is no legal distinction between a "workshop" and an audit meeting or a regular Town Board meeting. By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of

discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law. Assuming that a majority of the Board is present, again, for purposes of giving effect to the Open Meetings Law, there is no distinction between a workshop, an audit meeting and a regular meeting.

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

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

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

It has been consistently advised and held 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].

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, it cannot be known in advance of that vote that the motion will indeed be approved.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 19, 1998

Mr. Ron Turner
[redacted]

The staff of the Committee on 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. Turner:

I have received your letters of August 12 and August 13, as well as the materials attached to them.

In the earlier letter, you complained that the meeting room in Village Hall in the Village of New Paltz is on the second floor and that it is not barrier free accessible. You added that a meeting once was held on the first floor, which is accessible to handicapped persons, but that it is the practice of the Village Board of Trustees to conduct its meetings in the second floor meeting room unless a person who could not otherwise attend contacts the Village in advance to ask that the meeting be held on the first floor. In a somewhat different vein, you indicated that it is also the practice to ask "that a person speaking to the Village Board at a board meeting both identify themselves and where they are from."

In this regard, I offer the following comments.

First, subdivision (a) of §103 of the Open Meetings Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Subdivision (b) provides that:

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

The same direction appears in §74-a of the Public Officers Law regarding public hearings. Based upon those provisions, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons.

However, I believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings and hearings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a facility that is accessible to handicapped persons, I believe that the meetings should be held in the location that is most likely to accommodate the needs of those persons.

I note that in 1977, the initial year of the implementation of the Open Meetings Law, judicial direction was consistent with the advise offered here. Specifically, it was held that if a public body has the ability to conduct meetings in a location that is barrier free accessible, it is required to do so to comply with the Open Meetings Law [Fenton v. Randolph, 400 NYS 2d 987 (1977)]. Requiring handicapped persons who could not attend a meeting on the second floor to call in advance of a meeting is in my view unreasonable and inconsistent with law and would provide an impediment with respect to handicapped persons that does not exist with regard to others. There There may be any number of reasons why a person may be precluded from notifying the Village of his or her intent to attend a meeting in advance of a meeting. For instance, an individual may not be aware of a meeting until just prior to the meeting; a person may not know so far in advance that he or she would want to attend; a handicapped person may not know if transportation can be arranged, etc. In short, to fully comply with the Open Meetings Law, I believe that every meeting subject to that statute should be convened and held in a barrier-free accessible facility.

Second, 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. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", pursuant to the Education Law, §1709 (1), in a case in which a board's rules 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 reiterate that §103 (a) of the Open Meetings Law provides that meetings of public bodies are open to the "general public." As such, any member of the public, whether a resident of the Village or of another jurisdiction, would have the same right to attend. That being so, I do not believe that a member of the public can be required to identify himself or herself by name or by residence in order to attend a meeting of a public body. Further, since any person can attend, I do not believe that a public body could by rule limit the ability to speak to residents only. There are many instances in

which people other than residents, such as those who may own commercial property or conduct business and who pay taxes within a given community, attend meetings and have a significant interest in the operation of a municipality.

In short, it is my view that any member of the public has an equal opportunity to partake in an open meeting, and that an effort to distinguish among attendees by residence or any other qualifier would be inconsistent with the Open Meetings Law and, therefore, unreasonable.

The second letter refers to a special meeting held by the Board of Trustees, and you questioned the legality of action taken by the Board and compliance with the Americans With Disabilities Act (ADA). As you may be aware, the advisory jurisdiction of the Committee on Open Government is limited to matters involving public access to records and meetings. Consequently, the issues raised in that letter are beyond the jurisdiction or expertise of this office. With regard to the issue relating to the expenditure of public money, it is suggested that you seek guidance from the Office of the State Comptroller. With regard to compliance with the ADA, I recommend that you contact the federal agency that oversees that statute.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-2930

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 19, 1998

Ms. Amy Luetters
[redacted]

The staff of the Committee on 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. Luetters:

I have received your letter of August 15 in which you sought assistance concerning certain practices of the Hamilton School District Board of Education.

According to your letter, "[e]very School Board meeting in [your] town opens when the Board members enter the room as a group after an apparent gathering in the Superintendent's Office." You expressed the view that the gatherings are neither "chance meetings" nor social in nature.

In this regard, if the Board gathers by design prior to its open meetings for the purpose of reviewing its agenda, for example, or otherwise discussing public business, the gathering would, based on judicial decisions, constitute a "meeting" subject to the Open Meetings Law. In this regard, I offer the following comments.

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

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

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

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

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

Based upon the direction given by the courts, when a majority of the Board gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, even if it is preliminary and there is no intent to take action.

If the gatherings in question are "meetings", they 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.

In an effort to enhance its 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:tt
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2931

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August 26, 1998

Mr. Peter Henner
Attorney and Counselor At Law
P.O. Box 326
Clarksville, NY 12041-0326

The staff of the Committee on 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. Henner:

I have received your letter of August 24. In your capacity as attorney for Mary Ann Smith, a member of the City of Amsterdam Common Council, you have requested an advisory opinion under the Open Meetings Law concerning the "appropriateness and legality of the procedure by which the city of Amsterdam recently adopted a resolution."

According to your letter and news articles attached to it, a resolution was presented at a recent meeting of the Common Council to provide the City's Community and Economic Development Department with permission to ask the United States Department of Housing and Urban Development to consider an application for money for a local business. Three members of the Common Council, which consists of five members in its entirety, "voted, by a two-to-one margin, to grant such permission." Although two affirmative votes did not represent a majority of the five member Council, you wrote that:

> "Mayor John M. Duchessi deemed the resolution to have passed, and signed it. Mayor Duchessi was quoted in the Amsterdam Recorder as stating that he believed the resolution had passed, because it had received the vote of a majority of the City Council members who were present. According to Mayor Duchessi, the Amsterdam City Charter authorized a resolution to be passed by the affirmative vote of a majority of the aldermen present, rather than by the affirmative vote of a majority of the aldermen on the Council."

It is your view that the Mayor's position is incorrect as a matter of law. I agree with your contention. In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law applies to meetings of the 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 clear that the Common Council constitutes a public body required to comply with the Open Meetings Law. A key element in the implementation of that statute involves its relationship to §41 of the General Construction Law, which is entitled "Quorum and majority." That statute states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or dy. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were one of the persons or officers disqualified from acting."

Based upon the foregoing, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies, for example. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body. Therefore, if a public body consists of five members, three affirmative votes would be needed to approve a motion, even if only three members are present.

In construing §41 of the General Construction Law, it has consistently been found that action may be taken only by means of an affirmative vote of the majority of the total membership of a public body [see e.g., Rockland Woods, Inc. v. Suffern, 40 AD 2d 385 (1973); Walt Whitman Game Room, Inc. v. Zoning Board of Appeals, 54 AD 2d 764 (1975); Guiliano v. Entress, 4 Misc. 2d 546 (1957); and Downing v. Gaynor, 47 Misc. 2d 535 (1965); also Ops Atty Gen 88-87 (informal)].

In the context of the situation described, since the Council consists of five members, an affirmative vote of three would be needed to take any action. In the decisions cited above, a vote of less than three would be characterized as "nonaction."

In a case in which an action was purportedly taken by a vote of three to two by an entity consisting of nine members, again, it was found that no action was validly taken. In that decision, it was also determined that rules inconsistent with §41 of the General Construction Law were invalid [see Reiff v. New York City Council and Conciliation Appeals Board, 491 NYS 2d 565 (1985)]. Further, in Rockland Woods, supra, it was stated that "the purpose of that statute is to ensure that before official action is taken by a public body, there must be clear and expressed approval by a majority of its members (id.). From my perspective, insofar as a charter provision is inconsistent with §41 of the General Construction Law, it would be of no effect.

I note that §23 of the General City Law pertaining to the powers granted to and exercised by common councils states in subdivision (2) that:

> "In the absence of any provision of law or ordinance determining by whom or in what manner or subject to what conditions any power granted by this act shall be exercised, the common council or board of aldermen or corresponding legislative body of the city shall, subject to the provisions of this section, have power by ordinance to determine by whom and in what manner and subject to what conditions said power shall be exercised."

Stated differently, if no provision of law determines the manner in which the authority of a common council is exercised, that entity has the authority to adopt provisions that would govern the manner by which it carries out its authority. Nevertheless, in this circumstance, there is a provision of law, notably §41 of the General Construction Law, that specifies that action can be taken only by means of an affirmative vote of the total membership. Consequently, if indeed the City of Amsterdam has adopted a provision inconsistent with a state statute, §41 of the General Construction Law, I believe that it would be invalid to the extent of any inconsistency.

Lastly, you asked whether a person seeking to invalidate the action taken by the Common Council could seek to recover attorney's fees pursuant to the Open Meetings Law. There appears to be no issue involving action taken in private or an improper use of an executive session. However, the Common Council, according to the Mayor, purportedly took action at a meeting that fell within the scope of the Open Meetings Law. Under §107 of that statute, there are several potential vehicles available to ensure compliance, one of which involves an action for declaratory judgment. While I know of no judicial decision dealing with similar facts, it is possible that an action for declaratory judgment under the Open Meetings Law could be sought in an effort to declare that the Council's purported action constitutes what has been characterized by the courts as nonaction.

As you are aware, §107(2) provides a court with discretionary authority to award reasonable attorney's fees to the successful party. While the likelihood of an award of attorney's fees is conjectural, I note that the Court of Appeals found that an award of attorney's fees should have been made in a situation in which a public body acted "in such a manner as to circumvent the Open Meetings Law quorum requirement", and that "it is very often the possibility of recovering costs and attorneys' fees that gives private citizens like plaintiffs the impetus they need to bring meritorious

lawsuits to enforce the Open Meetings Law..." [Matter of Gordon v. Village of Monticello, 87 NY2d 124, 128 (1995)].

Copies of this opinion will be forwarded to officials of the City of Amsterdam.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. John J. Duchessi, Mayor
Common Council
Philip Cortese, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-2932

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August 27, 1998

Mr. Peter Henner
Attorney and Counselor At Law
P.O. Box 326
Clarksville, NY 12041-0326

The staff of the Committee on 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. Henner:

I have received your letter of August 24 in which you requested an advisory opinion relating to the Open Meetings Law.

The issue involves the validity of action recently taken by the Montgomery County Private Industry Council ("PIC"). You contend that the PIC is a public body required to comply with both the Open Meetings Law and §41 of the General Construction Law. You indicated that the PIC has twenty-seven members, and that a resolution was passed by a vote of ten to three with one abstention. You have asked whether the PIC "has the authority to act with less than the affirmative votes of 14 of its 27 members."

Based on materials sent to me by the New York State Department of Labor, PICs are created pursuant to the provisions of the federal Job Training Partnership Act. Section 101 of the Act provides that the governor of a state is required to designate "service delivery areas" which are "comprised of the State or one or more units of general local government" and "will promote effective delivery of job training services."

Section 102, entitled "Establishment of Private Industry Council", states that there must be a private industry council for each service delivery area. That provision describes the composition of a private industry council and indicates that the members are selected by the "chief elected officials" of "units of general local government in the service delivery area" or, in some instances, by the Governor. If the appointments to a private industry council are consistent with the requirements of §102, "the Governor shall certify a private industry council..."

Section 103 pertains to the functions of private industry councils and states in relevant part that:

> "It shall be responsibility of the private industry council to provide policy guidance for, and exercise oversight with respect to, activities under the job training plan for its service delivery area in partnership with the unit or units of general local government within its service delivery area."

Based on a review of the pertinent provisions, there appears to be no specific requirement concerning the number of persons serving on a private industry council, or the number of members constituting a quorum or needed to vote to take action.

From my perspective, it is questionable whether the Open Meetings Law is applicable. That statute, as you are aware, pertains to meetings of public bodies. Section 102(2) of the Open Meetings Law defines the phrase "public body" to mean:

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

Under the language quoted above, it would appear that a private industry council constitutes a "public body", for it is an entity consisting of at least two members, and it conducts public business and performs a governmental function for the state or for one or more municipalities. Due to the means by which the members are designated, in each instance by a government official, it also appears that a quorum would be required pursuant to §41 of the General Construction Law.

I point out, however, that in a case dealing with the status of a Laboratory Animals Use Committee (LAUC) created by federal law, the Court of Appeals held that "the powers of the LAUC derive solely from Federal law...and for that reason alone...the Committee is not a public body as defined by the Open Meetings Law" [American Society for the Prevention of Cruelty to Animals v. Board of Trustees of the State University of New York, 79 NY2d 927, 929 (1992)]. Nevertheless, in American Society, there was no general governmental control, nor was a function being carried out for units of state or local government. LUACs are required to be designated by any entity in which animals are used in laboratory testing, including private facilities and hospitals, for example. The suit was brought because a particular LUAC functioned within a governmental entity, a branch of the State University. In contrast, as indicated earlier, the members of a private industry council are chosen by officials of state or local government and they charged with developing public policy. While the nature of a judicial response to the issue of coverage of private industry councils by the Open Meetings Law is conjectural, due to the relationship between such councils and local governments, as well as the nature of their functions, it is likely in my view that a private industry council would be found to constitute a public body subject to the Open Meetings Law.

While §41 of the General Construction Law, which is entitled "Quorum and majority", typically pertains to entities that are clearly governmental, it includes within its coverage instances in which "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". Based upon that language, it appears that the requirements imposed by that statute would apply to a private industry council whether or not it is a public body. 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 dy. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were one of the persons or officers disqualified from acting."

Based upon the foregoing, a quorum is a majority of the total membership of an entity consisting of three or more public officers or three or more persons charged with a public duty to be exercised collectively, as a body, notwithstanding absences or vacancies, for example. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of such an entity. Therefore, if an entity consists of twenty-seven members, fourteen affirmative votes would be needed to approve a motion.

In construing §41 of the General Construction Law, it has consistently been found that action may be taken only by means of an affirmative vote of the majority of the total membership of an entity [see e.g., Rockland Woods, Inc. v. Suffern, 40 AD 2d 385 (1973); Walt Whitman Game Room, Inc. v. Zoning Board of Appeals, 54 AD 2d 764 (1975); Guiliano v. Entress, 4 Misc. 2d 546 (1957); and Downing v. Gaynor, 47 Misc. 2d 535 (1965); also Ops Atty Gen 88-87 (informal)].

In the context of the situation described, assuming that it is subject to §41 of the General Construction Law, since the PIC consists of twenty-seven members, an affirmative vote of less than fourteen might be characterized as "nonaction."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Montgomery County Private Industry Council

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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August 27, 1998

Mr. James P. Lamb
President
BBI Consulting Services
405 Imperial Way
Bayport, NY 11705

The staff of the Committee on 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. Lamb:

I have received your letter of August 18 in which you requested an advisory opinion relating to both the Freedom of Information and Open Meetings Laws.

You referred to the regulation of the motor carrier industry in New York by the State Department of Transportation and particularly its Intermodal Operations Bureau. The Bureau's Carrier Assistance Section, according to your letter, conducts audits of motor carriers to ensure compliance with law. You indicated that in some instances, the Department's inquiries lead to the issuance of notices of violations, which are adjudicated before an administrative law judge at a hearing. In relation to the foregoing, you raised the following questions:

> "(1). **Is the Department's monthly hearing schedule,** which: (1) identifies the respondents scheduled to appear, the violation numbers and the Department's issuing agents; and (2) advises the date, time and location of the Department's monthly hearings, **accessible to me under the state *Freedom of Information Law.***
>
> (2). **Are the individual *Notices to Appear*** sent to carriers advising them of the date, time and location of their hearing **accessible to me under the state *Freedom of Information Law.***
>
> (3). **I would like to know if the administrative hearings referred to above are required to be open to the public under the *Open Meetings Law.*"**

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. If the Department does not prepare a monthly hearing schedule that contains the items that you described, for example, it would not be required to prepare such a record on your behalf.

Second, insofar as agency records exist, 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, a monthly hearing schedule and notices to appear would be accessible. In short, none of the grounds for denial in my opinion would be pertinent. Although an agency has the ability to withhold records when disclosure would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)], the records in question as I understand them relate to business entities or persons acting in a business capacity. If that is so, the exception regarding the protection of privacy, which pertains only to natural persons, would be inapplicable.

Lastly, the Open Meetings Law in my view would be inapplicable. That statute pertains to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean an entity consisting of two or more members that performs a governmental function collectively as a body. A hearing before a single administrative law judge would not involve the presence of a public body. Moreover, §108(1) exempts from the coverage of the Open Meetings Law judicial and quasi-judicial proceedings. As I understand the matter, a hearing before an administrative law judge would be a quasi-judicial proceeding.

Notwithstanding the foregoing, I believe that the hearings in question must generally be open to the public. In a decision rendered by the Court of Appeals, the state's highest court, it was held that administrative proceedings are "presumed to be open, and may not be closed to the public unless there is demonstrated a compelling reason for closure..." [Herald Company, Inc. v. Weisenberg, 59 NY2d 378, 380 (1983)]. Based upon the holding of the Court of Appeals, I believe that the hearings at issue would be presumptively open to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Charles Bauer
John Dearstyne

STATE OF NEW YORK
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August 28, 1998

Hon. David L. Walrath, M.D.
Cayuga County Legislature
[redacted]

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

Dear Dr. Walrath:

I have received your letter of August 20. In your capacity as a member of the Cayuga County Legislature, you have sought an opinion pertaining to the propriety of certain actions and advice concerning the means by which your procedures might be improved.

You wrote that the County Legislature scheduled a meeting to he held on August 18. Prior to the meeting, you were contacted by a representative of the Health and Human Services Department and the Chairman of the Legislature, both of whom indicated that the Health and Human Services Committee needed to discuss a particular issue, and it was announced during the meeting of the County Legislature "that this would take place." You added that:

> "...near the end of the county legislative meeting, there was an hour-long public hearing on another local law which involved giving some county employees early retirement. During this public hearing because there were no persons interested in speaking on the local law under consideration without leaving our seats, the legislature discussed the possible local law on sewer effluence and sewer overflows. The meeting took place in public in the legislative chambers during or as part of the county legislative meeting. All members of the legislature who had been present earlier were present except for Chairman Standbrook. The public was still present and we were still in our very seats.
>
> "After the health and human services business was discussed, the Ways and Means Committee discussed another budget concern, again

> without leaving their seats. Both of these issues involve the entire legislature, were done in full view of the public, at the same time, in the same place, and really prior to adjourning the previously advertised meeting."

If my understanding of the facts is accurate, the Health and Human Services and Ways and Means Committees essentially held meetings as an adjunct to the meeting of the County Legislature. Although the meetings in question were conducted in public, it is questionable in my view whether there was compliance with the Open Meetings Law. In this regard, I offer the following comments.

When a committee consists solely of members of a public body, such as a County Legislature, I believe that the committee is required to comply and give effect to the Open Meetings Law.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject 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 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 legislative body, 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 County Legislature consists of fifteen, its quorum would be eight; 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)].

In my opinion, a basic element of the Open Meetings Law involves enabling the public to know when and where a public body will discuss public business. While members of the public could have been present at the committee meetings to which you referred, it appears that they could not have known in advance that those meetings would be held. In short, there appears to have been no notice of the committee meetings.

I would conjecture that committees frequently discuss issues that may be important to certain citizens, businesses or interest groups. Those persons or their representatives might not attend a meeting of the County Legislature, particularly if an agenda disclosed prior to its meeting includes no items of special interest. However, they might attend a meeting of a committee that focuses on issues of particular or continuing interest. For those reasons, the absence of notice, in my view, represented an inconsistency with respect to fulfillment of the obligations imposed by the Open Meetings Law.

That statute requires that notice be given to the news media and posted prior to every meeting of a public body, including a committee of a public body. Specifically, §104 provides that:

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

In the future, it is suggested that committee meetings, whenever feasible to do so, be scheduled in order that notice may be given to the public and the news media at a reasonable time prior to the meetings.

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
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August 28, 1998

Ms. Mary Lee Lasota
[redacted]

The staff of the Committee on 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. Lasota:

I have received your letter of August 23 in which you raised a variety of issues concerning the implementation of the Open Meetings and Freedom of Information Laws by the Hilton Central School District Board of Education. In the ensuing commentary, I will attempt to respond to the issues, but not necessarily in the order in which you presented them.

First, 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.).

I note that it has also been 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.

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.

Third, if the Board has entered into executive session and a member wants to discuss a matter that is not supposed to be discussed in private, you asked what the proper procedure should be. While I am not sure that I understand the question, if a public body has entered into an executive

session appropriately, but a new subject arises that does not fall within any ground for consideration in executive session, the public body in my opinion should return to an open meeting. In any situation in which a subject is being considered in executive session that should be discussed in public, it is my hope that there is always a member or other person present who is sufficiently vigilant and knowledgeable regarding the Open Meetings Law to suggest the public body discuss the issue in public.

Fourth, 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 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; 207AD 2d 55, 58 (1994)]

Fifth, you referred to situations in which you believe that board members hold telephone conversations and send e-mail messages "in which they argue and iron out their differences." In this regard, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone or by e-mail. However, a series of communications between individual members or telephone calls, or exchanges made through an electronic "chat room" 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 suggested 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 Board. While nothing in the Open Meetings Law refers to the capacity of a member to participate or vote at remote locations by telephone or e-mail, 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.

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 by phone, *via* e-mail or similar means.

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

Fifth, if a member of the public contacts a Board member to discuss a problem or concern, you asked whether it is "required that the School Board discuss this in private." Similarly, if a Board member objects to the manner in which meetings are held or objects to the actions of another member, you questioned whether the discussions are "required" to be conducted in private.

In both instances, the nature of the issues would determine the extent two which private discussions would be permissible. If a concern expressed by a resident involves the curriculum, the budget, the District's policy on a given issue, or any number of other subjects, there would be no basis for conducting an executive session or otherwise closing a meeting. If a Board member questions the use of e-mail to communicate between Board meetings or raises other issues relating to the Board or its members, it is reiterated that the subject matter, not the source of the discussion or issue, should determine the extent to which the public may be excluded from a meeting.

In the context of a school board's duties, of potential 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, 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 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.

Next, you asked whether Board minutes and other records accessible to the public under the Freedom of Information Law (i.e., teachers' names and salaries) may be published on the Internet. In short, if a record is available under the Freedom of Information Law, the recipient may do with the record as he or she sees fit. It is not uncommon for accessible records to be placed on the Internet.

Lastly, you asked whether a school district must always act in response to request made under the Freedom of Information Law, even if a person or group "files frivolous FOIL requests." Without additional information concerning the nature of so-called "frivolous" requests, I cannot offer specific guidance. However, I point out as a general matter that when records are accessible under the Freedom of Information Law, it has been held that 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)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant.

If you could provide details regarding allegedly frivolous requests, perhaps I could provide a more precise response.

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 11063
OML-AO- 2936

41 State Street, Albany, New York 12231
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September 17, 1998

Ms. Mary Lee Lasota
[redacted]

The staff of the Committee on 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. Lasota:

I have received your letter of September 9 in which you raised questions relating to both the Freedom of Information Law and the Open Meetings Law.

First, in my view, school board members do not "have exactly the same rights of privacy as a private citizen with respect to their School Board activities." As you know, the Open Meetings Law is applicable to school boards, and that statute limits the authority of those boards to engage in private discussions. Similarly, although the Freedom of Information Law provides that an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)], 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 those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee 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 items relating to public officers or employees are irrelevant to the performance of their 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, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

Second, you referred to the application of §105(1)(f) of the Open Meetings Law as it relates to "the actions of a School Board member." The cited 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..."

In my view, unless an issue under consideration falls within the specific terms of §105(1)(f), there would be no basis for entry into executive session to discuss the actions of a board member.

Third, judicial decisions indicate generally that entities that include 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 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.

I note that when a committee consists solely of members of a public body, the Open Meetings Law is applicable. The phrase "public body" is defined in §102(2) of the Open Meetings Law to include:

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

The definition makes specific reference to "committees, subcommittees and similar bodies" of a public body. Therefore, 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, 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)].

Lastly, with respect to the disclosure of requests made under the Freedom of Information Law, among the few instances in my view in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute an unwarranted invasion of personal privacy. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

Another would involve a request by a parent of a student for records relating to the student. In that situation, I believe that the Family Educational Rights and Privacy Act (20 USC §1232g) would preclude a school district from disclosing information that would make a student's identity easily traceable.

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-11077
OML-AO-2937

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September 28, 1998

Ms. Laura M. Costa
[redacted]

The staff of the Committee on 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. Costa:

I have received your letter of September 17. In brief, you complained that you have encountered delays in producing records that you requested from the Village of Manorhaven under the Freedom of Information Law. You made specific reference to a delay in the disclosure of minutes of a meeting.

In this regard, I offer the following comments.

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

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

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

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

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

Second, I note that §106 of the Open Meetings Law pertains to minutes of meetings of public bodies and states that:

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

Subdivision (3) deals specifically with the time within which minutes must be prepared and made available, a period of two weeks with respect to minutes of open meetings, and one week when action is taken during executive sessions.

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

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

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be forwarded to Village officials. Additionally, enclosed is a copy of an explanatory brochure concerning those laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Trustees
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2938

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October 5, 1998

Frederick J. Schreyer, Esq.
[redacted]

The staff of the Committee on 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. Schreyer:

I have received your letter of September 22. In your capacity as Counsel to the Town of Sand Lake Planning Board, you have sought an advisory opinion concerning the possibility of limiting the use of cameras at meetings of the Board.

Specifically, you have asked whether the Planning Board "could order the camera turned off if it causes serious personal distress to an applicant or member of the public who wishes to address the board on a pending matter." You referred to the determination rendered in Peloquin v. Arsenault [162 Misc. 2d 306, 616 NYS2d 716 (1994)] and wrote that "[i]n the main the court's analysis focused on the obtrusiveness of the broadcast equipment itself and not on the distress and embarrassment some people feel when being photographed or videotaped." The Board's concern is that "the presence of the camera and broadcast of the meetings will inevitably lead some people to forgo exercise of their rights because of the personal stress they must undergo."

As I interpret judicial decisions pertinent to the matter, it is unlikely that the preference of the speaker bears on right to record the proceedings. In this regard, I offer the following comments.

Peloquin, although the only decision of which I am aware that dealt with the use of video recording devices at open meetings, is the latest in a series of decisions pertaining to the use of recording equipment at meetings. In my view, those 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 recording devices 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, the Court found that the comments of members of the public, as well as public officials, may be recorded. As stated 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. While Mitchell pertained to the use of audio tape recorders, I believe that the same points as those offered by the Court would be applicable in the context of the use of video recorders. Just as the words of members of the public can be heard at open meetings, those persons can also been seen by anyone who attends.

Lastly, it is true that the court in Peloquin focused primarily on the manner in which camera equipment is used and found that the unobtrusive use of cameras at open meetings could not be prohibited by means of a "blanket ban" on their use. Nevertheless, it was also found that a prohibition "when the sole justification is a distaste for appearing on public access cable television is unreasonable" (id., 718). In my view, although you highlighted the "distress and embarrassment" that some may feel if a camera is running, those feelings are likely legally indistinguishable from the "distaste" felt by some to which the court made reference.

In sum, as I understand the judicial decisions rendered to date on the area of your inquiry, the only justification for prohibiting the use of recording devices would involve a finding that they are obtrusive or distracting. Discomfort, in my opinion, would not constitute a valid basis for directing that the use of a camera be restricted or terminated.

If you would like to discuss the matter, please feel free to contact me. 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

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October 5, 1998

Mr. Eugene A. Lugo
Soft-Tech
[redacted]

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

Dear Mr. Lugo:

I have received your letter of September 23, which focuses on the Board of Education of the Yonkers City School District.

You wrote that "[i]t appears that a 6 member majority of the Yonkers School Board has in the past, held clandestine meetings, deliberately excluding at least 3 members by failing to give adequate prior notice to them of these meetings." You have contended that "[a]ny resolutions that were passed or policies that were set when there was no quorum should be nullified and re-opened for proper discussion and review", and you asked "what measures should be taken to prevent this from happening in the future."

In this regard, I offer the following comments.

First, it is emphasized 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 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, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Therefore, if five or more members determine to convene to discuss public business, any such gathering would constitute a "meeting" subject to the requirements of the Open Meetings Law.

It is noted, too, that every meeting must be preceded by notice of the time and place given in accordance with §104 of the Open Meetings Law to the news media and by means of posting. Even if the only subject to be considered by a public body could properly be discussed during an executive session, because an executive session is defined to mean a portion of an open meeting [see §102(3)], notice must nonetheless be given, and the meeting must convened open to the public. Further, prior to entry into executive session, a procedure must be accomplished in public pursuant to §105. In brief, a motion to enter into executive session must be made in public, the motion must indicate the subject or subjects to be discussed, and the motion must be carried by a majority of the total member of the public body.

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

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

Based upon the language quoted above, a public body, such as a 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, six of nine members of a public body meet without informing the other three, even though the six represent a majority, I do not believe that there would be a quorum or that they could vote or act as or on behalf of the body as a whole; unless all of the members of the body are given reasonable notice of a meeting, there is no quorum, and the body in my opinion is incapable of performing or exercising its power, authority or duty.

Lastly, §107 of the Open Meetings Law deals with the enforcement of that statute, and subdivision (1) states in relevant part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a 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 my view, assuming the facts as you described them to be accurate, a court could find that action taken by a majority of members at meetings held without notice to the other members is essentially a nullity and order the Board to comply with the requirements of the Open Meetings Law and any other applicable statute. In addition, subdivision (2) of §107 gives a court discretionary authority to award costs and reasonable attorney fees to the successful party.

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

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October 5, 1998

Ms. Kate Boylan
Rockland Journal News
200 North Route 303
West Nyack, NY 10994

The staff of the Committee on 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. Boylan:

I have received your letter of September 23 in which you requested an advisory opinion concerning a "closed meeting of the Sloatsburg Village Board."

According to your letter, despite your objections, at 6:30 on the evening of September 21, the Board voted to close the meeting, citing "the possibility of a lawsuit as the reason" based on a claim that litigation has been "'intimated' by opponents of a zone change..." You added that the 6:30 meeting was followed by a 7:30 open meeting held at a different location. At that latter meeting, the Board entered into another executive session, "citing personnel matters as the reason."

In this regard, it is noted at the outset that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be 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 the Board is present to discuss Village business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, because the gathering held at 6:30 was a "meeting", I believe that it should have been 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.

Second, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Therefore, an executive session is not separate from an open meeting; rather, it is a part of an open meeting. Further, 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 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 possibly 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, if indeed the Board properly seeks to discuss litigation, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy relating to the XYZ Company v. the Village."

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, even though the term "personnel" appears nowhere in the Open Meetings Law. 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 had 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 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
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 9, 1998

Mr. C. Richard Sorvillo
[redacted]

The staff of the Committee on 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. Sorvillo:

As you are aware, I have received your letter of September 25. In your capacity as a member of the Massapequa School District Board of Education, you have questioned the propriety of "discussion behind closed doors in a retreat or executive session, not open to the public." You enclosed a variety of materials that describe the topics considered during retreats and executive sessions.

According to the materials, a "retreat" was held on July 7, and among the subjects considered were the BOCES public relations program, the role of spring exhibits and their impact on classroom activities, advisory committee assignments, District goals, Board of Education goals and procedures. Another retreat was held on July 30, and the Board considered procedures relating to the preparation of minutes of meetings and a variety of policies and procedures. Also attached is a copy of the minutes of a special meeting in which reference is made to an executive session held "for the purpose of discussing negotiations and personnel."

From my perspective, the retreats, as they are described in the materials that you sent, clearly fell within the coverage of the Open Meetings Law, and most aspects of those gatherings should have been conducted in public. Additionally, the extent to which executive sessions were appropriately held is unclear. In this regard, I offer the following comments.

First, §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 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 will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

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. In my view, with respect to each of the gatherings described in the correspondence, the issues under consideration involved matters of public business. Consequently, despite their characterization as "retreats", I believe that they were "meetings" that should have been held in accordance with the requirements of the Open Meetings Law.

Second, the descriptions of executive sessions referenced in the minutes as "negotiations and personnel" are vague and do not necessarily indicate that executive sessions were properly held.

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 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" 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 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 "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 teachers' 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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October 13, 1998

Mr. & Ms. DeRidder
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. and Ms. DeRidder:

I have received your letters of September 29 and October 1. You have sought assistance concerning certain practices of the Newfield Central School District Board of Education.

In the initial letter, you referred to "emergency meetings" frequently held "with the result that no one knows that a meeting is being held." In this regard, 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 or faxing notice of the time and place of a meeting to 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.

Another issue raised in that letter involves your contention that the Board "regularly holds an Executive Session prior to the regular open meeting", and that it conducts executive sessions "whenever they disagree on a matter whether qualified or not."

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

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

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

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.

It is also noted that paragraphs (a) through (h) of §105(1) specify and limit the subjects that can properly be considered during an executive session. Therefore, a public body cannot conduct an executive session to discuss the subject of its choice.

In the second letter, you asked whether votes may be taken at "meetings held out to be only 'Study Sessions'." In my view, there is no legal distinction between a "study session"and a meeting. By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

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

Because any gathering of a majority of the Board for the purpose of discussing public business would constitute a meeting, irrespective of its characterization, I believe that a "study session" must be conducted in accordance with the requirements of the Open Meetings Law. Any policy concerning the absence of voting at those sessions would be self-imposed, rather than based on any legal requirement. In short, I believe that votes could be taken at those gatherings. Since the Open Meetings law applies equally to a study session and a regular meeting, it is likely that confusion or questions could be eliminated by referring to each as meetings, rather than distinguishing them in manner that is artificial.

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:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 15, 1998

Ms. Elizabeth Crofut
Canal Side Center
110 N. Main Street
Canastota, NY 13032

The staff of the Committee on 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. Crofut:

I have received your letter of September 30, as well as the materials attached to it. You have sought an advisory opinion concerning the status of the Madison County Head Start Policy Council under the Open Meetings Law.

You wrote that Madison County Head Start is "a program of Cornell Cooperative Extension Agency of Madison County." The materials that you forwarded indicate that the Head Start Act, 42 U.S.C §9801 et seq. and the federal regulations promulgated pursuant to the Act require the creation of a policy council, which must have a certain composition and perform a variety of duties.

Based on a decision rendered by the State's highest court, the Court of Appeals, it appears that a policy council created pursuant to federal law would not be subject to the Open Meetings Law. The decision 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, and 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)].

Due to the similarity relative to the creation and basis for existence between the LAUC and a policy council, again, it appears that a policy council would not constitute a "public body" required to comply with the Open Meetings Law.

The foregoing is not intended to suggest that the Policy Council cannot hold open meetings; on the contrary, the guidance offered in the materials encourages public participation. Rather, based on the decision cited above, I do not believe that the state's Open Meetings Law would be applicable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

OML-AO-2944

From: Robert Freeman
To: [redacted]
Date: Mon, Oct 19, 1998 3:26 PM
Subject: Open Governments Complaint. -Reply

Dear Mr. Friedman:

I believe that the gathering that you described clearly constituted a "meeting" that fell within the coverage of the Open Meetings Law and that your status as a litigant had no effect upon your right, as a member of the public, to attend.

There is a decision involving "less than quorum gatherings" in which it was found that since there was no intent to circumvent the Open Meetings Law, that statute was not violated. In my view, however, the court inferred that if there was an intent to skirt the Open Meetings Law by ensuring that less than a quorum was present at any given time, the result would have been different [see Tri-Village Publishers, Inc. v. St. Johnsville Board of Education, 110 AD2d 932 (1985)].

If you want an expansive opinion in response to your communication, please let me know. If you want to discuss the matter, I can be reached at (518)474-2518.

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2945

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 8, 1998

Mr. Arthur Norden
[redacted]

The staff of the Committee on 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. Norden:

I have received your letter of September 28 and the materials attached to it.

You referred to a grievance filed last year by a music teacher who is the former pep band director and President of the Delaware Valley Central School District Faculty Association. You indicated that you were informed that the teacher "claimed to have made a verbal agreement with a previous Superintendent which allowed him to end his duties as Pep Band Director at half time." The teacher also claimed to have "a proprietary interest in the Pep Band Director position." You wrote that he contended that "this was a previously established practice and should now be considered the rule." Although the claim was initially denied and a new pep band director had been hired for the 1997 season, at an executive session recently held, a new superintendent was directed to execute a stipulation of settlement. The stipulation specifies that the grievance was withdrawn, that the teacher was reinstated as pep band director for the current school year and that the pep band "shall be required to stay no longer than the commencement of half-time of any game."

You wrote that the issue "has never been discussed or presented in any manner in any public meeting of the school board." Further, you were informed that "there are no Board of Education minutes regarding the ratification" of the stipulation of agreement. You have asked whether "this procedure has violated the open meetings laws..."

In this regard, it is emphasized that the function of the Committee on Open Government involves providing advice and opinions. The Committee cannot make a determination, and this office never concludes that a "violation" of law might have occurred.

Based upon the information that you presented, it is questionable in my view whether or the extent to which the issue could justifiably have been considered during an executive session. It appears that the only potential basis for entry into an executive session would have been §105(1)(f). That provision permits a public body to conduct an executive session to discuss:

> "the medical, financial, creditor 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..."

When one or more of the topics appearing in §105(1)(f) pertains to a particular person, an executive session may properly be held. In this instance, if my understanding of the situation is accurate, the issue primarily involved the functions and the duties inherent in the position of pep band director. If that is so and if consideration of the matter involved the functions and duties of any person who serves in the position of pep band director, the matter would not have focused on any particular person, but rather upon the position. In that circumstance, there would have been no basis, in my view, for consideration of the matter in executive session.

On the other hand, insofar as an issue involves how well or poorly an individual has performed his or her duties, for example, the focus would be on a particular person, and there would in my opinion be a proper basis for conducting an executive session.

Lastly, it appears that action to ratify or approve the settlement agreement should have been taken by the Board of Education. If that is so, I believe that any such action should have been in public and memorialized in minutes. I note 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.

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-2946

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 16, 1998

Mr. Michael D. Zarin, Esq.
Zarin & Steinmetz
81 Main Street, Ste. 415
White Plains, NY 10601

The staff of the Committee 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. Zarin:

I have received your letter of October 13. You made reference to an advisory opinion rendered on October 5 at the request of Ms. Kate Boylan, a reporter for the Rockland Journal News, and an article based on that opinion in which it was written that the Sloatsburg Village Board of Trustees had "wrongly shut its doors." You have asked for a clarification of that opinion in view of the information that you presented in your capacity as attorney for the Village.

Since you stated that you did not see the letter sent to me by Ms. Boylan, I have enclosed a copy. In brief, she referred to a closed meeting held in advance of a scheduled meeting, and stated that the Mayor "cited the possibility of a lawsuit as the reason for calling the closed session." You wrote that the Board has been considering, for more than a year, an amendment to a local law establishing planned residential zoning districts, that a "well-organized group" represented by counsel has opposed the amendment, and that the process has been "contentious". Due to various oral and written challenges by the group throughout the review process, you indicated that you "proposed a meeting in executive session...prior to the public meeting", and that the "express purpose was limited to offering legal opinion and advice to the Village Board concerning the particular legal issues that had been raised" by the organization in opposition. You added that you "considered it necessary to discuss preliminary litigation strategy in connection with what [you] reasonably predicted would be future proposed litigation challenging the adoption of the amendment and the sufficiency of the SEQRA review process."

From my perspective, part of the difficulty involves the use and application of certain terms that might have been somewhat misleading. In this regard, I offer the following comments.

First, having reviewed the opinion prepared at the request of Ms. Boylan, its essence in my view involves a single sentence. In considering the parameters of §105(1)(d) of the Open Meetings Law, which authorizes a public body to conduct an executive session to discuss "proposed, pending or current litigation", it was advised that "the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might possibly result in litigation." I do not believe that the opinion stated that the Board "wrongly shut its doors"; rather, the opinion referred to judicial interpretations of the Open Meetings Law and sought to describe the extent to which an executive session could properly have been held.

In discussing the matter with Ms. Boylan after her receipt of the opinion, one of the issues pertained to the ability to conduct an executive session under §105(1)(d) if no litigation has yet been commenced. It was explained that, in my opinion, even if no litigation has been initiated, there may be situations in which a public body might discuss litigation strategy in an effort to prepare for or perhaps avoid a lawsuit. It was also suggested that if a public body is discussing a contentious issue and believes that taking certain courses of action might result in litigation, but it is not yet discussing what its legal strategy would be should it be sued, it would not yet have a basis for entry into executive session.

With respect to the application of terminology, I point out that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. As you are aware and as indicated in the response to Ms. Boylan, §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. In short, prior to conducting an executive session, a motion must be made that includes reference to the subject or subjects to be discussed, and it must be carried by majority vote of a public body's membership.

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

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

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

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

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

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

Insofar as the Board seeks legal advice from its attorney and the attorney renders legal advice, I believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. Therefore, even though there may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to §108. For example, legal advice may be requested even though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, often at some point in a discussion, the attorney has stopped giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting.

Lastly, although it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies, and I believe that the advice offered in the opinion sent to Ms. Boylan would have been accurate based on the information that she provided, which in turn was apparently based on statements made by Village officials. In the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It is suggested that when a meeting is closed due to the

exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Samuel J. Abate, Mayor
Kate Boylan

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2947

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 16, 1998

Mr. Jeffrey H. Greenfield
[redacted]

The staff of the Committee on 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 letters of October 6 and October 10, both of which pertain to the Board of Trustees of the Village of Rockville Centre.

The first relates to the legality of a public forum during which a majority of the Board would participate. That issue appears to be moot in view of the copy of the notice that you attached to the second letter indicating that the Village Board of Trustees would be conducting a forum. You asked whether the Board is "required to keep minutes of a forum within the Open Meetings Law."

While the Board could prepare minutes concerning the forum, I would conjecture that there would be no requirement to do so.

In this regard, I point out that the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

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

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

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during the forum, technically I do not believe that minutes must be prepared.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2948

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 22, 1998

Ms. Lynn Jackson
Save the Pine Bush, 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 Ms. Jackson:

As you are aware, I have received your letter of September 30 and a variety of materials relating to it.

According to the correspondence, you and several others attended a meeting of the Zoning Committee of the Albany Common Council on September 23. The notice of the meeting indicated that there would be a "comment period" during the meeting. You and others prepared statements in anticipation of the opportunity to speak. Nevertheless, you wrote that the Chairman of the Committee "never opened the public comment period and no member of the public was permitted to speak at any time during the meeting." You have sought my opinion on the matter.

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

The materials that you forwarded include rules concerning public comment at Common Council committee meetings. Pertinent to the matter is Section 3.4.2, which states that:

> "Common Council committee meetings may allow a public comment period: The length and placement in the meeting agenda is to be

> determined by committee member consensus. This provision shall be part of the official meeting notification. Legislation introduced by a council member, but referred to committee, must require a public hearing by the committee before being released for consideration."

From my perspective, while nothing in the Open Meetings Law would have required the Committee to permit the public to speak at the meeting, since the notice of the meeting indicated that a public comment period was scheduled, I believe that the Committee was required to permit public comment in order to comply with the rule quoted above. Stated differently, the failure to permit you and others speak appears to have constituted a failure to comply with Section 3.4.2 of the Common Council's rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Daniel Herring
Hon. Helen Desfosses

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2949

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 29, 1998

Ms. Patricia Williams
[redacted]

The staff of the Committee on 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. Williams:

I have received your letter of October 16 and the documentation relating to it.

You wrote that you attended an "audit meeting/work session" of the Town Board of the Town of Newburgh on September 23. While the Board was in executive session, several members of the Town's Recreation Advisory Board arrived and informed you they were present in order to discuss a new recreation facility with the Board and representatives of an architectural firm. Following the executive session, the Town Board "conducted a few minutes of town business and adjourned the meeting." After adjournment, you indicated that the "full board...began the meeting with the Advisory Board." When you questioned the propriety of the gathering, you were informed by the Supervisor that it was a "chance meeting." Nevertheless, a memorandum prepared by the Chairman of the Advisory Board and addressed to its members stated that "A meeting of the Advisory Board, Town Board and Clough/Harbour will be held at the Town Hall Meeting Room on Wednesday, September 23, 6:00 p.m." The memorandum stated further that the meeting would include consideration of "the new facility."

Assuming that your description of the facts is accurate, the gathering between the Town Board and Recreation Advisory Board was scheduled and held by design, rather than by chance. If that is so, the gathering, in my view, constituted a meeting of the Town Board that should have been held in accordance with the Open Meetings Law.

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 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)]. Therefore, even though the gathering in question might have been held at the request of the Advisory Board, I believe that it was a meeting, for a quorum of the Town 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: Supervisor Bucci
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 2950

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 29, 1998

Mr. Roy Schneggenburger
[redacted]

The staff of the Committee on 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. Schneggenburger:

I have received your letter of October 15 in which you sought an advisory opinion relating to a meeting of the Lancaster Central School District Board of Education.

According to a news article that you forwarded, the Board of Education entered into executive session to discuss engaging in an agreement with the Coca Cola Bottling Company under which the company would have exclusive "pouring rights" in return for cash, commissions, and support for educational programs. The article indicated that the Board's vote on the agreement was taken after the executive session and that "[a] reporter was told the subject of the executive session, but the public was not and the doors to the district office building were locked."

In this regard, I offer the following comments.

First, it is emphasized 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. Therefore, an executive session is not separate from an open meeting, but rather is a part of an open meeting. In my opinion, when the executive session ended and the Board continued the meeting for the purposes of taking action, any member of the public would have had the right to have been present. If the doors to the building were locked, that right could not have been asserted.

I note, too, that several decisions construing §1708(3) of the Education Law indicate that a board of education generally can take action only during an open meeting [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)]. If the doors were locked, it would appear that the Board's action was effectively taken in private.

Second, it is unclear from the article whether the Board publicly stated the reason for conducting an executive session. Here I point out that §105(1) of the Open Meetings Law requires that a procedure be accomplished in public before an executive session may be held. That provision states in relevant part that:

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

As such, prior to entry into an executive session, a motion must be made in public indicating the reason for a closed door discussion.

Third, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session, and whether or the extent which an executive session could properly have been held is, in my view, questionable. The only direct reference to contract negotiations in the Open Meetings Law, §105(1)(e), which pertains to collective bargaining negotiations with a public employee union, and that provision would clearly have been inapplicable. The other provision of potential significance, §105(1)(f), permits a public body to conduct 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..."

As I understand the matter, only to the extent that the Board engaged in a discussion of the "financial, credit or employment history" of the Coca Cola Company or any other firm under consideration would an executive session properly have been held. While it is possible that some elements of the discussion may have involved those subjects, it is unlikely in my view that the entirety of the discussion would have fallen within the scope of §105(1)(f).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,131
OML-AO-2951

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 5, 1998

E-MAIL

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Sir:

I have received your communication of October 31. You wrote that a village has adopted a policy under which "every person who enters the front door [must] sign in before they proceed to any office or department." You have asked whether "a citizen should be able to access the public areas of a village hall (not private offices) for information without signing in."

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions concerning two statutes, the Freedom of Information Law and the Open Meetings Law. Neither of those statutes, in my opinion, would be applicable or pertinent to the issue that you presented. In short, the matter does not involve either public access to records or meetings of a public body.

I point out that various provisions of law permit the governing bodies of municipalities to adopt rules, policies or procedures to enable them to carry out their governmental duties [see e.g., Village Law, §4-412(1)]. However, it has been held in a variety of contexts that those rules, policies or procedures must be reasonable. From my perspective, the question is whether the rule or policy that you described is reasonable. Again, that is not an issue that can be determined under or that would be governed by the Freedom of Information or Open Meetings Laws.

It is noted, however, that it has been advised that members of the public cannot be required to identify themselves when in attendance at a meeting of a public body held in accordance with the Open Meetings Law. Section 103 of that statute provides that meetings of public bodies are open to the "general public." As such, any member of the public, whether a resident of the municipality or of another jurisdiction, would have the same right to attend. That being so, I do not believe that

a member of the public can be required to identify himself or herself by name or by residence in order to attend a meeting of a public body.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2952

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 10, 1998

Mr. Andrew W. Barone
[redacted]

The staff of the Committee on 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. Barone:

I have received your letter of October 21 in which you asked the following question:

> "Can a Village Board of Trustees, during a regularly scheduled meeting, go into 'executive' session (closed to the public) to discuss pending negotiations to be held with a Town Board on the matter of the renewal of long-standing contracts for the supply of a potable water to various Water Districts established within the Town?"

In this regard, as you may be aware, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may appropriately be considered during an executive session. From my perspective, the issue that you described likely does not fall within any of those grounds.

It is noted that the only reference in the Open Meetings Law to "negotiations" pertains to collective bargaining negotiations involving a public employer and a public employee union [see §105(1)(e)]. Clearly the negotiations to which you referred are not collective bargaining negotiations and would not fall within §105(1)(e).

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

OML-AO-2953

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 16, 1998

E-Mail

TO: Barry S. DeFuria, Deputy Supervisor, Town of Harrietstown

FROM: Robert J. Freeman, Executive Director

Dear Mr. DeFuria:

I have received your communication of November 11 and appreciate your kind words.

As Deputy Supervisor for the Town of Harrietstown, you referred to a comment that I made indicating that two members of a town board could gather to discuss town business outside the coverage of the Open Meetings Law. You added that you assume that the remark "does not apply if these same two members are 'committee members'."

In this regard, it is reiterated that a gathering of less than a majority of a public body generally falls outside the scope of the Open Meetings Law. However, when a public body designates a committee consisting of two or more members, I believe that the committee would itself constitute a "public body" required to comply with the Open Meetings Law. If a committee consists of two, its quorum would be two, and a meeting of the two in my view would be subject to the Open Meetings Law.

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

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

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was

enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §102(2) to include:

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of the body, 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, a public body 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)].

In sum, assuming that the committees in question consist of two or more members of the Board, those committees would constitute public bodies subject to the Open Meetings Law and a quorum of those bodies would be a majority of the membership of the committees.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 17, 1998

Mr. Harry A. Lathrop
[redacted]

The staff of the Committee on 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. Lathrop:

I have received your letter of November 9 in which you sought materials relating to the contents of meetings of a village board of trustees. You complained that certain information had been "left out" of the minutes of your interest.

In this regard, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. 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. It is noted, too, that if a public body merely discusses an issue during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

As you requested, enclosed are copies of the Open Meetings Law, an explanatory brochure on the subject and an opinion that likely deals with some of your concerns.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Gary March, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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41 State Street, Albany, New York 12231
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November 17, 1998

Hon. Michael J. Bragman
Majority Leader
New York State Assembly
305 South Main Street
North Syracuse, NY 13212

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

Dear Assembly Bragman:

I have received your letter of November 5, which reached this office on November 12.

You referred to questions raised by two trustees of the Village of North Syracuse relating to compliance with the Open Meetings Law and the authority of the Mayor to bind the Village in a "disputed purchase" of real property. Having reviewed the materials attached to your letter, the facts, from my perspective, are somewhat unclear. On the one hand, it may be contended that the Mayor took action to begin the process of purchasing a building with the authorization of the Board of Trustees; on the other, it can also be contended that the Mayor acting unilaterally and without authorization of the Board. The materials do not provide sufficient information to reach a conclusion on the matter. Nevertheless, I offer the following comments.

First, as I understand the situation, the Mayor, a single member of the Board of Trustees, could not have acted unilaterally without specific direction of the Board of Trustees. Since the issue involved the purchase of real property, I believe that any action would have required an affirmative vote of the majority of the membership of the Board of Trustees. Further, any such vote, to be valid, could only have occurred at a meeting of the Board. If action was taken by the Mayor without specific authority, should it be challenged in that circumstance, it is likely in my view that a court would determine that no valid action was taken. I note that §41 of the General Construction Law entitled "Quorum and majority" indicates that a public body can only take action by means of an affirmative vote of a majority of its total membership taken at a meeting during which a quorum is present.

If it is established that the Mayor acted pursuant to authority conferred by the Board of Trustees, the preceding remarks would be largely irrelevant.

A second issue involves the ability of a public body to take action during an executive session. In this regard, in general, a public body may vote during an executive session properly held, unless the vote is to appropriate public monies [see Open Meetings Law, §105(1)]. In my opinion, if an action represents an allocation or expenditure of funds that have previously been budgeted, the action would not involve an appropriation, and a vote could be taken during an executive session. However, if a determination is made to expend monies that have not been budgeted, i.e., to appropriate new monies, a vote to do so must occur during an open meeting. That does not appear to have occurred based upon the materials that you provided.

Lastly, as you are likely aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Pertinent to the matter is §105(1)(h), which authorizes a public body to enter into executive session to discuss:

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

Insofar as discussions by the Board, if conducted publicly, would have substantially affected the value of the property under consideration, executive sessions would properly have been held. It appears that the purchase of the site in question has been a matter of controversy known to the public for some time. When the public is aware of a possible real property transaction, including the site of the property, the extent to which executive sessions may validly be held is questionable; the more that the public is aware of the details of a transaction, the less likely it may be that publicity would substantially affect the value of the property.

Again, due to conflicting points of a view regarding what occurred, I regret that I cannot offer definitive guidance. Nevertheless, 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-11,161
OML-AO-2956

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 18, 1998

Mr. Theodore Kalkhuis
[redacted]

The staff of the Committee on 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. Kalkhuis:

I have received your undated letter, as well as the materials attached to it, which reached this office on October 22.

You described your unsuccessful efforts in obtaining records regarding what may be an inappropriate designation of a residence in West Haverstraw. In this regard, it is emphasized that the functions of the Committee on Open Government involve providing advice concerning the Freedom of Information and Open Meetings Laws. If an agency fails to comply with law by not maintaining certain records, that issue in my view would not involve the Freedom of Information Law. That statute deals with existing records and provides parameters concerning the extent to which they must be disclosed. Further, since you asked which state or federal agency might have the authority to investigate the matter, I know of none. The Village is independent, and the residents have the ability to choose its representatives who serve on the Board of Trustees.

Insofar as the issues that you raised involve the jurisdiction of this office, I offer the following comments.

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

If a record exists indicating action taken following a finding of a violation of law, I believe that such a record would be accessible, for none of the grounds for denial would be pertinent. Similarly, the other records to which you referred, if they exist, would in my opinion be accessible. Nevertheless, as suggested earlier, the Freedom of Information Law pertains to existing records and

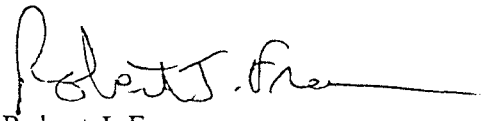
does not require that an agency create or prepare a record in response to a request. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, 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.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Lastly, you referred to your search of the Rockland Journal News and found no reference to a meeting held by the Zoning Board of Appeals on January 8. I note that you also referred to a hearing. Here I point out that the requirements concerning notices of hearings and meetings differ. Frequently, there is a statutory requirement that notices of a hearing be published as a legal notice in a newspaper. Section 104 of the Open Meetings Law, however, specifies that notice of a meeting held under that statute does not require the publication of a legal notice. Rather, the Open Meetings Law requires that notice of the time and place of a meeting be given to the news media and posted prior to every meeting. Once in receipt of notice of a meeting, a news media organization may choose to publish a notice or report on a meeting, but there is no obligation to do so.

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-2957

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November 20, 1998

Ms. Danielle Cordier
Catskill Watershed Corporation
P.O. Box 569
Margaretville, NY 12455

The staff of the Committee on 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. Cordier:

I have received your correspondence in which you sought guidance concerning the ability of the Board of Directors of the Catskill Watershed Corporation (CWC) to conduct an executive session to review "a particular individual's financial and credit history."

By way of background, the CWC administers an economic development fund and is required to review loan applications to determine whether, based on financial information, risk and benefits, to grant loans to applicants. From my perspective, it is clear that the CWC Board would have the authority to conduct executive sessions in relation to the subject matter under consideration.

In brief, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be held in accordance with paragraphs (a) through (h) of §105(1) of the statute.

Pertinent to the matter is §105(1)(f), which 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..."

Based on the language quoted above, discussions by the CWC Board of the "financial, credit or employment history of a particular person or corporation" could, in my view, validly be conducted in executive session [see LaCorte Electrical Construction and Maintenance Inc. v. County of Rensselaer, 576 NYS 2d 397 (1991)].

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-2958

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 20, 1998

Mr. Edward P. Januszewski
[redacted]

The staff of the Committee on 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. Januszewski:

I have received your letter of October 23. You have asked why, as an elected member of the City of Amsterdam Citizens Review Board, you are not permitted to attend executive sessions held by the Common Council. You expressed the belief that the City Charter provides the privilege of attending the Council's executive sessions.

In this regard, I am unfamiliar with the Amsterdam City Charter. If the Open Meetings Law is the governing statute, you would not have the right to attend the Common Council's executive sessions. I direct your attention to §105(2) of the Open Meetings Law, which states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." As such, only the members of a public body have the right to attend an executive session of that body. Since a member of the Citizens Review Board is not a member of the Common Council, he or she ordinarily would not have the right to attend an executive session of the Council.

If however, the City Charter specifies that the members of the Citizens Review Board may attend executive sessions of the Common Council, that provision, in my view, would supersede the Open Meetings Law. As 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 access than required by the Open Meetings Law. If that is so under the City Charter, it would be "less restrictive with respect to public access" than the Open Meetings Law.

It is suggested that you seek to review the City Charter in an attempt to ascertain whether the issue that you raised is directly addressed. If it is not, the Open Meetings Law would govern, and you would not have the right to attend the Common Council's executive sessions.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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OML-AO-2959

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November 20, 1998

Mr. Frank Giosi
[redacted]

The staff of the Committee on 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. Giosi:

I have received your letter of October 15 in which you raised a series of questions relating to certain practices of the Mt. Sinai School District.

You asked initially whether the President of the Board of Education may "require" that those who attend meetings of the Board to provide their addresses and whether she may prohibit persons from speaking at meetings based on a refusal to give their addresses.

In this regard, as you suggested, I believe that she may request the addresses of those who attend meetings, but I do not believe that she can validly exclude a person from attending a meeting or treat a person different from those who provide their addresses in terms of their opportunity to participate at a meeting.

I point out that 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. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings [see e.g., Education Law, §1709(1)], 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 rules 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 note that §103 of the Open Meetings Law provides that meetings of public bodies are open to the "general public." As such, any member of the public, whether a resident of the District or of another jurisdiction, would have the same right to attend. That being so, I do not believe that a member of the public can be required to identify himself or herself by name or by residence in order to attend a meeting of a public body. Further, since any person can attend, I do not believe that a public body could by rule limit the ability to speak to residents only. There are many instances in which people other than residents, such as those who may own commercial property or conduct business and who pay taxes within a given community, attend meetings and have a significant interest in the operation of a municipality or school district.

In short, it is my view that any member of the public has an equal opportunity to partake in an open meeting, and that an effort to distinguish among attendees by residence or any other qualifier would be inconsistent with the Open Meetings Law and, therefore, unreasonable.

In a related area, you wrote that the public has had the opportunity to ask questions, but that they have been prohibited from making statements or offering opinions. In my view, if there is a rule or policy of that nature and it is applied uniformly, it would be valid. Again, it is emphasized that members of the public do not have the right to speak at meetings; the ability to do so would be dependent on a public body's rules or policies.

The remaining area of inquiry pertains to a request for records that was denied, according to your letter, because of "potential litigation." As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. Based upon the foregoing, the possibility of litigation would not, in my opinion, affect either the rights of the public or a potential litigant under the Freedom of Information Law.

Notwithstanding the foregoing, it appears that the issue may involve the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need

not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In the context of your request, I am unaware of the means by which the District maintains its records. If it maintains all of the records sought in a file or group of files that are retrievable on the basis of the terms of your request, I believe that you would have met the requirement that the records be reasonably described. On the other hand, however, it is possible that it maintains records falling within the scope of your request in a number of locations or units by means of different filing systems within those units. In short, it is questionable whether your request "reasonably described" the records as required by law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Peter Paciolla, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2960

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November 20, 1998

Hon. George P. Bucci, Jr.
Supervisor
Town of Newburgh
1496 Route 300
Newburgh, NY 12550

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

Dear Supervisor Bucci:

As you are aware, I have received your letter of November 4 in which you referred to an advisory opinion prepared on October 29 at the request of Ms. Patricia Williams. According to her letter, the Town of Newburgh Recreation Committee met with the Town Board on September 23, and it was advised that the gathering constituted a "meeting" that should have been held in a manner consistent with the requirements of the Open Meetings Law.

You wrote however, that the facts, as she presented them, were "either left out or distorted." You indicated that:

> "1) The Recreation Advisory Board wast to meet with myself on an update of a Town project. I requested their chairman to meet with me after a Town Board Meeting for easy scheduling on my part.
>
> 2) I conducted this meeting alone with the Advisory Board.
>
> 3) Town Board members who had no knowledge of this meeting stayed around and observed. Not one of them ever spoke during my presentation.
>
> 4) There was no engineering firm present at the meeting or scheduled to be.

5) I have no control over what the Chairman of The Advisory Board notifies his Board Members of. Apparently there was a misunderstanding from his point of view on the meetings intent.

6) At no time was any member of either Board or persons who attended the regular Town Board Workshop asked to leave the room."

Based on the information that you have provided, it does not appear that the gathering in question was subject to the Open Meetings Law. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean: "the official convening of a public body for the purpose of conducting public business." Inherent in the definition, in my view, is the notion of intent. If a majority of a public body intends to gather to conduct public business, collectively, as a body, the gathering would constitute a "meeting" that falls within the requirements of the Open Meetings Law. However, if there was an intent that the Recreation Advisory Board meet only with you, if the other members of the Board had no knowledge of the gathering, and if they did not participate as a body, the gathering in my opinion, would not have been a "meeting." In that circumstance, I do not believe that Open Meetings Law would have applied.

The foregoing should be considered to have replaced the earlier opinion and I apologize for any hardship that may have arisen.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Patricia Williams

Encs.

OML-AO-2961

From: Robert Freeman
To: [redacted]
Date: Wed, Dec 2, 1998 1:10 PM
Subject: School Board Meetings

The brief answer is that any gathering of a majority of the Board for the purpose of discussing public business would constitute a "meeting" that must be held in accordance with the Open Meetings Law, even if there is no intent to take action, and irrespective of the manner in which the gathering is characterized. Every meeting should be preceded by notice given to the news media and the public by means of posting.

The meeting must be conducted open to the public, except to the extent that certain issues might arise in relation to particular individuals [see Open Meetings Law, section 105(1)(f)]. Issues regarding policy or positions must be discussed in public.

If you want a more detailed response that includes a detailed rationale please let me know.

To obtain more information, our website address is:
www.dos.state.ny.us/coog/coogwww.html
The website includes the text of the Open Meetings Law and the text of opinions on the subjects of your inquiry. In the OML advisory opinion index, it is suggested that you look at opinions under the following key phrases:

Personnel, Policy relative to
Personnel Matters
Meeting
Work Session

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,162
OML-AO-2962

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 4, 1998

Mr. Joseph Gredder
[redacted]

The staff of the Committee on 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. Gredder:

I have received your letter of October 26 in which you raised a series of questions relating primarily to the application of the Freedom of Information and Open Meetings Laws to school districts and boards of education.

Your first question is whether members of a board of education are "State Officers". In this regard, the advisory jurisdiction of the Committee on Open Government is limited to the statutes referenced above. Since that question does not involve those statutes, the matter is beyond the jurisdiction of this office.

The next series of questions deal with whether school districts or school boards are required to comply with various provisions of the Freedom of Information Law that you cited. That statute pertains to agencies, and the term "agency" is defined in §86(3) 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, it is clear that either a school district or a board of education would constitute an "agency" required to comply with the provisions of the Freedom of Information Law to which you referred. Further, in view of the breadth of definition of "record" appearing in §86(4) of the Law, it is equally clear in my opinion that materials reflective of a school district budget and its expenditures fall within the scope of rights of access.

In a somewhat different vein, you asked whether the Open Meetings Law requires "the Board of a public UFSD to record detailed minutes of the specific questions asked by the public and the answers provided by the Board." In short, 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, it is clear that minutes need not consist of a verbatim account of every comment that was made or refer to questions, answers or the details of deliberations and discussions. So long as minutes include the elements described in §106(1), a public body would be acting in compliance with that provision.

Lastly, you asked whether "the law allow[s] videotaping of such Board meetings." In this regard, 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. 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-2963

From: Robert Freeman
To: [redacted]
Date: Fri, Dec 4, 1998 1:12 PM
Subject: Open Meetings Law Enformcement -Reply

Dear Ms. Beckley:

From my perspective, your contentions are generally valid. I would suggest, however, that your commentary be shortened and that you focus on three points: first, that a public body cannot hold an executive session in advance of or schedule an executive session prior to a meeting; second, that the law specifies and limits the topics that can validly be considered during an executive session, and that it appears that the Board has conducted a series of executive sessions without any legal justification; and third, the basic principle underlying the other two, that the public has the right to observe the deliberative process, and that reasons for closing meetings must be expressed in public in a manner that enables the public to know whether (or not) an executive session is being properly held.

Also -- I believe that you have misinterpreted subdivision 2 of section 105 of the law. That provision indicates that only the members of a public body have the right to attend an executive session, but that a public body has the authority to permit others to attend. For instance, if a staff person or consultant has special knowledge or expertise regarding a certain issue, the Board could permit that person to attend a proper executive session. The public has no general right to attend an executive session.

Lastly, you asked that detailed agendas be posted and made available prior to meetings. In short, there is nothing in the Open Meetings Law or any other statute that pertains to agendas. Further, as you may be aware, the Open Meetings Law, section 104, requires only that meetings be preceded by notice of the time and place.

It is suggested, once again, that you review opinions available via our website.

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2904

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December 7, 1998

Mr. Jay M. Gubernick
[redacted]

The staff of the Committee on 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. Gubernick:

I have received your letter of November 6, as well as the materials attached to it. As I understand your comments, the Woodbury Town Board conducted "about 7 budget work sessions" that were not preceded by notice to the public. You have asked what the "next steps" might be taken in relation to what you characterize as the Board's "disregard for the public."

It is noted initially that there is no legal distinction between a "work session" conducted by a public body and a "meeting". By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

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

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.

Decisions involving the budget most often must be conducted in public. Often a discussion concerning the budget has an impact on personnel. Nevertheless, despite its frequent use, 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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981).

Third, as you are aware based on previous correspondence, every meeting, including a work session, must be preceded by notice given in accordance with §104 of the Open Meetings Law. That provision states that:

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

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

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."

In an effort to enhance compliance with and understanding of the Open Meetings Law, and to avoid litigation, 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:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2965

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December 7, 1998

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 et al.:

I have received your letter of November 7. You have sought an opinion concerning restrictions on your ability to speak at a meeting of the Warrensburg Town Board.

In this regard, it is noted at the outset that while individuals may have the right to express themselves and to speak, I do not believe that they have a constitutional right to do so at meetings of public bodies. It is noted that there is no constitutional right to attend meetings of public bodies. That right is conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, I do not believe that the public would have the right to attend.

In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, as you are aware, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, it is reiterated that, in my opinion, there is no constitutional right to attend meetings.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which I am aware provides the public with the right to speak during meetings, I do not believe that a public body is required to permit the public to do so during meetings. Certainly a public body may in my

view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally.

In my opinion, if, for example, the Town Board established a rule or policy by resolution involving public participation at meetings, it would have the authority to alter its policy at any meeting, and I know of no provision that would prevent its immediate implementation. In the absence of a change in a policy or rule, I believe that a public body must comply with its existing policy or rule.

Although I am unfamiliar with the Town Board's rules regarding public participation at its meetings, I point out that the Town Law, §63, states that the Town Supervisor, "when present, shall preside at the meetings of the town board." However, the same statute also states that "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board" and that "The board may determine the rules of its procedure..." Based on the foregoing, I do not believe that the Supervisor could change a policy or rule unilaterally. However, as suggested earlier, the Town Board, in my opinion, could alter an existing policy adopted by resolution at any time.

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-11170
OML-AO-2966

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 7, 1998

Mr. John McAndrew
[redacted]

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

Dear Mr. McAndrew:

I have received your letter of November 2 and the correspondence attached to it.

According to the materials, you have initiated several grievances against the Port Jervis School District. Although the contract between the District and the Teachers' Association states that "All hearings shall be and remain confidential", District officials have identified you as the subject of hearings at open meetings. You have asked whether the District is required to identify the subject of a hearing prior to entry into executive session or may be prohibited from naming you publicly as a grievant involved in a hearing.

In this regard, first, it has consistently been advised that a public body is not required to identify a person who may be the subject of a discussion in an executive session. In my view, a motion for entry into executive session must provide sufficient detail to enable the public to know whether an executive session will appropriately be conducted. For instance, if a motion indicates that the Board will discuss a "particular person" in conjunction with one or more of the topics described in §105(1)(f) of the Open Meetings Law, that would be sufficient to comply with law. Section 105(1)(f) permits a public body to enter into executive session to discuss:

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

Second, however, neither the Freedom of Information Law nor the Open Meetings Law would prohibit the disclosure of your identity as a grievant during an open meeting. 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. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, 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, the Freedom of Information Law is permissive. Although an agency may withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals, the State's highest court, has held that the agency is not obliged to do so and may choose to disclose. As stated in that unanimous decision: "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

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

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

In a different context, in Geneva Printing Co. and Donald C. Hadley v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would

> accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In short, insofar as the terms of a collective bargaining agreement are inconsistent with the Freedom of Information Law, I believe that they would be unenforceable and void.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

OML-AO-2967

From: Robert Freeman
To: [redacted]
Date: 12/17/98 8:28AM
Subject: Open Meetings Qquestion -Reply

Dear Mr. Lehmann:

I have received your communication in which, as a member of the East Ramapo School District Board of Education, you questioned the propriety of a discussion conducted during an executive session.

As I understand the matter, while in a valid executive session, a new subject was raised relating to the "administration of a federally funded program to the non-public schools" in the District. You wrote that a member of the Board wanted to know of the types of reports supplied to the District and the frequency of on site inspections and indicated that the matter should be discussed in executive session due to the "lack of vigilance on the part of the district which may contribute to possible irregularities in the program."

In this regard, as you may be aware, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. From my perspective, the subject that you described would not have fallen within any of those grounds, and the Board should have returned to the open meeting for the purpose of discussing the matter.

For a detailed discussion of the parameters of the three most commonly cited grounds for entry into executive session, personnel, litigation and contractual matters, it is suggested that you review advisory opinions that are available througjh our website. The address is:

www.dos.state.ny.us/coog/coogwww.html

You will see a reference to advisory opinions rendered under the Open Meetings Law. Click onto that for an index to opinions and scroll down to "executive session, sufficiency of motion". Then click onto opinion #2621.

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2968

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December 7, 1998

Hon. James M. Corrigan
Trustee
[redacted]

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

Dear Trustee Corrigan:

I have received your letter of November 5. You have requested an opinion concerning the propriety of conducting an executive session to discuss "contractual matters."

You wrote that the Village of Northport has an agreement with the Town of Huntington to process sewage for the Town, and that a private entity contacted the Village attorney to seek permission to connect with your waste collection system. Your attorney's report was the subject of the executive session. In relation to the foregoing, you wrote that:

> "No negotiations had yet taken place and we did not discuss the financial status of the private concern at any time, nor the cost of our providing the service to this concern. We did discuss, however, the fact that our treatment plant does not have the capacity to process their additional sewerage and that way would have to be found to reduce our plant's load before we could agree to take on additional hook-ups, especially the size of a nursing facility. A suggestion was made and our attorney was instructed by the Board to initiate discussions on the matter using the suggested solution."

In this regard, I offer the following comments.

First, as you are likely aware, the Open Meetings Law requires that meetings of public bodies must be conducted open to the public, unless there is a basis for entry into an executive session. The subjects that may properly be considered in executive session are specified in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. Because those subjects are limited, a public body cannot conduct an executive session to discuss the subject of its choice.

Second, although certain "contractual matters" may be conducted or discussed in executive session, not all such matters fall within the grounds for entry into executive session. The only provision that pertains specifically to contracts, §105(1)(e), deals with collective bargaining negotiations between a public employer and a public employee union under Article 14 of the Civil Service Law, which is commonly known as the Taylor Law. In short, it does not appear that §105(1)(e) or any of the grounds for entry into executive would have been pertinent.

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

Potentially relevant to the situation is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

Insofar as the Board seeks legal advice from its attorney and the attorney renders legal advice, I believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. Therefore, even though there may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to §108. For example, legal advice may be requested even though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, often at some point in a discussion, the attorney has stopped giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting.

Lastly, although it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies and requires that a motion to enter into executive session, citing the reason, must be made and carried in public. In the case of the latter, when a matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It is suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to 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

OML-AO-2969

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 11, 1998

Mr. Arthur Norden
[redacted]

The staff of the Committee on 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. Norden:

I have received your letter of November 19. You referred to a portion of an earlier opinion in which it was advised that a board of education cannot take action in executive session, except in rare circumstances.

In an effort to acquire more precise guidance on the subject, you enclosed a portion of the agreement between the Delaware Valley School District and its teachers association involving containing grievance procedures and referred to a stipulation "that was signed after the completion of stage 2." Stage 2 pertains to a situation in which a teacher is not satisfied with a Stage 1 decision, in which case the Board of Education is required to hold a meeting with the teacher or his or her representative. The agreement then states that "Within ten calendar days after the conclusion of this meeting, the Board shall render a decision in writing to the teacher." You wrote that the "entire process took place out of public purview, and there are no meetings minutes memorializing the existence of this grievance, much less the action taken by the board."

In this regard, if indeed the grievance procedure was applicable, it is clear that the Board of Education was required to conduct a meeting and take action. If indeed action was taken, I believe that the Open Meetings Law requires that minutes indicating the nature of the action must be prepared. Further, any such action must in my view have been taken during an open meeting.

From my perspective, there are but two situations in which a board of education is authorized to vote or take action in private. One involves a so-called 3020-a proceeding in which a board must vote in executive session to determine whether charges should be filed with respect to a tenured employee. The other generally pertains to situations involving particular students, for certain federal laws prohibit the disclosure of information identifiable to students without the consent of the parents (see e.g., Family Educational Rights and Privacy Act, 20 USC §1232g). Therefore, if, for instance, disciplinary action is taken concerning a particular student, I believe that a vote may be taken behind

closed doors. Similarly, in situations in which the vote may identify a handicapped student, I believe that, due to requirements of federal law, a vote should occur in private. In those cases relating to students, federal law prohibits the disclosure of information personally identifiable to a student, i.e., information that would make a student's identity "easily traceable" (see 34 CFR §99.3).

In my opinion, action taken by the Board in relation to a grievance would not represent one of the situations in which the Board would be authorized or required to vote in private.

Lastly, with respect to minutes of meetings, §106(1) of the Open Meetings Law states that:

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

In sum, it appears that action should have been taken at a meeting, that it should have been taken in public, and that minutes reflective of the action should have been prepared.

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-2970

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 22, 1998

E-MAIL

TO: Mark Reimer "Togwo" [redacted]

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on 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. Reimer:

I have received your communication of November 20. You referred to information provided by this office citing judicial precedent that would allow you to videotape open meetings of a town board. Having been in contact with Cablevision of Rockland concerning the replay of tapes of meetings, you indicated that Cablevision "was unsure...on whether or not they can accept a videotape from [you] or must it come from the government body being taped."

In this regard, there is no requirement that a government body, such as a town board, record its meetings. When a member of the public records an open meeting using his or her own equipment, the recording is the property of that person, who may do with the recording as he or she sees fit. In my view, the government body has no control over the recording, and its consent or permission to broadcast the tape is unnecessary and irrelevant.

Perhaps the most expansive decision concerning the use of recording equipment at meetings is Mitchell v. Board of Education of the Garden City Union Free School District [113 AD2d 924 (1985)], which was decided unanimously by the Second Department, Appellate Division, which includes Rockland County within its jurisdiction. In holding that a public body could not prohibit the use of recording devices that do not detract from the deliberative process, the Court also stated that:

> "Those who attend such meetings, and 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.

> " Nor are we persuaded by the appellants' contention that since recordings can be edited, altered, or used out of context, the Board was justified in forbidding their use altogether. Clearly 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. A contemporaneous recording of a public meeting is memorializing what is said at the proceeding. Once the information and comments are conveyed to the public, it should be of no consequence that they may subsequently be repeated by means of replay, to those who were unable to attend." (id., 925).

Based on the foregoing, the Town Board, in my view, has no control or authority over the use of recordings of its open meetings.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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December 22, 1998

E-MAIL

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on 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. Masse:

I have received your communication of November 23. In your capacity as the Student Trustee on the Erie Community College Board of Trustees, you wrote that the Board "is holding executive session meetings for issues that should be made public." You referred specifically to the hiring of an individual that you believed to be unqualified, consolidation of "the student governments and the college newspapers", and finding "a discretionary account out of public funds." You also alleged that the Board "intimidated" you in private in relation to articles that you wrote when you reported for the college newspaper.

You have requested an opinion concerning the foregoing. In this regard, I offer the following remarks.

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 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 my opinion, a discussion involving the hiring of a specific individual or that person's qualifications clearly could be discussed during an executive session. Whether the person hired is indeed qualified is a question separate from compliance with the Open Meetings Law and beyond the jurisdiction of this office. However, when an issue relates to personnel generally, involves matters of policy, the functions, addition or elimination of positions or, for example, deals with budgetary matters concerning the allocation of public moneys, I do not believe that there typically would be any basis for conducting an executive session.

Second, 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.

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

For instance, if a discussion by a Board of Trustees is derived from 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 student consents 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 that situation, I believe that a board of trustees and college employees would be prohibited from disclosing, because a statute requires confidentiality.

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

Although there may be no prohibition against disclosure of 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. 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
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2971

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December 23, 1998

Ms. Marilyn Bartelotte
[redacted]

The staff of the Committee on 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. Bartellote:

I have received your letter of November 25 in which you sought advice concerning the Open Meetings Law. Specifically, you asked whether "the time of a regular meeting of a 'public body' scheduled, and noticed in a newspaper, for a certain time of day can be called to order and business heard, discussed, and decisions made before that specified time without notice being given to the public by posting, and to the news media."

In this regard, I offer the following comments.

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

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

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

> conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

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

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

However, the same provision states further that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2972

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December 23, 1998

Mr. John Moyer
Ft. Covington Sun
[redacted]

Ms. Pam Ouimet
Massena Courier-Observer

The staff of the Committee on 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. Moyer and Ms. Ouimet:

I have received your letter of November 27. You have sought an opinion concerning the propriety of an executive session held by the Salmon River Board of Education.

According to the news article accompanying your letter, the Superintendent indicated that the Mid-Winter Conference for School Superintendents was scheduled for the same date as a meeting of the Board of Education. Because he wants to attend the Conference, the Superintendent asked that the date of the Board meeting be changed. At that point, the President of the Board "said she would like to discuss the issue in executive session, as changing the date deals with a contractual issue." Upon questioning, she added that attendance at the Conference "deals with his contract."

From my perspective, there 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, the only ground for entry into executive session that refers to a "contractual" matter is §105(1)(e). That provision permits a public body to conduct an executive session to consider "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law is commonly known as the "Taylor Law", and it deals with the relationship between public employers, i.e., school districts, and public employee unions, i.e., a teachers' association. As such, the ability to assert §105(1)(e) is limited to those situations in which a public body is discussing collective bargaining negotiations relative to a public employee union. In the circumstance described, the matter clearly did not involve collective bargaining with a union, and §105(1)(e) would not have been pertinent.

In short, it is emphasized that not all "contractual issues" may validly be discussed in executive session. In this instance, again, I do not believe that there would have been any basis for conducting an executive session.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1121
OML-AO-2973

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 23, 1998

Ms. Francine Jakob
[redacted]

The staff of the Committee on 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. Jakob:

I have received your letter of November 30 and appreciate your kind words. You have raised issues relating to compliance with the Freedom of Information and Open Meetings Law by the Town of Tuscarora.

You wrote initially about difficulty in obtaining a tentative budget. In this regard, I believe that the tentative budget must be disclosed in great measure, if not in its entirety. 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 is the provision to which you alluded, §87(2)(g), which deals with what might be characterized as internal documents. While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, §87(2)(g) permits am agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

In short, to the extent that the tentative budget consists of "statistical or factual information," i.e., numbers, I believe that it must be disclosed. On the other hand, if it contains narrative expressions of opinion, recommendation or justification, for example, those portions may be withheld.

As you may be aware, following a review and alteration of the tentative budget by a town board, that document becomes the preliminary budget. I note, too, that §106(4) of the Town Law provides that "[t]he preliminary budget shall be filed in the office of the town clerk and the town clerk shall reproduce for public distribution as many copies as the town board may direct." In addition, the town board must hold a public hearing on the preliminary budget in accordance with §108 of the Town Law. That statute, in consideration of your inquiry, states in relevant part that:

> "Notice of such public hearing shall be published at least once in the official newspaper, or if no official newspaper has been designated, in any newspaper having general circulation in the town....The notice of hearing shall state the time when and the place where the public hearing will be held, the purpose thereof and that a copy of the preliminary budget is available at the office of the town clerk where it may be inspected by any interested person during office hours...The town clerk shall cause a copy of the notice to be posted on the signboard of the town, maintained pursuant to subdivision six of section thirty of this chapter, not later than five days before the day designated for such hearing...."

Section 87(2)(g) would also govern rights of access to a tentative amendment of a town law. If indeed a proposal is preliminary and has not yet been disclosed at or through discussions at one or more open meetings, I do not believe that the Town would be required to disclose the record in question. If, however, discussion of the matter in public has resulted in a disclosure of the proposal, I believe that the record containing the proposal would be accessible, for the Board would have effectively waived its ability to deny access. Further, if a proposed local law is the subject of a public hearing, the text of the proposed law must generally be disclosed prior to the hearing.

You also complained that records available from a court were made available by the Town only after certain portions of the records were deleted. From my perspective, if a record is available in its entirety from a court, a duplicate of the same record maintained by a municipality would be equally available.

Next, you indicated that minutes of meetings were not accurate or did not reflect what was said at a meeting. Here I direct your attention to the Open Meetings Law. Section 106 pertains to

minutes, and subdivision (1) provides what might be viewed as minimum requirements concerning the contents of minutes. Specifically, that provision 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 minutes need not consist of a verbatim account of what is said at a meeting or that they include reference to each comment made during a meeting. So long as the minutes consist of "a record or summary" of the items required to be included in the minutes, the Board, in my opinion, would be complying with law.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Garry Payne-Coykendall, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2974

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December 28, 1998

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 November 30. You wrote that you are "confused as to what rules and regulations the Lynbrook BID must follow" and asked whether it is subject to the Open Meetings Law.

In this regard, the statutes concerning the creation and functions of business improvement districts are found in Article 19-A of the General Municipal Law, §§980 and 980-a through 980-p. Having reviewed those provisions, I do not believe that business improvement districts are public bodies; rather they are geographical areas in which business districts are located within municipalities. Other than district management associations, which will be discussed later, Article 19-A did not create any new governing body to operate those districts. Section 980-c specifies that a local legislative body has various powers with respect to districts and the meetings of those entities, the local legislative bodies, would be subject to the Open Meetings Law.

It is unlikely in my view that district management associations created by §980-m of the General Municipal Law would be subject to the Open Meetings Law. That statute applies to public bodies, and §102(2) of that statute defines "public body" to mean:

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

It is noted that judicial decisions indicate generally that entities, such as citizens advisory bodies, having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a government function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS2d 373, 374, 151 AD2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD2d 65, 67 (1989); see also New York Public Interest Research Croup v. Governor's Advisory Commission, 507 NYS2d 798, aff'd with no opinion, 135 AD2d 1149, motion for leave to appeal denied, 71 NY2d 964 (1988)]. Assuming that the associations have no authority to take binding action on behalf of governmental entities, I do not believe that they would constitute public bodies.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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December 28, 1998

Ms. Jill A. Anderson
[redacted]

The staff of the Committee on 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. Anderson:

As you are aware, I have received your letter of December 2. In your capacity as a member of the Springs Board of Education, you indicated that the Board has scheduled a "retreat". In addition, attached to your letter is a document entitled "Programmatic Goals" that includes a variety of items that may be considered at the retreat. It is your view that since "no public will be allowed", those items "are not appropriate for a retreat."

I fully agree with your contention. In this regard, I offer the following comments.

First, §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 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 will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

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. In my view, the issues under consideration described in the document that you forwarded clearly involved matters of public business. Consequently, despite its characterization as a "retreat", I believe that the planned gathering would constitute a "meeting" that must be held in accordance with the requirements of the Open Meetings Law.

Second, based on the descriptions of the topics to be considered, I believe that those matters must be discussed in public.

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. From my perspective, each of the subjects listed under the heading of "Programmatic Goals" represents consideration of school policy. None of the grounds for entry into executive session would be pertinent to those subjects, which, must, in my view, be discussed in public, during open meetings.

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
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December 28, 1998

Ms. Carol Perry
[redacted]

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

Dear Ms. Perry:

I have received your letter of December 4 and the materials attached to it. You have sought an opinion relating to an appeal involving rights of access to a loan application submitted to the Malone Economic Development Corporation ("MEDCO"), MEDCO's two approval letters concerning the loan, a letter sent by MEDCO rescinding the first loan approval, and the minutes of meetings during which the actions relating to the loan were taken. MEDCO's attorney has contended that the "application contains private information which is confidential and proprietary." The loan was sought by the owner of a wine and liquor store.

In this regard, in our initial communication on the subject, reference was made to and reliance placed upon the decision rendered by the Court of Appeals in Buffalo News, Inc. v. Buffalo Enterprise Development Corp. [84 NY2d 488 (1994)]. While the members of the MEDCO are not at this juncture selected by government officials, MEDCO's actions, according to the regulations that you attached concerning the revolving fund that is the focal point of your request, MEDCO clearly carries out its duties for the Village of Malone. That being so, it is reiterated that MEDCO, in my view, is required to comply with the Freedom of Information Law.

Second, as I understand the matter, the records at issue have been withheld in their entirety. Here I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as

portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [87 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the New York City Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, MEDCO has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed for the purpose of identifying those portions of the records that might

fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Third, with respect to the loan application, it appears that MEDCO's attorney alluded to two of the grounds for denial. One of them, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." However, there are several judicial decisions, both New York State and federal, that pertain to records about individuals in their business or professional capacities and which indicate that those records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be

> of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of the identities of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such an unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

In this instance, although the information in question would be identifiable to a particular individual, it would pertain to his business capacity. Unlike an individual's social security number or medical records identifiable to patients, which would involve unique and personal details of people's lives, the records in question are not "personal" in my opinion; rather, again, they deal with functions carried out by an individual in a business capacity.

The other ground for denial of potential significance relates to the claim that the record contains "proprietary" information. Specifically, §87(2)(d) states that an agency may withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my view, the nature of records, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and the effect of disclosure upon the competitive position of the entity to which the records relate.

Pertinent is a decision rendered by the Court of Appeals which, for the first time, considered the phrase "substantial competitive injury" [(Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410,[(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.

> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

Disclosure of the records sought would likely have no impact on "the government's ability to obtain necessary information", for seeking a loan is purely voluntary. Further, the extent to which disclosure would cause "substantial" injury to the competitive position of a liquor store is questionable. Even if portions of the application would, if disclosed, cause "substantial injury" to the competitive position of the enterprise, the remainder should nonetheless be disclosed.

The other records that have been withheld, the approval letters and the letter rescinding the loan, would appear to be accessible under the law. In short, none of the grounds for denial appear to be pertinent.

Lastly, I believe that MEDCO's board of directors constitutes 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 the information that you have provided, MEDCO conducts public business and performs a governmental function for a public corporation, the Village of Malone.

Assuming that it is a public body, I note that the Open Meetings Law requires that minutes of meetings be prepared and made available in accordance with §106 of that statute. That section states that:

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

In view of the foregoing, I believe that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

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.

If action is taken during an executive session, records reflective of the action taken must be prepared and made available, to the extent required by the Freedom of Information Law, within one week of the executive session during which the action was taken.

Further, as you suggested, when a final action is taken by a public body, §87(3)(a) of the Freedom of Information Law requires that a record be maintained that indicates the manner in which each member cast his or her vote.

In good faith, and in an effort to enhance compliance with and understanding of the statutes at issue, copies of this opinion will be forwarded to MEDCO's director and its attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Boyce Sherwin
Brian S. Stewart

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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December 28, 1998

Mr. Daniel J. Kress
Zoning and Building Coordinator
City of Geneva
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 Mr. Kress:

I have received your memorandum of December 10. In your capacity as Zoning and Building Coordinator for the City of Geneva, you indicated that the Zoning Board of Appeals asked you to seek an opinion concerning "whether or not a Zoning Board of Appeals can go into executive session in the course of a public meeting to discuss pending litigation." Apparently the attorney for an applicant for a zoning variance contended that the Zoning Board has no right to enter into executive session.

In this regard, I offer the following comments.

First, I would conjecture that the attorney may recall an amendment to the Open Meetings Law that precludes zoning boards of appeal from deliberating toward a decision in private. By way of background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law. Stated differently, due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108(1).

Second, under the circumstances that you described, I believe that the Zoning Board could validly have conducted an executive session. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a zoning board of appeals must deliberate in public. Pertinent to the matter is §105(1)(d), which permits a public body to enter into executive session to discuss "proposed, pending or current litigation." Since the Board discussed an Article 78 proceeding in which its action was challenged, I believe that it could validly have conducted an executive session.

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

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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December 29, 1998

Mr. Stan Breite
[redacted]

The staff of the Committee on 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. Breite:

I have received your letter of December 9. You wrote that it is the "policy" of the Town Board, the Zoning Board of Appeals and the Planning Board in the Town of Rochester "to simply announce 'pending litigation' and then go into executive session." You have sought clarification concerning the "steps necessary" to enter into executive session.

In this regard, I offer the following comments.

First, §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.

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

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

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

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 Town of Rochester."

If the Board seeks to discuss its litigation strategy regarding a matter not yet in court, and if the identification of the potential adversary would disadvantage the Town, I do not believe that the identity of the adversary would have be included in the motion. In that event, it is suggested that a motion for entry into executive session indicate that the appropriate board will discuss litigation strategy in relation to a matter in which premature disclosure of the identity of the adversary would be detrimental to the interests of the Town and its residents.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Zoning Board of Appeals
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 29, 1998

Ms. Emilia Sutz
[redacted]

The staff of the Committee on 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. Sutz:

I have received your letter of December 14. In your capacity as a member of the Herricks Union Free School District Board of Education, you have sought clarification of the requirements of the Open Meetings Law. While the facts that you described are not entirely clear, I offer the following comments.

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

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

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

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

In short, based upon the direction given by the courts, if a majority of the public body, such as a school board, gathers to conduct the business of the body, in their capacities as board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

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.

Of relevance to the duties of a school board is §108(3) of the Open Meetings Law, which exempts "matters made confidential by state or federal law" from the coverage of that statute. 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 Board or the CSE 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm