STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 2280

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January 5, 1999

Mr. Joseph L. Girardi, Ph.D.
Superintendent
Lancaster Central School District
177 Central Avenue
Lancaster, NY 14086-1897

The staff of the Committee on 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. Girardi:

I have received your thoughtful letter of December 10 in which you referred to an advisory opinion rendered at the request of Mr. Roy Schneggenburger on October 29.

In brief, based on the information that he provided, which appeared in a news article, it was advised that it was unlikely that the entirety of a certain discussion could validly have been considered during an executive session. You wrote that "[t]he purpose of that executive session was for the Board to review with Mr. Swiatek [the Board's attorney] the numerous legal issues that had been addressed in [prior] negotiations, to receive his explanation of the terms of the agreement on those issues and to allow the Board to ask questions about those matters."

From my perspective, in view of your description of the basis for conducting an executive session, the problem involved the use of terminology. In this regard, 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 Mr. Schneggenberger, §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.

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 Mr. Schneggenberger would have been accurate based on the information that he provided. 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: Roy Schneggenburger
Jeff Swiatek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2981

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January 6, 1999

Mr. Russell Kratoville
Town of Riverhead
[redacted]

The staff of the Committee 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. Kratoville:

As you are aware, I have received your letter of November 9 and the materials relating to it.

According to the correspondence, a majority of the members of the Riverhead Town Board met on November 2 at the offices of an accounting firm that prepared a draft examination concerning the operation of two departments in Town government. You wrote that the meeting was held without notice to the public, the news media or the Town Clerk, and that you asked to be present because the meeting dealt with your department and your position.

The draft indicates that the objectives of the examination involved a review of the current "personnel structure" to determine the "chain of responsibility" and whether job functions are duplicative or overlapping, to study the method and adequacy of fees, to consider internal controls in relation to fiscal program aspects of the departments and to offer recommendations to improve the operation of the departments.

You have raised questions concerning the propriety of the meeting in relation to 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, 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 Town Board gathered to discuss Town business, which appears to have been so, the gathering, in my opinion, would have constituted 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. 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, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the 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, in a discussion of positions and whether those positions should be retained, consolidated or abolished, the issues would involve the functioning of a department and the duties inherent in certain positions, irrespective of who might hold those positions. 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, 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 confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

In sum, based upon the specific language of the Open Meetings Law and its judicial interpretation, I do not believe that discussions relating to functions associated with positions, policies, fee structures, or programs could appropriately be discussed during an executive session. In my view, only to the extent that an issue focuses on a "particular person" in conjunction with one or more of the topics appearing in §105(1)(f) could an executive session properly have been held in the context of the issues that you raised.

Lastly, you wrote that you requested that you be "part of the process to determine the structure of the department [you] oversee." In my view, the extent to which you may be involved is a matter within the authority and discretion of the Board. I note, too, that the Open Meetings Law is silent with respect to participation by the public or staff. In short, while the Board could permit you to participate, I do not believe that it is required to do so.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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January 8, 1999

Mr. Glenn Burton
Town of Onondaga
Zoning Board of Appeals
4801 West Seneca Turnpike
Syracuse, NY 13215

The staff of the Committee on 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. Burton:

I have received your letter of December 2, which reached this office on December 21. You have requested materials that may be useful to members of zoning boards of appeals and asked whether a zoning board of appeals "can legally go into executive session."

In this regard, although this office does not prepare explanatory materials on the subject of your interest, I have enclosed documentation prepared by the Department of State's Division of Local Government Services that may be useful to you.

With respect to your question, I believe that a zoning board of appeals may in limited circumstances enter into executive session. 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.

Due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with

an exemption other than §108(1). Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a zoning board of appeals must conduct its business in public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 11, 1999

Hon. Lawrence L. Marmet
Richfield Town Justice
[redacted]

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

Dear Justice Marmet:

I have received your communication of December 20 in which you referred to delays in response to requests for records of the Town of Richfield and constructive denials of access by the Town.

In this regard, I offer the following comments.

First, in general, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a public official should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a member of the board or other officer such as yourself acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some additional right conferred by means of law or rule. In such a case, a public officer seeking records could presumably be treated in the same manner as the public generally.

Second, as you are aware, 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.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...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 objectives 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" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "within thirty days" or some other particular period, following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, thirty days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and

can be found easily, there would appear to be no rational basis for delaying disclosure for as much as thirty days. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

Lastly, since you referred to minutes of Town Board meetings, I point out that subdivision (3) of §106 of the Open Meetings Law states that:

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

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

In an effort to enhance compliance with and understanding of the requirements of the Freedom of Information Law, copies of this opinion will be forwarded to the Town Board and the Town Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Hon. Monica Harris, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 13, 1999

Mr. Robert S. Thompson
Massapequa School Board 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 Mr. Thompson:

I have received your letter of December 23, as well as the materials relating to it. In your capacity as a member of the Massapequa School District Board of Education, you referred to issues involving notice of meetings.

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 the local news media and by posting notice in one or more designated locations.

Since there appears to be some question concerning whether the reference to notice being given seventy-two hours prior to a meeting a scheduled at least a week in advance is intended to mean business hours, it is clear my view that the seventy-two hour notice requirement involves real time, not business hours. In other statutes, where there is reference to a time period and there is an intent to indicate business hours, it is stated directly. For instance, in the Freedom of Information Law, several provisions specify that agencies must act within a certain number of "business days". Absent that specific direction, a time period in my opinion involves real time.

I point out, too, that the notice provisions in the Open Meetings Law merely require that notice include reference to the time and place of meetings. While a public body may include additional information, such as an agenda or a description of topics to be considered, there is no obligation to do so imposed by the Open Meetings Law. A public body could, however, on its own initiative, require that notices of meetings include descriptive information or be transmitted to any number of persons or locations prior to 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:tt

cc: Dr. Brucia

STATE OF NEW YORK
DEPARTMENT OF STATE
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January 15, 1999

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 letter of December 23 in which you raised questions relating to the Freedom of Information and Open Meetings Laws.

You referred initially to the acknowledgement of the receipt of your request for records by Martha Krisel, Village Attorney for the Village of Rockville Centre. Although you indicated that correspondence was attached, no materials were included with your letter. Nevertheless, you asked "what legal time obligation the Village has to complete the FOIL request other than just sending an acknowledgement."

In this regard, 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.

Next, you wrote that you are "somewhat confused as to whether inter-agency and intra-agency materials are subject to disclosure under FOIL." The contents of those records determine the extent to which they must be disclosed. Specifically, §87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

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

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

Lastly, "when a quorum of the Board is present for a political meeting and a notice is given for that meeting", you asked whether "that then constitute[s] a public Village meeting necessitating the minutes to be included with the official Village minutes and approved at a subsequent meeting."

"Political" meetings are generally outside the scope of the Open Meetings Law and the requirements imposed by that statute relating to minutes. Section 108 of the Open Meetings Law exempts from its provisions "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

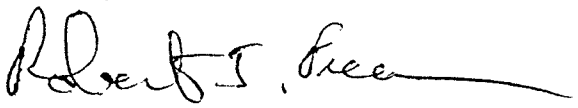
> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or the legislative body of a county, city, town or village, who are members or adherents of the same political party, 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, in general, either the majority or minority party members of a legislative body may conduct closed political caucuses, either during or separate from meetings of the public body.

It is also noted that, even when the Open Meetings Law clearly applies, there is no requirement see 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 in accordance with §106 (3), and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Martha Krisel, Village Attorney

STATE OF NEW YORK
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OML-AO-2986

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January 15, 1999

Legislator James McMahon
Oswego County Legislator
[redacted]

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

Dear Legislator McMahon:

I have received your letter of December 28. In your capacity as a member of the Oswego County Legislature, you questioned "the legality of phone polls conducted by many of the committees of the...Legislature..."

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 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 carried out at a meeting during which a quorum has physically convened. It is noted that 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)].

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

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 quorum has convened. A quorum of a committee would be a majority of its total membership.

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.

Last but perhaps most importantly, a recent judicial decision, the first dealing with the issue, reached the same conclusion as offered here and cited an opinion rendered by this office. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), the court stated that:

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102[1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions to invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner was formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that

> telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

In sum, I do not believe that a public body may validly conduct a meeting or take action by means of a conference call or a series of calls among the members.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Oswego County Attorney

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January 20, 1999

Ms. Susan Beckley
[redacted]

The staff of the Committee 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. Beckley:

As we discussed, I have received your email letter of January 6 and will treat it as a request for an advisory opinion. You referred to the practice of the Trumansburg Board of Education of conducting executive sessions prior to meetings. You also questioned whether the subject of executive sessions described merely as "personnel issues" is adequate to comply with law.

In this regard, I offer the following comments.

By way of background, it is emphasized at the outset that the Open Meetings Law 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 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 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.

With specific respect to your first question, 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, 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.

With regard to the second area of contention, as indicated earlier, a motion for entry into executive session must include reference to the subject or subjects to be discussed. Here I note that although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

> "...the medical, financial, credit or employment history of a 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 issues" 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 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
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January 22, 1999

Ms. Jean M. Baric
[redacted]

The staff of the Committee 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. Baric:

As you are aware, I have received your letters of January 8 and 18. In short, you have questioned the propriety of a meeting held by the Penfield Town Board, a portion of which was closed to the public, and the ability of the Board to take action during an executive session. In addition, you indicated by phone that the Town has delayed disclosure of minutes of meetings.

In this regard, despite your description of the matter and the receipt of materials from the Town, the specifics of the discussion held in private are not entirely clear. As such, in the following commentary, I will attempt to provide general guidance concerning the operation of the Open Meetings Law as it relates to the issues that you raised.

First, from my perspective, part of the difficulty frequently involves terminology, and it is noted that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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

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, 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.

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 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.

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; 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.

In a somewhat relate vein, I point out that the Open Meetings Law is permissive; while a public may have the ability to discuss an issue in private, there is no obligation to do so. Consequently, even if there is a basis for consideration of an issue in executive session, a public body may choose to discuss it in public. Further, if a motion to enter into executive session is not approved by a majority vote of its total membership, a public body would either table the matter or discuss the issue in public. Similarly, even though there may be an attorney-client communication, the client, i.e., the Board, may waive the privilege, and there are numerous instances in which a public body, during a meeting, will seek the opinion of its attorney in full view of the public.

Second, §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."

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

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 one or two weeks, as appropriate, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

I hope that the foregoing serves to clarify your understanding of the Open Meetings Law and that I have been of assistance. In an effort to enhance compliance with the Open Meetings Law, a copy of this opinion will be sent to the Town Board.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 26, 1999

Hon. Victor K. Hamilton II
Councilman
Town of Bath
[redacted]

The staff of the Committee on 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 Hamilton:

I have received your letter of January 5. In your capacity as a member of the Bath Town Board, you described a situation in which an employee of the Town accused of misconduct reached an agreement with the Town prior to any determination of charges that you prepared against him. Since the matter was considered in executive session, you asked whether there are "criteria, law, regulation, etc...stating what **must** be kept in executive session and is illegal to release to the public" (emphasis yours).

In this regard, I offer the following comments.

First, I note that the Open Meetings Law is permissive. Although a public body **may** enter into an executive session in accordance with the provisions of §105(1) of the Law, there is no obligation to do so. Therefore, even when there is a valid basis for discussing an issue during an executive session, a public body is not required to consider the matter in private.

Moreover, in a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In my opinion, although information may be obtained during an executive session properly held, a claim of confidentiality can only be based upon a statute that specifically confers or requires confidentiality. Unless a statute prohibits disclosure, I know of no law that would preclude a member of a public body from disclosing information acquired during an executive session.

While there may be no prohibition against disclosure of information acquired during executive sessions withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Inappropriate disclosures could work against the interests of a public body as a whole and the public generally. The unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

Historically, I believe that public bodies were created in order to reach collective determinations, determinations that better reflect various interests within a community than a single decision maker could reach alone. Members of boards need not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus of the majority of a public body should in my opinion generally be recognized and honored by those members who may dissent. Disclosures made contrary to or in the absence of consent by the majority could result the revelation of litigation strategy, in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations; even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

In the context of the situation that you described, while I believe that the terms of the agreement between the employee and the Town must be disclosed, charges or allegations that were never formally proven, in my opinion, may be withheld. Here I direct your attention to the Freedom of Information Law, which pertains to access to records and states, in part, that an agency may withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)].

Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute

an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

If there was no determination to the effect that the employee engaged in misconduct, I believe that a denial of access to the charges based upon considerations of privacy would be consistent with law. Nevertheless, there are several decisions indicating that the terms of settlement agreements reached in lieu of disciplinary proceedings must generally be disclosed [see Geneva Printing, supra; Western Suffolk BOCES v. Bay Shore Union Free School District, Appellate Division, Second Department, NYLJ, May 22, 1998, ___ AD2d ___; Anonymous v. Board of Education for Mexico Central School District, 616 NYS2d 867 (1994); and Paul Smith's College of Arts and Science v. Cuomo, 589 NYS2d 106, 186 AD2d 888 (1992)].

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
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January 29, 1999

Mr. Steven L. Fornal
[redacted]

The staff of the Committee on 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. Fornal:

I have received your letter of January 11 and the materials relating to it. In brief, it is your belief that a portion of a tape recording of a meeting of the Town of Rochester Planning Board was erased, and you have sought my views on the matter.

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

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

Based on the foregoing, when a public body prepares or maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

Second, of possible relevance to the matter is the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

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

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. I note that the provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration, which has developed schedules that indicate

minimum retention periods for various records. I believe that tape recordings and notes of meetings must be retained for a minimum of four months.

Third, and this is not to suggest that they apply, of potential significance are §240.65 of the Penal Law and its companion, §89(8) of the Freedom of Information Law (which is Article 6 of the Public Officers Law). The former states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. If there is a belief that the provisions referenced above apply, it is suggested that you contact the appropriate law enforcement agencies.

Lastly, in the correspondence attached to your letter, you referred to "the right of any citizen of the United States to speak anywhere they want to; a right protected by the U.S. Constitution." 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, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, in my opinion, there is no constitutional right to attend or speak at 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, a public body, in my view, is not required to permit the public to do so during meetings. A public body may choose to 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board
Town Board

STATE OF NEW YORK
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February 1, 1999

Brian F. Howard, Ed.D.
Superintendent of Schools
Liberty Central School District
115 Buckley Street
Liberty, NY 12754

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

Dear Dr. Howard:

I have received your letter of January 20. You have asked whether "a member of the Board of Education or a minority of the Board of Education [can] add comments or notes to the minutes."

In this regard, I offer the following comments.

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

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

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

Based on the foregoing, minutes need not consist of a verbatim account of everything said at a meeting; 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.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether to record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181). From my perspective, a board of education, like other public bodies, functions by means of action taken by a majority vote of its total membership. Pertinent is §41 of the General Construction Law, entitled "Quorum and majority", which states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or 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, 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, for example, the Board in your district consists of seven members, four affirmative votes would be required to take action.

In the context of your question, I do not believe that a single member or a minority of members could insist or require that their comments or opinions be included in minutes; those additions would be required to be included only following an approval to do so by means of an affirmative vote by a majority of the Board's total membership.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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February 1, 1999

Ms. Donna Patterson
[redacted]

The staff of the Committee on 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. Patterson:

As you are aware, I have received your letter of January 20. According to your letter and the materials attached to it, the Board of Education of the Ellenville Central School District provides notices of its meetings indicating that the meetings will begin at a certain time, but the meetings actually begin prior to the time stated.

In this regard, I offer the following comments.

By way of background, it is emphasized at the outset that the Open Meetings Law 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 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 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.

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, 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.

As indicated earlier, a motion for entry into executive session must include reference to the subject or subjects to be discussed. Since the minutes that you attached refer to "specific personnel", I note that although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise, and may relate to matters that are unrelated to personnel. 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 issues" is inadequate, and that the motion should be based upon the 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)]

The minutes also refer to "special education." Insofar as the Board's discussion involves a matter that could render a student's identity easily traceable, I believe that the matter may be discussed in private, not necessarily in an executive session, but rather outside the coverage of the Open Meetings Law. Relevant in that situation would be §108(3), which exempts from the Open Meetings Law:

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

Here I direct your attention to the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and the regulations promulgated pursuant to FERPA by the U.S. Department of Education. In brief, FERPA applies to all educational agencies or institutions that participate in funding or grant programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over, a so-called "eligible student", similarly waives his or her right to confidentiality. The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;

(b) The name of the student's parents or other family member;
(c) The address of the student or student's family;
(d) A personal identifier, such as the student's social security number or student number;
(e) A list of personal characteristics that would make the student's identity easily traceable; or
(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, disclosure of students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law. Further, the term disclosure is defined in the regulations to mean:

> "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means."

In consideration of FERPA, if the 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Peter J. Ferrara, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 2, 1999

Mr. Terry Wilbert
[redacted]

The staff of the Committee on 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. Wilbert:

I have received your letter of January 17 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, "it would appear that the Albion Central School District School Board had a meeting prior to the regularly scheduled public meeting in July." You wrote that the Board discussed possible candidates for president and vice president and indicated that those interested in those positions "were asked to discuss their ideas for the office and what they hoped to accomplish if elected to the office." You added that after "this private meeting, the Board of education swore in its new members and proceeded to nominate, in public, people for these same offices", and that even though more than one candidate had been nominated for president, "only one candidate was nominated for each position in the public session."

In this regard, I offer the following comments.

First, by way of background, it is emphasized at the outset that the Open Meetings Law 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 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 have constituted 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.

It is also 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 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 conduct or 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.

Second, in my opinion, discussions regarding the election of officers would not have fallen within any of the grounds for entry into executive session. The only provision that appears to be relevant, §105(1)(f), permits a public body to conduct an executive session to discuss:

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

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 not among them.

Third, with respect to the absence of any record indicating how the members voted at the closed session, I point out in passing 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. 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, none of which would have been present in the situation in question.

With regard to information indicating 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)].

Further, there is case law dealing with the notion a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education, 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).

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

With respect to the enforcement of the Open Meetings Law, §107(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."

It is noted that the time for initiating a proceeding under Article 78 expires four months after the date of an agency's final determination. Since the meeting in question was held in July, it appears that the statute of limitations would preclude any meaningful action that might otherwise have been taken. However, in an effort to enhance compliance with and understanding of applicable statutes, 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
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February 4, 1999

Mr. John L. Graham
[redacted]

The staff of the Committee on 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. Graham:

I have received your letter of January 29 in which you sought an opinion concerning the Open Meetings Law.

According to your letter, the Richmondville Town Board received a petition from residents who requested that a water district be formed, and the Board held a public hearing in response. Following the hearing, "the town board went into executive session to review among themselves the four (4) areas that they must address by resolution pursuant to article 194 of town law." You indicated that, following the executive session, the Town Attorney announced that the Board needed more time to review the four areas.

From my perspective, it is unlikely that there would have been any basis for entry into executive session. However, there may have been a different ground for conducting a portion or portions of the meeting in private. In this regard, I offer the following comments.

First, §194 of the Town Law, entitled "Establishment or extension of districts", states in subdivision (1) that:

> "After a hearing held upon notice as hereinafter provided and upon the evidence given thereat, the town board shall determine by resolution:
>
> (a) whether the petition is signed and acknowledge or proved as required by law and is otherwise sufficient;
>
> (b) whether all the property and property owners within the proposed district or extension are benefited thereby;

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

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

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

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

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 a new topic 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.

In consideration of §194 the Town Law, whether a petition was prepared in a manner consistent with law might involve a legal opinion; whether it is "in the public interest" to grant the petition might have involved the rendition of legal advice by the Town Attorney. If indeed legal advice was sought and given, to that extent, it appears that the discussion might have been exempt from the coverage of the Open Meetings Law.

The other two areas of inquiry under §194 would not appear to involve legal interpretation. If that is so, there would have been no basis for closing the meeting to consider those matters.

> (c) whether all the property and property owners benefited are included within the limits of the proposed district or extension;
>
> (d) whether it is in the public interest to grant in whole or in part the relief sought."

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.

In the context of your inquiry and a review of §194 of the Town Law, I do not believe that any of the grounds for entry into executive session would have been pertinent or applicable.

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

Of possible relevance to the matter is §108(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.

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 review the grounds for entry into executive session and question the propriety of such a session. In this instance, again, I do not believe that there would have been any basis for entry into executive session. For reasons also discussed, however, there might have been a basis for asserting the attorney-client privilege, but that possibility was neither indicated nor expressed. It has been 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

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
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February 8, 1999

Mr. Steven L. Fornal
[redacted]

The staff of the Committee on 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. Fornal:

I have received your letter of January 27. While some of the issues that you raised were considered in the opinion addressed to you on January 29, for purposes of clarity, I offer the following remarks.

First, you wrote that the Chairman of the Town of Rochester Planning Board stated, in your words, that "by law -- the town planning board is required to keep stenographic notes and the approved/accepted minutes as the official record." In this regard, I know of no law that requires that a planning board or any public body maintain stenographic notes of meetings. In general, the "official record" of a meeting, the information to be memorialized and kept permanently, would be the minutes.

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

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

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

Based upon the foregoing, minutes must be prepared and made available within two weeks, and it is clear that minutes need not consist of a verbatim account of every comment that was made.

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

Second, for reasons discussed in the earlier correspondence, a tape recording of a meeting constitutes a "record" that falls within the coverage of the Freedom of Information Law. Whether it is characterized as "official" has no bearing on its status under that statute; it is a record subject to rights of public access.

Lastly, since the Chairman apparently recommended that rules be adopted to state that "the tape recorder may be turned off during meetings", again, there is no law of which I am aware that requires that meetings be tape recorded in whole or in part. However, I note that judicial decisions indicate that any person present at a meeting, i.e., any member of the public, may use his or her own device to record an open meeting, so long its use is not disruptive [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Peloquin v. Arsenault, 616 NYS 2d 716 (1994); and People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board

STATE OF NEW YORK
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February 17, 1999

Mr. Francis X. Stock
First Ward Trustee
Village of Lancaster
[redacted]

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

Dear Trustee Stock:

I have received your letter of February 12 in which you sought an advisory opinion.

You indicated that you "have periodically sent the Village Board letters and have also had letters at Board meetings", but that the Board "has refused to enter [your] letters into the Village's correspondence" or to include them in minutes of meetings. You added that it is your "feeling that they do not want to accept your correspondence as official correspondence or even enter [your] statements into official Board minutes as a measure to circumvent the Freedom of Information Law." You have sought guidance concerning the requirement in relation to the foregoing.

In this regard, I offer the following comments.

First, the Freedom of Information Law does not distinguish between "official correspondence" and other correspondence. 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 language quoted above, when a letter or other item of correspondence comes into the possession of the Village, irrespective of its source, the letter or other correspondence constitutes a "record" that falls within the scope of the Freedom of Information Law. However, there is nothing in the Freedom of Information Law or any other statute of which I am aware that would require the Board of Trustees to acknowledge, "officially accept", or answer your letters or similar items of correspondence.

In short, while the items to which you referred are Village records, the Board is not obliged to take any public or official step in publicly acknowledging their receipt.

Second, with respect to reference to your comments or correspondence in minutes of meetings, I note that the Open Meetings Law contains what might be characterized as minimum requirements concerning contents of minutes. Specifically §106 (1) of the Open Meetings Law pertains to minutes of meetings of public bodies 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, minutes need not consist of a verbatim account of everything said at a meeting; 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.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether to record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181). From my perspective, a village board of trustees, like other public bodies, functions by means of action taken by a majority vote of its total membership. Pertinent is §41 of the General Construction Law, entitled "Quorum and majority", which states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or 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 on §41, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. 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, for example, the Board consists of five members, three affirmative votes would be required to take action.

In the context of your question, I do not believe that a single member or a minority of members could insist or require that their comments or letters be included in minutes; those additions would be required to be included only following an approval to do so by means of an affirmative vote by a majority of the Board's total membership.

I hope that the foregoing serves to enhance your understanding of the matter and 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, 1999

Mr. Hebert Corwin
[redacted]

The staff of the Committee on 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. Corwin:

I have received your letter February 1 in which you offered a series of allegations concerning misconduct on the part of officials of the Town of Riverhead.

In this regard, the jurisdiction of the Committee on Open Government is limited to matters involving public access to government information, primarily under the state's Freedom of Information and Open Meetings Laws. While you raised a series of concerns, the only issue that relates to areas within the expertise of this office involves the ability of the public to speak at meetings.

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., Town Law, §63], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's 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, too, 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 Town 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 or on the condition that they identify themselves. Again, however, if the Town Board by rule chooses to authorize the public to speak for a limited time, with respect only to items on an agenda, or at the end of a meeting, such a rule would in my view be valid so long as it is uniformly applied.

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-2998

41 State Street, Albany, New York 12231
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February 18, 1999

Ms. Jean M. Baric
[redacted]

Dear Ms. Baric:

I have received your memorandum of February 4 and a copy of a letter to the editor of your local newspaper sent by the Penfield Town Supervisor. You have asked that I consider whether the Supervisor, based on his comments, correctly understands the opinion addressed to you on January 22.

In the letter, Supervisor Philbrick cited the opinion rendered by this office and wrote that "the Town Board is completely within its right to privately discuss with its attorney behind closed doors any issue that has a history of litigation and may possibly lead to future litigation."

Since I cannot know whether the Supervisor understands the opinion, I would like to offer a brief rendition of the advice offered to you last month.

First, the ability to conduct an executive session to discuss litigation is limited to the consideration of litigation strategy. Therefore, if a topic is the subject of possible litigation, and the Town Board is not discussing litigation strategy in relation to that topic, there would be no basis for entry into litigation.

Second, notwithstanding the foregoing, and even though there may be no basis for entry into executive session, the Board may seek and obtain the legal advice of its attorney in private pursuant to an assertion of the attorney-client privilege, which would remove that communication from the coverage of the Open Meetings Law. This is not to suggest that every communication between the Board and its attorney is subject to the attorney-client privilege and, therefore, exempt from the Open Meetings Law. If, for instance, the Board asks the attorney whether it is likely to snow, the answer does not involve legal expertise, and there would be no attorney-client relationship. However, if the Board seeks a legal opinion from its attorney acting in his or her capacity as attorney for the Town, the communication could be accomplished outside the coverage of the Open Meetings Law. I am not suggesting that such a communication *must* occur in private; public bodies frequently seek the

legal opinions of their attorneys during open meetings. I am suggesting though that the client, the Town Board, *may* in my view choose to seek and obtain legal advice from its attorney in private, even if none of the grounds for entry into executive session would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Channing Philbrick, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2999

41 State Street, Albany, New York 12231
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February 26, 1999

Mr. Thomas J. Walsh
[redacted]

The staff of the Committee on 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. Walsh:

I have received your letter of February 11. You have sought an opinion concerning a failure on the part of the Hicksville School District's Finance/Facilities Committee to include in its notice an agenda or identification of the topics to be considered.

In this regard, the Open Meetings Law requires that a public body provide notice prior to a meeting indicating the time and place of the meeting. Specifically, §104 of that statute provides that:

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

Based on the foregoing, the Open Meetings Law does not require that notice given prior to a meeting include an indication of the subjects to be discussed. Further, neither the Open Meetings Law nor any other statute requires the preparation of agendas.

In my view, the only circumstance in which a public body must disclose an agenda or an indication of the subjects to be considered with notice of a meeting would involve a situation in which the public body has, by means of its own rule or policy, adopted such a requirement.

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: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3000

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February 26, 1999

Ms. Georgia Svolos
Coalition for Creative Solutions
[redacted]

The staff of the Committee on 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. Svolos:

I have received your letter of February 12 in which you sought an advisory opinion concerning what you characterized as "certain abuses of open government" in the City of Peekskill.

You referred initially to a situation in which an individual "was denied access to the City Council's working meeting, and when he pressed his right to attend, the meeting went into executive session." In this regard, there is no legal distinction between a "working meeting" and a formal or official 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.

Further, a public body cannot conduct an executive session to discuss the subject of its choice; §105(1) of the Open Meetings Law specifies and limits the subjects that may properly be considered during an executive session.

Next, you referred to situations in which you sought to attend a "scheduled work session meeting" but "found that it had been held at an earlier time." Since a "working meeting" is subject to the Open Meetings Law, it must be preceded by notice. Section 104 of that statute provides that:

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

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

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

I note 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.

You indicated that you have also experienced difficulty in obtaining records, particularly crime statistics and those relating to the renovation of a named facility. Specifically, you wrote that:

> "We have been trying for three months to obtain via the filing of an FOI, the original application from the Peekskill Housing Authority for money from HUD for installation of surveillance cameras. We have been sent from the Housing Authority to City Hall and from City Hall back to the Housing Authority with detours to the Police Department, with no visible result."

In my view, both the City and the Authority are required to comply with the Freedom of Information Law, and each has an obligation to respond to requests for records in their custody. I point out by way of background that the Freedom of Information Law is applicable to agency records and that §86(3) of the Law defines the term "agency" to include:

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

The Kiley Center is operated by the City of Peekskill Civic Center Authority, which, according to §2073 of the Public Authorities Law, is a public benefit corporation. Since a public benefit corporation is an "agency" subject to the Freedom of Information Law, it would be required to comply with that statute.

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

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

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

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

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

Lastly, you complained concerning "the continual refusal on the part of City government to place items on its agenda that [you] have asked them to consider..." In short, I know of no law that would require the City to place items on its agenda or to consider issues pursuant to your request that it do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council, City of Peekskill
Board of Directors, Peekskill Civic Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3001

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February 26, 1999

Ms. Joan Eustace-Reeverts
[redacted]

The staff of the Committee on 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. Eustace-Reeverts:

I have received your letter of February 16 in which you raised a series of questions concerning the disclosure of information by Erie Community College.

The initial area of inquiry involves your efforts in obtaining notes of interviews pertaining to you. In this regard, in view of the delays that you have encountered, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

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

Relevant with respect to access to the notes is §87 (2)(g), which states that an agency may withhold records that:

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

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

In short, insofar as the notes consist of factual information, I believe that they must be disclosed; insofar as they include the interviewer's opinions or recommendations, I believe they may be withheld.

A second area of inquiry pertains to the contents of minutes of meetings of the Executive Committee of the Board of Trustees. In this regard, §106(1) of the Open Meetings Law provides direction concerning the contents 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."

In a decision that may be pertinent to the matter, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the precise nature of the Board's action.

With respect to minutes of executive sessions, the remainder of §106 of the Open Meetings Law provides 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."

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

It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, even when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have include reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)].

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)], 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)].

Lastly, you expressed an understanding that :

> "if an employee is going to be discussed in 'executive session' that the employee must be given 48 hours advance notice, and the employee has the right to move it to an 'open session' and that the decision is strictly up to the employee not the employer, and the employee has a right to counsel."

I believe that your understanding is inaccurate. There is nothing in the open Meetings Law that requires that an employee be given notice that he or she will be discussed during an executive

session. Further, the subject of the discussion has no control over whether the discussion is held in public or in private based on the provision of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Darley Willis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3002

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March 1, 1999

Ms. Louise B. Vandemark
[redacted]

The staff of the Committee on 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. Vandemark:

I have received your letter of February 15 in which you sought an opinion concerning "legality of a meeting held by the Town of Deerpark Town Council on February 8, 1999."

According to your letter:

> "That meeting was scheduled and announced at a regularly scheduled meeting of the Council on February 1. The stated purpose of the meeting was to conduct interviews for positions on the town Cable Commission. The public and members of the press were present at the February 1 meeting. No further notice of the February 8 meeting was given. No formal notice was sent to the press and it was not posted on the bulletin board in Town Hall."

The requirements concerning notice of meetings are found in §104 of the Open Meetings Law, which provides that:

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

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

If it was known that a member of the news media was present at the meeting of February 1, and if notice of the time and place of the meeting of February 8 was announced then, I believe that the portion of the notice requirements that the news media be given notice would have been satisfied. However, notice must also be posted, and if the Town Board failed to post notice pertaining to the meeting of February 8, I believe that it would have failed to have fully complied with the requirements imposed by the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 8, 1999

Mr. James M. Dee
[redacted]

The staff of the Committee 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. Dee:

I have received your letter of February 23 in which you sought an advisory opinion concerning the Open Meetings and Freedom of Information Laws.

According to your letter, at a recent meeting held to elect officers, the Board of the Tonawanda Housing Authority voted by secret ballot. You wrote that the public was not given the opportunity to review the ballots, and that "[n]o record exists as to how individual members voted."

In this regard, as you may be aware, I was contacted by phone concerning the issue that you have presented, and I believe that the matter has been resolved. However, for purposes of clarity, I offer the following comments.

First, the Tonawanda Housing Authority was created pursuant to §412 of the Public Housing Law and, as a public authority constituting "a body corporate and politic", I believe that it is an "agency" and a "public body" for purposes of the Freedom of Information and Open Meetings Laws [see respectively, Public Officers Law, §§86(3) and 102(2)].

With regard to the members' votes, I direct your attention initially 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", a record must be prepared that indicates the manner in which each member who voted case his or her vote. Ordinarily, records of votes will appear in minutes.

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

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

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

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

Based on a discussion with Ms. Meadows, the Board's attorney, the matter has been rectified, and I believe that a record of votes likely now appears in minutes of the meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Directors, Tonawanda Housing Authority
S. Meadows, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 8, 1999

Mr. Robert Bossi, Jr.
[redacted]

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

Dear Mr. Bossi:

I have received your letter of February 24, as well as the materials attached to it. In brief, you criticized the Poughkeepsie Common Council relative to a series of executive sessions held in relation to the City's efforts to develop its waterfront.

In this regard, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted upon to the public except to the extent that there may be a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may properly be considered during an executive session.

From my perspective, it is likely that two of the grounds for entry into executive session would be pertinent to the issue under consideration.

Section 105(1)(h) permits a public body to enter into executive session to discuss:

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

In my opinion, the 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 or business entity, 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.

In some circumstances, if the general public is aware of the location of a parcel under consideration for a proposed transaction, public discussion by a public body may have little or no impact on the value of the parcel. However, in others, 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 on the value "would be substantial" (as opposed to minimal or possible), an executive session could, to that extent, be properly held.

Without additional knowledge of the facts and the nature of the discussions held in private, it is difficult to conjecture as to the extent to which §105(1)(h) could properly have been asserted.

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 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, insofar as the Common Council discussed the financial, credit or employment history of a particular person or corporation, I believe that it could validly have held executive sessions.

Since you indicated that "no public record exists" regarding many of the meetings held by the Common Council, I note that it is unlikely that minutes would have been required concerning those meetings. Section 106 of the Open Meetings Law pertains to minutes and contains what might be characterized as minimum requirements concerning the contents of minutes. The cited provision states that:

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

Based on the foregoing, with respect to open meetings, unless there were motions, proposals, resolutions or action taken, there would have been no requirement to prepare minutes. Similarly, if an issue is discussed in executive session and no action is taken, there is no obligation to prepare minutes of the executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 8, 1999

Ms. Susan Edelman
New York Post
1211 Avenue of the Americas
New York, NY 10036-8790

The staff of the Committee 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. Edelman:

As we discussed, you have requested an advisory opinion concerning the implementation of the Open Meetings Law by the New York City Board of Education.

By way of background, with a letter of November 9, you included copies of minutes of executive sessions held by the Board over a period of months and asked that I review them "to determine any possible violations of the state's Open Meetings Law." Soon thereafter, during a series of telephone conversations, I offered my perspective regarding the propriety of executive sessions held by the Board, and those comments were reported in an article that you prepared and which was published on November 30. Since the publication of that article, there has been correspondence between myself and the former Counsel to the Board of Education in an effort to exchange information and points of view. Although I offered to meet with Board officials to discuss the propriety of executive sessions referenced in the minutes, they refused to do so unless our communications were conducted in private and kept confidential. Since you requested a written advisory opinion, it was and continues to be my belief that an opinion could not be prepared in conjunction with a promise of secrecy.

Because Board officials have rejected my offer to discuss the matter in a way that would not breach what I consider to be valid concerns regarding confidentiality, you have sought a written opinion for the purpose of obtaining my views concerning the proper scope of executive sessions held under the Open Meetings Law.

Without having been present at the executive sessions, it is difficult in some situations to ascertain the extent to which executive sessions might validly have been held. Nevertheless, on the basis of the minutes of executive sessions, I believe that numerous discussions held by the Board of Education in private should have occurred during open meetings.

The minutes include reference to subjects discussed under specific headings that were used repeatedly. The use of those headings or phrases in many instances appears to be based upon the belief that they justified the holding of executive sessions. In my view, the repeated use of those phrases suggests a lack of understanding of 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, such as the Board of Education, must be conducted open to the public unless there is a basis for entry into an executive session. Section 105(1) of the Open Meetings Law prescribes a procedure that must be followed by a public body before an executive session may be held. Specifically, that provision states that:

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

The ensuing provisions in §105(1), paragraphs (a) through (h), specify and limit the subjects that may property be considered during an executive session. As such, a public body may not conduct an executive session to discuss the subject of its choice or merely because an issue is controversial or contentious.

One of the recurring topics identified for consideration in executive session involves "legislative disputes", or matters similarly described. Legislation obviously deals with a law, and a law represents a "legal matter." However, there is no basis for entry into executive session to discuss laws or legal matters or disputes generally, whether they relate to legislation or otherwise. In several instances, as I understand the minutes, the Board's lobbyist discussed a variety of issues with the Board relating to legislation. I an unaware of whether the lobbyist is an attorney. However, in that person's capacity as lobbyist, irrespective of his status as an attorney, I do not believe that he would be carrying out the functions of an attorney. I believe that discussions regarding legislation primarily involve matters of public policy that would not constitute valid subjects for consideration in executive session.

An example of "legislative dispute" considered in executive session which in my view should have been discussed in public states as follows:

> "Board Member Lerner, Chair of the Board's Legislative Subcommittee, and Steve Allinger presented on the principal tenure draft legislative agenda language."

That kind of issue, from my perspective, would not have approached any of the grounds for entry into executive session.

Another heading that appears in virtually every set of minutes of executive session is "Pending/Proposed Litigation." As I understand the materials, there were numerous situations in

which issues discussed related to matters that might possibly result in litigation or which related to pending litigation. Based on judicial decisions, however, unless a discussion involved the Board's "litigation strategy", I do not believe that there would have been a basis for entry into 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", and 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. Additionally, the mere threat or possibility that litigation might be initiated would not itself constitute a valid basis for entry into an executive session.

There are several examples of situations in which "Pending/Proposed Litigation" was cited where it is doubtful that any ground for entry into executive session would have been applicable or pertinent. For instance, one of the subjects considered in executive session under that heading states as follows:

> "The Chancellor and Deputy Chancellor Spencer advised the Members of the proposed job description and responsibilities of the Borough Deputy position advising that the draft job description had been circulated to all Borough Presidents. Although a resolution pertaining to this matter will be acted upon in March, the Members agreed that informal implementation of the selection of individuals should begin."

Another involved:

> "...an update on a grant District 18 received from the federal government regarding an abstinence only curriculum."

Still another states that:

> "Board Member Gresser, Chair of the Parent Involvement Subcommittee, provided an update on the Subcommittee's activities regarding the revision of the 'Blue Book' and the Board's current policy concerning the definition of a parent as it relates to participation on parent associations."

The foregoing represent three among numerous examples in which the discussions did not apparently involve any consideration of litigation strategy or any other matter for which an executive session would have been justifiably held. In my view, a discussion of legal issues, perhaps in relation to legislation or policy, is separate from consideration by the Board of its litigation strategy; only to the extent that litigation strategy is discussed would executive sessions have been proper and held in accordance with §105(1)(d).

Another term that has been repeated in the minutes as an apparent justification for entry into executive session is the word "particular." The term appears only once in the Open Meetings 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..."

An example of what I believe to be a misuse of the term "particular" as a means of holding an executive session involved "Matters Pertaining to a Particular Entity", and the minutes state that:

> "Beverly Donohue advised the Members of the basis for the recommendation that the Board transfer five million dollars from the Board's budget to the School Construction Authority budget for emergency repairs of school buildings. The Members were assured that the Division of School Facilities personnel would supervise the projects and that the Members would be advised of the school buildings to be repaired."

Another related to "Matters Pertaining to a Particular Agreement." With respect to that reference, the minutes state that:

> "Len Davis, Auditor General advised that the State has agreed to accept an opinion from KPMG which 'certifies' the community school districts' financial audits. A written agreement is being finalized and will be provided to the Board.
>
> "Mr. Davis addressed the Members' concerns that the RFP process be reopened to encourage greater competition, advising that he will do

> an evaluation of the work that has to be performed and will report on the advisability of a new RFP by September 11, 1998.'

Based upon the descriptions of the subjects discussed, none of the grounds for entry into executive session would have applied, even though they related to a "particular" entity or agreement.

It is also noted that §105(1)(f) has been construed, as it relates to individuals, to be applicable to discussions that focus on a specific person. In several situations, the issues discussed in private pertained to positions, irrespective of who might hold those positions. In those instances, I do not believe that any basis for entry into executive session would have applied [see Gordon v. Village of Monticello, 207 AD 2d 55 (1994)],

Reference was made on several occasions to "Collective Bargaining" and "UFT." The pertinent provision in the Open Meetings Law is §105(1)(e), which permits a public body to enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Not every discussion relating to a union, such as the UFT, or a collective bargaining agreement, necessarily involves collective negotiations. An example of an executive session which, in my view, was inappropriately held involved a matter under the headings of "Collective Bargaining" and "UFT" states as follows:

> "Howard Tames advised of the changes in the revised Special Circular No. 6 regarding the teachers' administration periods and provided an update on the implementation of the program. Board Members raised issues pertaining to the cost of the program, and what, if any, problems had occurred. A written evaluation of the program was requested."

Another under the same headings states as follows:

> "Deputy Chancellor Spencer and Howard Tames advised of the Board of Regents Teaching Task Force's final report 'Teaching to Higher Standards: New York's Commitment', which if adopted by the Regents will have an impact on future staffing, and highlighted some specific concerns."

From my perspective, the issues involved matters of policy rather than any collective bargaining negotiations, and they should have been discussed in public.

In good faith, I point out that in addition to the grounds for entry 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.

Of potential relevance is §108(3), which exempts from the Open Meetings Law "...any matter made confidential by federal or state law." When an attorney-client relationship has been invoked, 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. 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.

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. Moreover, 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.

In addition, as suggested earlier, that an issue that deals with a law, legislation, or a legal matter, does not transform the matter into a subject that falls within the scope of the attorney-client privilege. If guidance is given by a person who is not an attorney, by a person who is an attorney but whose official duties do not involve the functions of legal counsel, or if an attorney offers advice that does not involve legal expertise, there would be no basis for the assertion of the attorney-client privilege.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Ron LeDonni

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 9, 1999

Ms. Elizabeth S. Manion
Director
Marlboro Free Library
P.O. Box 780
Marlboro, NY 12542

The staff of the Committee on 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. Manion:

I have received your letter of February 25 and the article attached to it. You indicated that you are "confused" for you "always believed that any discussion was considered confidential if discussed in Executive Session. (e.g., salary negotiations/personnel issues)."

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. 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)].

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

For instance, if a discussion by a library board concerns a record pertaining to a particular user of the library, the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify that person. As you may be aware, §4509 of the Civil Practice Law and Rules prohibits a library from disclosing records identifiable to users of its services. In the context of the Open Meetings Law, a discussion concerning a user of the library would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, a record identifiable to a user would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a library board of trustees and its employees would be prohibited from disclosing because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your letter.

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

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

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

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March 15, 1999

Ms. Theresa C. Valada
Town Clerk
Town of Walton
129 North Street
Walton, NY 13856

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

Dear Ms. Valada:

I have received your letter of March 1 in which you asked "when a single member of the town board can insist upon the inclusion of his statement in the minutes."

In this regard, the Open Meetings Law contains what might be characterized as minimum requirements concerning contents of minutes. Specifically §106 (1) of the Open Meetings Law pertains to minutes of meetings of public bodies 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, minutes need not consist of a verbatim account of everything said at a meeting; 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.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether to record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181).

From my perspective, a town board, like other public bodies, functions by means of action taken by a majority vote of its total membership. Pertinent is §41 of the General Construction Law, entitled "Quorum and majority", which states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or 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 on §41, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. 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, for example, the Board consists of five members, three affirmative votes would be required to take action.

In the context of your question, I do not believe that a single member or a minority of members could insist or require that their comments or letters be included in minutes; those additions would be required to be included only following an approval to do so by means of an affirmative vote by a majority of the Board's total membership.

I hope that the foregoing serves to enhance your understanding of the matter and 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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March 16, 1999

Hon. Angelo J. Cintron, Trustee
Village of Haverstraw
7 Broadway
Haverstraw, NY 10927

The staff of the Committee on 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 Cintron:

I have received your letter of February 26 and the materials attached to it. In your capacity as a member of the Board of Trustees of the Village of Haverstraw, you complained that the Mayor has called meetings on short notice (i.e., less than three hours) "to conduct business of a non-emergency nature", that "actions were taken without a public vote" and that minutes for eight meetings "will not be available due to inaudible and/or damaged recordings."

In this regard, I offer the following comments.

First, 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 village board of trustees. 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.

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, 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, it is unlikely that the Mayor could validly have taken action on his own initiative with respect to matters to which you referred that are within the province of the Board. In short, he is one member among five on the Board of Trustees, and 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.

It is noted that the Village Law vests certain powers in the Board of Trustees. For instance, subdivision (1) of §4-412 states in pertinent part that:

> "...the board of trustees of a village shall have management of village property and finances, may take all measures and do all acts, by local law, not inconsistent with the provisions of the constitution, and not inconsistent with a general law except as authorized by the municipal home rule law, which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of its property, the preservation of peace and good order, the suppression of vice, the benefit of trade, and the preservation and protection of public works."

Lastly, tape recordings are frequently used as an aid in preparing accurate minutes of meetings, but there is no requirement that meetings be tape recorded or that minutes consist of a verbatim account of statements made at a meeting. In my view, by attending meetings and taking appropriate notes, the clerk can prepare minutes in accordance with the direction provided in §4-402(b) of the Village Law and §106 of the Open Meetings Law. The former states that the clerk shall

"act as clerk of the board of trustees and of each board of village officers and shall keep a record of their proceedings." The latter provides that:

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

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

I point out that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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 applicable law, copies of this opinion will be forwarded to the Mayor and the Board of Trustees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mayor Wassmer
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3009

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March 23, 1999

E-MAIL

TO: Louis A. Cruz [redacted]

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Cruz:

I have received your letter of March 12 in which you sought clarification concerning the application of the Open Meetings Law. Specifically, you questioned the status of a "3-person committee of a NYC Public Board of nine members..." Since you are a member of the Board of Correction, which consists of nine members, it is assumed that your inquiry pertains to committee of the Board.

In this regard, I offer the following comments.

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

Second, however, when a committee consists solely of members of a public body, such as the Board of Corrections, 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 the Board, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, for example, since the Board consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3010

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March 24, 1999

Mr. Anthony G. Szkutak
[redacted]

The staff of the Committee on 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. Szkutak:

I have received copies your correspondence with the Town of Hampton and would like to offer the following comments for the purpose of clarification.

First, since you referred to executive sessions held to discuss "potential litigation", I note that the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of

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

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

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

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

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Hampton."

Second, you wrote that the "personnel" exception for entry into executive session "pertains only to employees of the municipality and not to appointed or elected officials." In short, based on the language of the Open Meetings Law, I disagree. That provision, §105(1)(f), permits a public body to conduct an executive session to discuss:

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

The language quoted above is not restricted to employees and may be applied in appropriate circumstances to deal with others. For example, while members of planning boards or zoning boards of appeals are not employees, the Town Board could validly enter into executive sessions to discuss the strengths and weaknesses of specific individuals under consideration for service on those boards. Further, there may be instances in which the issue relates to a business entity and the Board considers the financial history of particular corporation before determining to contract or do business with that

firm. In those and other situations, §105 (1)(f) could be cited to discuss matters that do not relate to employees.

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 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.

Third, in one item of correspondence, you asked that the Town's Freedom of Information Law Appeals Officer "provide by reference the section of the 'OML' that excludes the public from contesting the accuracy of the minutes prior to the minutes being accepted." There is no such provision of law, but I point out there is similarly no provision of law that gives the public the right to contest the contents of minutes. In fact, while I believe that minutes must be accurate, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved.

I note, too, that the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. Section 106 of that statute states that:

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

Based on the foregoing, it is clear that minutes need not consist of verbatim account of statements made at a meeting or that they include reference to all who might have spoken.

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, in a letter to the Town's Appeals Officer, you sought descriptions and explanations of certain actions or activities of the Town Board. In this regard, it is emphasized 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 a request. In the context of your request, if the minutes include the information required by §106 of the Open Meetings Law, I do not believe that the Town would be obligated to prepare new records containing descriptions or explanations of its actions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Peter L. Genier, Appeals Officer

STATE OF NEW YORK
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March 25, 1999

Mr. Ed Kramer, Jr.
[redacted]

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

Dear Mr. Kramer:

I have received your letter of March 9, as well as the materials attached to it. You have raised questions concerning the propriety of certain actions that occurred at a meeting of the Springville Griffith Institute School District Board of Education on February 24.

You wrote that you and your wife attended the meeting in question and that the Board entered into an executive session in conjunction with the following agenda item:

"Policies - 2nd Reading
(1) Selection of Athletic Coaches
(2) Tax Sheltered Annuities
(3) Notification of Sex Offenders
(4) Dissemination of Information to Public
(5) Due Process Rights for Parents of Children with Disabilities
(6) Religious Expression in the Public Schools
(7) Independent Educational Evaluations."

When the Board went into the executive session, you were "ordered out of the building."

In conjunction with the foregoing, you asked whether the Board had the authority to order you out of the building "and lock the door", and what the status of the executive session might have been in relation to the Open Meetings Law.

In this regard, I offer the following comments.

First, it is emphasized that the phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate

from a meeting, but rather is part of a meeting. That being so, unless there is specific information given to the contrary, I believe that it may be assumed that a public body will continue its open meeting following an executive session. In that circumstance, in my opinion, ordering members of the public out of a building and locking the door would be inconsistent with the Open Meetings Law unless the building in which the meeting is held consists of one room. If the building contains more than one room or has a hallway or foyer, members of the public could be asked to wait in those locations rather than being removed form the building.

Second, based upon the agenda, the Board would not have had the authority to conduct an executive session. As you may be aware, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during executive sessions. Discussions of policies in my opinion would not fall within any of those grounds and should have been considered in full view of the public.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 30, 1999

Mr. Peter W. Sluys
Editor-in-chief
Rockland County Times
14 East Central Avenue
P.O. 510
Pearl River, NY 10965

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

Dear Mr. Sluys:

I have received your letter of March 16 in which you questioned the validity of advice rendered by this office in relation to the assertion of the attorney-client privilege during a meeting.

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

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

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

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions

are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

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

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

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

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

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

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

Insofar as 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 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.

There are several decisions in which the assertion of the attorney-client privilege has been recognized as a means of closing a meeting. In Cioci v. Mondello (Supreme Court, Nassau County,

March 18, 1991), the issue involved the ability of a county board of supervisors to seek the legal advice of its attorney in private, and the court stated that "Clearly, the Supervisors' discussions with the County Attorney...are exempt from the provisions of the Open Meetings Law (see POL §108(3), CPLR §4503...)". In another decision citing §108(3), it was found that "any confidential communications between the board and its counsel, at the time counsel allegedly advised the Board of the legal issues involved in the determination of the variance application, were exempt from the provisions of the Open Meetings Law" [Young v. Board of Appeals, 194 AD2d 796, 599 NYS2d 632, 634 (1993)].

Notwithstanding the foregoing, it has been advised by this office and held judicially that the authority to assert the attorney-client privilege as an exemption from the coverage of the Open Meetings Law is narrow. In a decision that cited an advisory opinion of the Committee, the court in White v. Kimball (Supreme Court, Chautauqua County, January 27, 1997) found that:

> "While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595, Robert J. Freeman, Executive Director of Committee on Open government at page 4:
>
> > "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, if 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 your understanding of the issue and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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April 1, 1999

Mr. Sandor Deak
[redacted]

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

Dear Mr. Deak:

As you are aware, I have received your letter of March 15. You have raised three issues relating to the Open Meetings Law.

First, you indicated that you are experiencing difficulty in obtaining minutes of meetings of the Pawling Joint Sewer Commission in a timely manner. In this regard, §106 of the Open Meetings Law states that:

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

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks, and that they need not consist of a verbatim account of every comment that was made.

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

Second, you complained that notice of a meeting of the Village of Pawling Board of Trustees was held on the same day that notice of the meeting was published in a local newspaper. The notice requirements imposed by the Open Meetings Law are found in §104, which provides that:

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

Based on the foregoing, while the Open Meetings Law requires that notice be given to the news media, it does not require that a public body pay to place a legal notice. Further, when notice is given to the news media, the newspaper, for example, in receipt of the notice may but is not required to report that a meeting will be held. If the newspaper chooses to publicize a meeting, it is free to publish it at any time. In short, a public body has no control over whether or when a newspaper decides to print a notice of a meeting.

Lastly, you wrote that the Mayor of the Village of Pawling treats you differently from others when public comments are made at meetings. With respect to public participation, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and

permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Pawling Joint Sewer Commission
Village of Pawling Board of Trustees
Cheryl Harrington, Clerk
Gloria Belknap, Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3014

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April 12, 1999

Ms Patricia Rudolph
[redacted]

The staff of the Committee on 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. Rudolph:

I have received your letter of March 22. You wrote that, you attempted without success to attend a meeting of the PTA that was held at a school in Seaford School District.

You have requested an advisory opinion concerning your ability to attend the kind of meeting that you described. In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and the phrase "public body" is defined in §102(2) 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, as a general matter, I believe that public bodies are those entities that perform governmental functions. Although a PTA performs its functions in relation to government, I do not believe that a PTA would constitute a public body subject to the Open Meetings Law. As such, its meetings in my view fall outside the requirements of the Open Meetings Law.

Second, however, §414(1)(c) of the Education Law states that a board of education may permit school property to be used for specific purposes, one of which is:

> "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."

In view of the language quoted above, if a meeting is held on school property for a "civic" purpose or for a purpose pertaining to the welfare of the community, such a gathering "shall be non-exclusive and shall be open to the general public." As such, it appears that a meeting of the PTA held on school property would fall within the scope of §414 of the Education Law, and that any such meeting must be open to the public.

In an effort to enhance compliance with and understanding of applicable law, a copy of this letter 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
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April 12, 1999

Mr. Michael Berardi
[redacted]

The staff of the Committee on 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. Berardi:

I have received your letter of March 21 in which you wrote that the President of the Board of Trustees of your local library recently met with the Ulster Town Board to discuss "joint library-town board fiscal strategy regarding the spending of public monies." The meeting was conducted in private "under the guise" of a political caucus.

You have questioned the legality of the meeting. In this regard, I offer the following comments.

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

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

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

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

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

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

Based upon the direction given by the courts, when a majority of the Town Board gathers to discuss the Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law.

Second, the Open Meetings Law provides two vehicles under which a public body may meet in private. One is the executive session, a portion of an open meeting that may be closed to the public in accordance with §105 of the Open Meetings Law. The other arises under §108 of the Open Meetings Law, which contains three exemptions from the Law. When a discussion falls within the scope of an exemption, the provisions of the Open Meetings Law do not apply.

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

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

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

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

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

If the Town Board consists of members of two or more parties, and if the gathering at issue was attended by members of one party with the President of the Library Board, it appears that it could have been closed as a political caucus. If, however, the Town Board members are all of the same political party, I believe that the Open Meetings Law would have applied and that the meeting should have been conducted in public.

Pertinent in that event is the case of Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992), which involved a political caucus held by a public body consisting solely of members of one political party. In that decision, the court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, stating that:

> "In a divided legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it would be fair to assume the meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless. Therefore, the meeting of February 8, 1992 was in violation of Article 7 of the Open Meetings Law...
>
> "When dealing with a Legislature comprised of only one political party, it must be left to the sound discretion of honorable legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of Public Officers Law Article 7" (id., 278).

The court continually referred to the term "meeting" and the deliberative process, and the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its

preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.

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

"A literal reading of Section 108, as urged by Respondent, could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a 'political caucus' which would have no public input, and the public meetings decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. The Legislature could not have contemplated such a result by amending Section 108 and at the same time preserving Section 100" (id., 277).

To reiterate a statement in the Buffalo News decision: "any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278). If the Town Board consists entirely of members of one political party, again, the gathering at issue, based on the judicial interpretation of the Open Meetings Law, would have constituted a "meeting" subject to that statute, not a political caucus exempt from its provisions.

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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April 12, 1999

Mr. Anthony G. Szkutak
[redacted]

The staff of the Committee on 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. Szkutak:

I have received your letter of March 22 in which you raised a variety of concerns relating to compliance with the Open Meetings Law by the Hampton Town Board.

I believe that most were considered in an opinion addressed to you on March 24. The only issue in my view that was not addressed involves the ability of individuals to ensure that their comments are included in the minutes. As indicated in that opinion, minutes need not consist of a verbatim account of statements made at a meeting or include reference to those who spoke. In my view, the only valid means of including a particular statement, whether the statement is made by a member of the Board or a member of the public, would involve a motion made by a member of the Board to include the statement within the minutes. If the motion is adopted by a majority vote of the total membership, only then would the statement be included in the minutes of the meeting.

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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COMMITTEE ON OPEN GOVERNMENT

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April 13, 1999

Ms. Stacy Kowaleski
[redacted]

Ms. Debra Koss
[redacted]

Ms. Lori Fox
[redacted]

Dear Ms. Kowaleski, Ms. Koss and Ms. Fox:

I have received your letter of March 19 in which you sought my opinion concerning a variety of practices of the Board of Education of the Akron School District and a subcommittee of the Board in relation to both the Freedom of Information Law and the Open Meetings Law.

The initial area of inquiry involves a meeting of the Board of Education held on January 20 in which a portion of the discussion related to the District's homework policy. The Board President said that the Board would consider the concerns expressed by parents and at the end of the meeting, at which time the Board entered into executive session without indicating a reason. A week later, the subcommittee of the Board also considered the homework policy. You wrote that there was no meeting of the Board in the time between the Board and subcommittee meetings and asked whether the School Board should "have charged the subcommittee to look at this homework policy during executive session."

You also referred to a survey distributed to parents, teachers and children concerning the homework policy and asked whether those surveys, which did not seek names of those who responded, are considered "school district records." Due to a discrepancy in the numbers of surveys reportedly returned to the District, you asked whether you can "ask to count them."

Reference was made to other meetings during which executive sessions were held with no disclosure of the reason. Further, you questioned the ability to discuss certain issues that were not specified in agendas. You added that at one of the meetings, the Superintendent "insisted" that he

needed the names of those who attended, and you asked whether that kind of request is "customary and appropriate."

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

> "...the medical, financial, credit or employment history of a 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.

In the context of the issues that you described, insofar as the discussions involved a particular person in relation to one or more of the subjects described in §105(1)(f), the executive sessions would have been justifiably held. On the other hand, to the extent that they involved consideration or review of matters of policy, or the functions of an office or certain positions, irrespective of who might hold those positions, I do not believe that there would have been a basis for discussion in executive session. Similarly, "scolding" a member of the Board would likely not have involved a matter that could properly have been considered in executive session. Even though those kinds of subjects might be reflective of "specific personnel" issues, unless they focused on a particular person in relation to the subjects listed in §105(1)(f), there would have been no basis for holding an executive session.

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

It is noted that the Appellate Division confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305).

> Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

In short, the grounds for entry into executive session are limited. While it is unclear whether those topics were in fact discussed during executive sessions, insofar as the Board or its subcommittee considered the homework policy, directed the subcommittee to study the issue of homework policy or prepared or reviewed the survey, I do not believe that executive sessions would validly have been held.

Next, with respect to agendas, there is nothing in the Open Meetings Law or any other statute that pertains specifically to agendas. Unless a public body has established a rule to the contrary, there is no requirement that an agenda be followed. Similarly, there would be no prohibition against discussing issues that do not appear on an agenda.

You questioned why members of the Board of Education who are not members of the subcommittee but who attended the subcommittee's meeting could not attend an executive session. In this regard, §105(2) of the Open Meetings Law states that the only persons who have the right to attend an executive session are the members of the public body conducting an executive session. Since a subcommittee is a public body separate and distinct from the Board of Education [see definition of "public body", Open Meetings Law, §102(2)], the members of the Board who do not

serve on the subcommittee would not have had the right to attend an executive session of the subcommittee. I point out that §105(2) also states that a public body may authorize others to attend. Therefore, while the subcommittee could have permitted the attendance of others, it would not have been required to do so. The foregoing is based, of course, on an executive session being validly held. For reasons discussed earlier, it is questionable whether the subcommittee appropriately held an executive session. If the matter did not fall within any of the grounds for entry into executive session, any person would have had the right to have been present.

Next, §103 of the Open Meetings Law states that meetings of public bodies are open to the general public. In my opinion, the right to attend a meeting can in no way be conditioned upon an individual's status, interest or residence. For that reason, I do not believe that a public body or a superintendent can require those attending a meeting to identify themselves or indicate their residence.

Lastly, based on the language of the Freedom of Information Law and its judicial interpretation, the surveys would, in my opinion, clearly fall within its scope. That statute pertains to agency records and defines the term "record" expansively to include:

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

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

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

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

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

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

Of potential relevance is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA". In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The federal 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, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld from the public in order to comply with federal law.

If the survey did not include names, I would conjecture that most would not have contained information personally identifiable to a student. In those situations, I believe that the survey responses would be available in their entirety and could be inspected pursuant to the Freedom of Information Law by any person.

In the rare instances in which a survey response contains information that is personally identifiable to a student, the District, in my opinion, would be required to delete those portions, while disclosing the remainder. In that situation, since you would not have the right to inspect the survey responses, the District could charge a fee of up to twenty-five cents per photocopy, and photocopies could be made available after having deleted those portions identifiable to students.

I note that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if no total or figure has been tabulated by the District regarding the number of survey responses, it would not be required to prepare a total on your behalf. Nevertheless, in conjunction with the preceding commentary, I believe that you would have the ability to review each survey response in whole or in part and that you could, based upon such a review, prepare your own total.

In an effort to enhance compliance with and understanding of applicable 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:jm

cc: Board of Education
Alan Derry
Marilyn Kasperek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3018

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April 14, 1999

Mr. Dominick A. Tomanelli
[redacted]

Mr. Daniel Petigrow
Donoghue, Thomas, Auslander & Drohan
Summit Corporate Park
2 Summit Court, Suite 104D
Fishkill, NY 12524

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

Dear Messrs. Tomanelli and Petigrow:

I have received your letters, respectively dated March 24 and March 30, concerning an executive session conducted by the Marlboro Central School District Board of Education on March 24.

In short, the Board apparently considered a variety of issues relating to a school renovation project, and it entered into an executive session "to discuss legal matters regarding the awarding of contracts." When Mr. Tomanelli questioned the propriety of the closed session, the District's attorney, Mr. John Donoghue, recommended that the meeting could validly be closed. Mr. Tomanelli also asked "whether the District's Attorney has ill advised the Board or has the Board wilfully chose [sic] to ignore the law."

Mr. Petigrow, a member of the law firm that represents the District, referred to the ability to close a meeting based on the assertion of the attorney-client privilege, and to deal "with strategies that would be available to the Board of Education to either avoid litigation or to prepare for litigation..."

From my perspective, although the grounds for closing the meeting were not expressed as clearly as they should have been, it appears that the much of the discussion could validly have been conducted in private. In this regard, I offer the following comments.

It is emphasized 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. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

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

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

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

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

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

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

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

Insofar as the Board seeks legal advice from its attorney and the attorney renders legal advice, I believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. Therefore, even though there may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to §108, and legal advice may be requested even though litigation may not be 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.

In the circumstances described by Mr. Petigrow, it appears that the attorney-client privilege and the "litigation" exception for executive session might have essentially overlapped. As you may be aware, §105(1)(d) states that a public body may enter into executive session to discuss "proposed, pending or current litigation." In construing that provision, 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 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.

In my view, insofar as the Board sought the legal advice of its attorney and the attorney offered legal advice, or insofar as the Board considered its litigation strategy, the meeting could justifiably been closed. However, prior to closing the meeting, it would have been appropriate in my opinion to have informed those in attendance that the Board would be seeking legal advice from its attorney and discussing litigation strategy in relation to the renovation project.

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 19, 1999

Mr. William E. Boeddener
[redacted]

The staff of the Committee on 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. Boeddener:

I have received your letter of March 26 and the materials attached to it. You have questioned the propriety of an executive session held by the Glen Cove School District Board of Education at a Board member's home to discuss "personnel."

In this regard, I offer the following comments.

First, I note 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. As you may be aware, 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.

Second, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the Law states that:

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

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposed no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a first floor room that is accessible to handicapped persons rather than a second floor room, I believe that the meetings should be held in the room that is most likely to accommodate the needs of people with handicapping conditions.

From my perspective, a member's home would generally not be an appropriate location for a meeting of a public body. Aside from the issue of barrier-free access to physically handicapped persons, a home is not a public facility, and many have suggested that entry into a home to attend a

meeting involves a sense of intrusion or intimidation. In my view, every law, including the Open Meetings Law, should be implemented in a manner that gives effect to its intent. Holding a meeting at a member's home would, in my opinion, be unreasonable and inconsistent with the intent of the law.

Third, as indicated earlier, 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. Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Robert E. Sapir

STATE OF NEW YORK
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April 19, 1999

Mr. Robert J. Kasper
[redacted]

The staff of the Committee on 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. Kasper:

I have received your letter of March 25 in which you sought an "informal evaluation" of the following situation.

You wrote that you are a member of a landowner group that filed a petition with a town board concerning the status of a road, and you requested in writing that the petition "be placed on hold" to give you sufficient time to discuss the matter with the town attorney and many of the landowners who reside in Florida during the winter. Although it was your understanding that you would be advised when the matter was placed on an agenda, you were recently informed that the town board had already taken action on the matter.

You asked whether, "as petitioners, [you were] entitled, under the law, to notification that [y]our request was placed on the agenda for a specific open meeting date."

In this regard, without knowledge of the nature of the petition or the subject of your concern, I cannot offer specific guidance. In some instances, there may be statutory requirements that owners of property affected by an action be notified in advance, particularly if a public hearing is required. In other cases, there may be no specific notice requirement to those persons.

With respect to the Open Meetings Law, §104 of that statute requires that every meeting be preceded by notice given to the news media and by means of posting; there is no requirement that separate notice be given to individuals who may be affected by action to be taken at a meeting. Further, there is nothing in the Open Meetings Law that requires that an agenda be prepared or followed.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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April 28, 1999

Reverend Richard M. Nahman, OSA
Augustinian Friary
[redacted]

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

Dear Reverend Nahman:

I have received your letter of March 30 in which you sought "clarification on what constitutes 'public business' in the definition to which the Open Meetings Law applies." You raised the issue in relation to the following fact patterns:

> "(1) If a public body is mandated to submit an annual report to other authorities, does the discussion about and formulation of this report constitute 'public business'? Must the preparation and mutual exchange of reflection about the content of the report be open to the public? Must the press and the public know the content of the report before those to whom it is mandated to be issued are aware of the content?
>
> "(2) If the public body is of a 'watchdog' nature, must its strategies for fair and yet effective exercise of its responsibilities be developed in sessions open to all? Or would such a requirement so compromise the body's ability to attain its goals as to prevent it from serving the public as its establishment intended?"

In this regard, as you are aware, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business." 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)].

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.).

From my perspective, the kind of issue that you described, consideration of the content of an annual report, would clearly constitute a matter of public business. The issue relates to the performance of the official duties of the body and must, in my view, be discussed in public in accordance with the Open Meetings Law.

With respect to the second area of inquiry, I note that the Open Meetings Law is based on a presumption of openness. Stated differently, all meetings must be conducted open to the public, except to the extent that an executive session may properly be convened. Paragraphs (a) through (h) specify and limit the subjects that may properly be considered during an executive session.

Without greater knowledge of the nature of the agency or its "strategies", I cannot offer specific guidance. It would appear, however, that only two of the grounds for entry into executive session would be pertinent, and the extent to which they might apply would be dependent on the duties of the agency and the effects of public disclosure. Those provisions would be paragraphs (b) and (c) of §105(1), which respectively authorize a public body to enter into executive session to discuss "any matter which may disclose the identity of a law enforcement agent or informer" or "information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed." From my perspective, unless the public body

is involved in criminal investigation or law enforcement, it is unlikely that any of the grounds for conducting an executive session could justifiably be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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April 29, 1999

Mr. Roger W. Mosher
Board of Education Member
Johnsburg Central School
North Creek, NY 12853

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

Dear Mr. Mosher:

I have received your letter of March 29. In your capacity as a member of the Johnsburg Central School District Board of Education, you wrote that at the end of a recent meeting, the Board entered into an executive session to discuss "personnel and contract negotiations." Nevertheless , additional items were discussed, "such as, how much the district would charge the taxpayers to use the newly constructed auditorium", charging "other schools to tuition students to [y]our district for distance learning and alternative education", and "not push[ing] the building project until the budget is passed."

From my perspective, the kinds of issues that you described could not have justifiably been discussed in an executive sessions. In this regard, I offer the following comments.

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.

In short, the matters that you described would not in my view have fallen within any of the grounds for entry into executive session.

It is also noted that the term "personnel" does not appear in the Open Meetings Law and that the authority of a public body to conduct executive sessions to discuss "personnel" or "contract negotiations" is limited.

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 provision 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; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Similarly, with respect to "contract negotiations", the only ground for entry into executive session that mentions that term is §105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, §105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union.

In terms of a motion to enter into an executive session held pursuant to §105(1)(e), it has been held that:

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

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the police union."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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April 29, 1999

Ms. Shirley G. Bright-Neeper
[redacted]

The staff of the Committee on 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. Bright-Neeper:

I have received your letter of April 1. You wrote that you requested from the Orleans County Cornell Cooperative Extension its 1998 annual report, its Form 990, the names of the members of its board of directors, and minutes of meetings. Based on your commentary, there appears to be some question as to whether the entity at issue is subject to the Freedom of Information Law.

From my perspective, it is required to comply with the Freedom of Information Law, as well as the Open Meetings Law, which provides direction concerning minutes of meetings. In this regard, I offer the following remarks.

First, the Freedom of Information Law pertains to agency records, and that §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."

According to §224(8)(b) of the County Law, a county extension service association is a "subordinate governmental agency" whose organization and administration are "approved by Cornell University as agent for the state." As such, I believe that the Cooperative Extension is an "agency" required to comply with the Freedom of Information Law, for it performs a governmental function for the State and, in this instance, Orleans County.

I note, too, that in a unanimous decision rendered by the Appellate Division, it was held that the records of Cornell University pertaining to its four "statutory colleges", arms of the State University of New York, are subject to the State's Freedom of Information Law [Stoll v. New York State College of Veterinary Medicine at Cornell University, 664 NYS2d 851, __ AD2d __ (1997)]. The provision of the County Law cited above refers specifically to the extension service and the "educational programs of the New York State College of Agriculture and Life Sciences and the New York State College of Human Ecology at Cornell University", both of which are statutory colleges.

Similarly, I believe that the board of a county cooperative extension agency is subject to 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."

Again, due to the direction provided by §224(8)(b) of the County Law, the board of a cooperative extension agency performs a governmental function for the state and a public corporation, Orleans County.

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 the annual report that you requested is typical of similar reports, it is likely that it would be accessible under the law. A Form 990, according to IRS rules, must be made available by the entity that prepared it. Consequently, that document would clearly be available under the Freedom of Information Law.

Lastly, the Open Meetings Law includes direction concerning the minimum contents of minutes and the time within which they must be prepared. 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 sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter

which is not required to be made public by the freedom of information law as added by article six of this chapter.

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

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks.

As you requested, copies of this response will forwarded to those identified in your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Hunter Rawlings
Merrill Ewert
Glenn Applebee
Ron Bricker
Roger Harrison
George Bower
Ann Mathews
Richard Bennett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 5, 1999

Mr. Richard Jannaccio
President
West Flushing Civic Association, Inc.
P.O. Box 7770
Flushing, NY 11352

The staff of the Committee on 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. Jannaccio:

I have received your letter of April 13 in which you raised a series of issues concerning the implementation of the Freedom of Information and Open Meetings Laws by Community Board 7 in Queens.

According to your letter, until recently, one could "walk into" the offices of Community Board 7 "during business hours, request specific public information and be given it right away." You wrote, however, that the practice has been changed, that individuals are now required to seek records in writing, and that access has been delayed. Further, you indicated that the"the decision to stifle the flow of information was made unilaterally by CB7's Executive Board on March 8, when they usurped authority and shut out the rank and file Board members from voting on the proposed rule change", and that "because the decision was made in a backroom meeting closed to the public, the Executive Board was also in violation of the City Charter, Chapter 70, Sec. 2800, d(3): 'Each community board shall take action only at a meeting open to the public.'" At the end of your letter, you made a series of allegations and accusations concerning the activities and character of Claire Shulman, the Borough President, and you asked that this office "investigate this matter immediately, and take the appropriate enforcement action in order to preserve and protect open government."

In this regard, it is noted at the outset that the Committee on Open Government has neither the authority nor the resources to conduct an investigation. While the Committee has the ability to offer advice and opinions pertaining to open government laws, it is not empowered to enforce those statutes. Additionally, the ensuing remarks focus on the activities of the Community Board, not the Borough President. Her office and her duties are, in my view, separate from those of the Community Board in the context of the issues that you presented.

First, notwithstanding past practice, it is clear that an agency, such as a community board, has the authority to require that requests for records be made in writing, and that there is no obligation that an agency respond instantly to a request. While agencies frequently waive the requirement that requests be made in writing and make records available immediately on request, under the terms of the Freedom of Information Law, they are not required to do so. Specifically, §89(3) of that statute 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..."

Although 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.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...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 objectives 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" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay in disclosure, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report

is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure.

Second, in my opinion, the Executive Board is subject to the Open Meetings Law, and that entity could not have validly adopted a new policy.

By way of background, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly and 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 a determination rendered soon after its enactment in which it was held that committees of a board of education were not subject to the Open Meetings Law [see Daily Gazette Co., Inc. v. North Colonie Board of Education, [67 AD2d 803 (1978)], a series of amendments to the Open Meetings Law was enacted in 1979 to ensure that those entities fall within its coverage. Among the changes was a redefinition of the term "public body", which has since been defined in §102(2) to include:

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a community board, would fall within the requirements of the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, a community board consists of 51, its quorum would be 26; in the case of a committee consisting of nine, a quorum would be five.

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)].

Third, the Executive Board would not have had the authority, in my opinion, to have considered a change in or the adoption of policy regarding the treatment of requests for records in private.

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

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

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

The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Consideration of policy in relation to requests for records would not have fallen within any of the grounds for entry into executive session, and any person would have had the right to attend a meeting of a public body held to discuss that issue.

Lastly, in my opinion, only the Community Board itself, at meeting during which a quorum is present, and only by means of an affirmative vote of a majority of its total member, would have the authority to alter or adopt policy; the Executive Board in my view does not have had the authority to do so.

Reference was made earlier to §41 of the General Construction Law, and a key element in the implementation of the Open Meetings Law is its relationship to that statute. That 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 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. 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)]. While a committee of a public body is itself a public body, a committee generally cannot take final action that is binding on the larger body, i.e., a community board. Only the latter could do so.

In an effort to enhance compliance with and understanding of Open Government laws, copies of this opinion will be forwarded to the Community Board and others.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Community Board 7
Hon. Claire Shulman, Borough President
Melinda Katz, Director of Community Boards

STATE OF NEW YORK
DEPARTMENT OF STATE
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May 12, 1999

Mr. Mark Lembo
BCL Technologies, 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. Lembo:

I have received your correspondence of April 21 and the statement attached to it, which you prepared as a member of the Shoreham-Wading River School District Board of Education. In brief, you indicated that "secret sessions" were held by members of the Board by telephone, and you alleged in the statement that "[i]n these private sessions the above mentioned board members discussed board of education budget issues, made decisions and instructed the school superintendent to carry out same." You added that the discussions occurred "without prior knowledge of the remaining board members or the public at large."

You have sought my opinion on the matter, and in this regard, based on the assumption that your contentions are factually accurate, I offer the following comments.

First, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, 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.

Second, it is noted that 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."

Section 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". 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 the definitions referenced above, I believe that a meeting, i.e., the "convening" of a public body, such as a board of education, involves the physical coming together of at least a majority of its total membership. 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" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

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

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only at meetings during which a quorum has physically convened. Further, if a majority gathers but does not provide reasonable notice of the gathering to all of the members, there would be no quorum and, therefore, no capacity to take action.

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.

Last but perhaps most importantly, a recent judicial decision, the first dealing with the issue, reached the same conclusion as offered here and cited an opinion rendered by this office. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), the court stated that:

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102 [1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions do invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner as formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 affd 45 NY2d 947).
>
> The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five-member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

In sum, I do not believe that a public body may validly conduct a meeting or take action by means of a conference call or a series of calls among the members.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the 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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May 12, 1999

Ms. Christine McDonald
Crandall Public Library
251 Glen Street
Glens Falls, NY 12801

The staff of the Committee on 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. McDonald:

I have received your letter of April 23 in which you questioned the application of the Open Meetings Law to a meeting of a committee of the Southern Adirondack Library System (SALS). You indicated that you reviewed §260-a of the Education Law, that you find it confusing, and that you interpret it to mean that "if your city doesn't have a million people, you don't have to follow the Open Meetings Law for committee meetings."

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, such as a board of education, a city council, a county legislature, and the like. That statute does not typically apply to meetings of the boards of not-for-profit corporations or other entities that are not governmental in nature. If the SALS is analogous to other library systems, it is a not-for-profit corporation, and although it receives funding from government, it is not itself a governmental entity.

Second, however, the Open Meetings Law, 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.

When a committee consists solely of members of a public body, such as a board of education or the board of a municipal library, I believe that the Open Meetings Law is applicable. Based on the definition of "public body", 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 [see Syracuse United Neighbors v. City of Syracuse, 80 AD2d 984 (1981)].

In view of the foregoing, it is clear that a library board of trustees including the SALS Board is required to comply with the Open Meetings Law. In the context of your inquiry, although the Board of the SALS is required to comply with the Open Meetings Law, that is so not because it is a public body, but rather due to the specific direction imposed by §260-a of the Education Law. That being so, and in view of the language of §260-a of the Education Law, a committee of a library board of trustees would be required to comply with the Open Meetings Law only if it is a committee of a public body as suggested earlier, or if it is a committee of a library board of trustees in New York City, the only city in the state with a population above one million.

In sum, while the meetings of the Board of the SALS are clearly subject to the Open Meetings Law, if the SALS is not a public body because it is not a governmental entity, meetings of its committees would not, in my opinion, be subject to the requirements of that statute.

This is not to suggest that a committee *could not* conduct open meetings, but rather that it would not be required to do so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Southern Adirondack Library System

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 25, 1999

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

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

Dear Mr. Mack:

I have received your letter of April 22. In brief, you wrote that the Cattaraugus County Legislature selects which members will hold leadership positions. Those legislators, eight of the twenty-one members of the County Legislature, frequently meet to consider matters involving the duties or jurisdiction of the Legislature. You have questioned the status of the leadership meetings under the Open Meetings Law.

In this regard, it has been held that "[i]n the absence of a quorum, the Open Meetings Law does not apply" [Mobil Oil Corporation v. City of Syracuse Industrial Development Agency, 646 NYS2d 741, 752; 224 AD2d 15; motion for leave to appeal denied, 89 NY2d 811 (1997); see also Tri-Village Publishers, Inc. v. St. Johnsville Board of Education, 110 AD2d 932 (1985), Sciolino v. Ryan, 103 Misc. 2d 1021, 431 NYS2d 664, aff'd 81 AD2d 475, 440 NYS2d 795, MCI Telecommunications Corp. v. Public Service Commission, 659 NYS2d 563, 231 AD2d 284 (1997)]. According to §41 of the General Construction Law, since a quorum of a public body is a majority of its total membership, a quorum of the County Legislature is eleven. That being so, a gathering of eight of the members would not constitute a quorum, and the Open Meetings Law would not apply.

I note that similar questions have arisen with respect to meetings held by the leaders of the State Legislature, and that the response has been essentially the same, that the application of the Open Meetings Law is not triggered until a quorum, a majority of the total membership of a public body, has gathered for the purpose of conducting public business.

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: Gerard J. Fitzpatrick, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 26, 1999

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 April 27. You wrote that questions have been raised by residents concerning the contents of minutes of Town Board meetings. Specifically, you wrote that they have "asked why their comments, made during public participation, are not recorded." You have sought my views on the matter.

In this regard, 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.

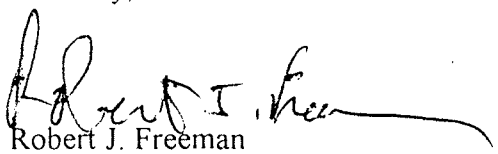
You also asked whether there might "be a problem with closing the portion of our public board meeting in which we do business, by a motion of the board, and then have the board remain to conduct public questions and discussion." If you can do so, you suggested that you could "dismiss the Town Clerk and avoid the question of her recording public comments."

For reasons considered earlier, there would be no requirement to prepare minutes during the gathering that you described. In short, none of the activities required to be included in minutes would occur. However, in my opinion, that kind of session would represent a continuation of the meeting. I note that it was held more than twenty years ago that any gathering of a majority of a public body for purpose of conducting public business, even if there is no intent to take action, constitutes a "meeting" that falls within the scope of the Open Meetings Law [see Orange County Publications v. City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1948)].

In short, it is suggested that the meeting not be "closed" but rather continued for public participation, questions and discussion. Further, if it is clear that none of the events requiring the preparation of minutes will occur during that aspect of the meeting, I believe that the Town Board could permit the Clerk to leave.

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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June 1, 1999

Ms. Susan Edelman
Reporter
New York Post
1211 Avenue of the Americas
New York, NY 10036-8790

The staff of the Committee on 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. Edelman:

I have received your letter of May 1 in which you sought an opinion concerning the application of the Open Meetings Law to a certain gathering.

According to your letter, on April 19, the entire membership of Community School Board 19 met with Chancellor Rudolph E. Crew at his office to discuss "what the board members knew about [redacted]". Following a protest by the attorney for the *Post*, the attorney for the Chancellor offered several reasons for contending that the Open Meetings Law did not apply.

While I agree with his contention that the "Chancellor is not a public body", I believe that the gathering constituted a meeting of the Board that fell within the coverage of the Open Meetings Law. In this regard, I offer the following comments.

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

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

Based on the foregoing, the Chancellor, the executive head of an agency, would not constitute an entity consisting of two or more persons and would not be a "public body". A board of education, however, would clearly constitute a public body required to comply with the Open Meetings Law.

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

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

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

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

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

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

The event in question was neither a social gathering nor a chance meeting. On the contrary, those asked to join the Chancellor presumably were asked to attend due to their status as members of a particular board of education. Whether the Board had the authority to take action with respect to the issues raised by the Chancellor is, in my view, not relevant if the members were asked to meet to discuss matters of which they may be aware or for the purpose of considering issues of concern to them as Board members. In short, it appears they were called together, as a body, in relation to the performance of their of their official duties. If that is so, I believe that the gathering constituted a "meeting" that should have been held in accordance with the Open Meetings Law.

That the gathering was convened at the request of the Chancellor rather than by the Board on its own initiative would not, according to an Appellate Division decision, have removed it from the coverage of the Open Meetings Law. Specifically, 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 Chancellor, I believe that it was a meeting, for a quorum of the Board was present for the purpose of conducting public business in its capacity as a board of education. Further, the event in question appears to be somewhat analogous to the "planned information conference" referenced by the court in Goodson-Todman.

Lastly, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting of a public body. 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: Rudolph E. Crew
Chad Vignola
Community School Board 19

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 1, 1999

Ms. Joyce Shepard, CSW
President
CACC
18-55 Corporal Kennedy St., Suite L-2
Bayside, NY 11360

The staff of the Committee on 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. Shepard:

I have received your letter of May 4 in which you raised a variety of issues concerning compliance with the Open Meetings and Freedom of Information Laws by Community Board 7 and its committees.

In view of your questions, it is important in my view to describe the coverage 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."

Based on the foregoing, a governing body, such as a community board, clearly constitutes a "public body" required to comply with the Open Meetings Law. Further, since the definition makes specific reference to a committee or subcommittee of a public body, committees of a Community Board consisting of two or more members of the Board would also constitute public bodies subject to the Open Meetings Law. If, for instance, a community board consists of 51, its quorum would be 26. If the Board designates a committee consisting of 9, the committee would be a public body and a quorum of the committee would be 5.

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 in appropriate circumstances as a governing body [see e.g., Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. A contention that a committee is not covered by the Open Meetings Law based on Roberts Rules is, in my view, without merit; Roberts Rules are not law.

If members of a public body meet, but there is no quorum present, i.e., if there is not a majority of the total membership, the Open Meetings Law would not apply. Similarly, meetings among public officials generally are not subject to the Open Meetings Law. In short, unless a quorum of a public body has convened for the purpose of conducting public business collectively, as a body, the Open Meetings Law would not apply.

You wrote that the Community Board has refused to accept requests made under the Freedom of Information Law that are transmitted by a fax machine. In this regard, an agency, pursuant to §89(3) of the Freedom of Information Law, may require that a request for records be made in writing, and it is my view that an agency must accept requests made via a fax machine, unless the use of the machine adversely impacts on the agency's capacity to carry out its duties. For example, if a law enforcement agency uses a fax machine to carry out essential law enforcement functions, interference with the use of the machine could hamper its ability to perform its duties effectively. In short, in a circumstance in which public use of a fax machine would interfere with an agency's functions, its use for making requests under the Freedom of Information Law might be restricted, so long as requests traditionally made are accepted, i.e., requests made in writing by mail or by personal delivery. On the other hand, if the acceptance of requests made via fax machine would not substantially interfere with an agency's functions, such as protecting public safety, a refusal to accept requests by fax would, in my opinion, be unreasonable and inconsistent with law.

You also wrote that you were informed that you could inspect records "at 4PM only." Further, if you cannot complete your review by the close of business, you were instructed to return the next day at the same time. Based upon the regulations promulgated by the Committee on Open Government and a decision rendered by the Appellate Division, Second Department, the public has the right to inspect the records during regular business hours.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations. Section 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..."

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to your inquiry and the foregoing is the decision to which allusion was made earlier in which one of the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Lastly, you asked whether you can review a public employee's schedule. In this regard, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In a decision concerning access to Mayor Koch's appointment calendar, it was found that such a record must be disclosed (Kerr v. Koch, Supreme Court, New York County, February 1, 1988). Consequently, it has been advised that those entries relating to the performance of one's official duties generally must be disclosed. However, references to personal activities or events, such as birthdays, appointments with doctors, family gatherings and the like could in my opinion be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Adrian Joyce, Chair
Marilyn Bitterman, District Manager.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 1, 1999

Ms. Patricia Pagano
[redacted]

The staff of the Committee on 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. Pagano:

I have received your letter of May 5. In brief, you complained that the Village of Manorhaven has delayed responding to requests for records and that the Village Board of Trustees has discussed issues during executive sessions in a manner inconsistent with law.

In this regard, I offer the following comments.

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

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

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

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

> explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

I note that although 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.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...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 objectives 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" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay beyond five business days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure.

Second, the Open Meetings Law is based on a presumption of openness. Stated differently, a public body must conduct its meetings in public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify the subjects that may properly be considered during an executive session. Because the ability to enter into executive session is limited, a public body may not conduct an executive session to discuss the subject of its choice.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Rosemary Pernice, Clerk

STATE OF NEW YORK
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June 1, 1999

E-Mail

TO: Ann Adams <aadams@th-record.com

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 Ms. Adams:

I have received your letter of May 4 in which you questioned certain practices of the Chester School District Board of Education in relation to the Open Meetings Law. In an effort to enhance compliance with and understanding of that statute, copies of this response will be forwarded to the Board and the Superintendent.

You referred initially to a meeting held by the Board of Education, the Village Board of Trustees and the Town Board, without prior notice, "to discuss building a new school." In this regard, if a quorum of any of those bodies convened for the purpose of discussing public business, the gathering, based on judicial decisions, would have constituted a "meeting" subject to the requirements of 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 a public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

It has also been held that joint meetings held by two or more public bodies are subject to the Open Meetings Law [Oneonta Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)], and that in a 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 any of the three entities represented, I believe that it was a meeting, assuming that a quorum of a single public body was present for the purpose of conducting public business.

I point out, too, that 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. If 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 next incident to which you referred involved a meeting that was adjourned and then followed by an executive session during which the Board adopted the District's budget. Here I direct your attention to §102(3) of the Open Meetings Law, which defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, an executive session cannot be held either prior to or after the adjournment of a meeting, for it is part of a meeting.

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.

If it can be assumed the executive session involved consideration of the budget, I believe that the closed session should have been 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.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible

layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

Next, 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 view of the foregoing, first, the Board in my opinion would have no basis for discussing the budget in private, and second, any vote on the matter should have been taken in public.

Lastly, I note that 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 Board reaches 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Superintendent

OML-AO-3033

From: Robert Freeman
To: [redacted]
Date: Wed, Jun 9, 1999 9:05 AM
Subject: fire company and emergency squad meetings

Dear Kathy:

It has been held that volunteer fire companies are subject to the state's Freedom of Information Law and that volunteer ambulance companies having similar relationships with government are also subject to that statute. When that is so, I believe that meetings of the boards of those companies would also be subject to the Open Meetings Law.

When meetings are subject to the Open Meetings Law, any person has the right to attend, irrespective of status, interest or residence. It is also noted, however, that the Open Meetings Law does not provide a right on the part of those who attend to speak or otherwise participate. In short, the right conferred by that statute involves the ability to attend, listen and observe. If a board wants to permit public participation, it has been suggested that it do so by means of reasonable rules that treat members of the public equally. For instance, a time may be set aside during a meeting during which members of the public may speak for up to 3 or 5 minutes.

To obtain more information on the subject, our website includes an index to opinions rendered under the Open Meetings Law. It is suggested that you check the opinions under the following key phrases: "Ambulance corps", "public participation" and "volunteer fire company". Those with the higher numbers (above approximately 2100) are available in full text.

I hope that I have been of assistance. If you have further questions, please feel free to contact me.

Robert J. Freeman
Executive Director
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June 14, 1999

Mr. Richard G. Hollis
[redacted]

The staff of the Committee on 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. Hollis:

I have received your letter of May 14 and appreciate your kind words. You have sought a "written decision" concerning closed caucuses held by the Allegany County Legislature. You indicated that the Legislature consists wholly of members of one political party.

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to render advisory opinions concerning the Open Meetings Law. While it is our hope that the opinions issued by this office are educational and persuasive, they are not binding.

With respect to the issue that you have raised, I offer the following comments.

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

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the

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

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

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

Based upon the direction given by the courts, when a majority of the Legislature is present to discuss County business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law.

Second, the Open Meetings Law provides two vehicles under which a public body may meet in private. One is the executive session, a portion of an open meeting that may be closed to the public in accordance with §105 of the Open Meetings Law. The other arises under §108 of the Open Meetings Law, which contains three exemptions from the Law. When a discussion falls within the scope of an exemption, the provisions of the Open Meetings Law do not apply.

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

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

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

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

Many local legislative bodies, recognizing the potential effects of the 1985 amendment, have taken action to reject their authority to hold closed caucuses and to continue to conduct their business open to the public as they had prior to the amendment. Moreover, there have been recent developments in case law regarding political caucuses that indicate that the exemption concerning political caucuses has in some instances been asserted improperly as a means of excluding the public from gatherings that have little or no relationship to political party activities or partisan political issues.

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

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

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

Perhaps most similar to the situation to which you referred is the case of Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992), which involved a political caucus held by a public body consisting solely of members of one political party. As in Humphrey, the court

concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, stating that:

> "In a divided legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it would be fair to assume the meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless. Therefore, the meeting of February 8, 1992 was in violation of Article 7 of the Open Meetings Law...
>
> "When dealing with a Legislature comprised of only one political party, it must be left to the sound discretion of honorable legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of Public Officers Law Article 7" (id., 278).

The court focused on the intent of the Open Meetings Law and continually referred to the term "meeting" and the deliberative process, not merely the act of adopting or taking action. In fact, the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.
>
> > "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.

> "A literal reading of Section 108, as urged by Respondent, could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a 'political caucus' which would have no public input, and the public meetings decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. The Legislature could not have contemplated such a result by amending Section 108 and at the same time preserving Section 100" (id., 277).

Based on the foregoing, I believe that consideration of the matter must focus on the overall thrust of the decision. To reiterate a statement in the Buffalo News decision: "any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278).

In sum, based on the Buffalo News decision, a discussion of political party business by members of the Legislature would constitute a political caucus exempt from the coverage of the Open Meetings Law.. However, because there is no minority membership in the Legislature, a discussion of public business by a majority of the Legislature would constitute a meeting subject to that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chairman, Allegany County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 16, 1999

Ms. Nancy DeAngelis
[redacted]

The staff of the Committee on 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. DeAngelis:

I have received your letter of May 19, which pertains to the status of a not-for-profit corporation, Public Access Northern Dutchess Area ("PANDA"), under the Open Meetings Law. You wrote that five municipalities designated PANDA to operate the local public access television station, and that PANDA operates out of the Rhinebeck Town Hall.

From my perspective, assuming it was created pursuant to regulations promulgated by the New York State Commission on Cable Television, PANDA 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, PANDA is, in my view, a "public body". It is an entity consisting of more than 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 five public corporations, two towns and three villages in Dutchess County.

As a public body, meetings of PANDA 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.

It is noted 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.).

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of PANDA gathers to conduct public business, any such gathering would, in my opinion, constitute a "meeting" subject to the Open Meetings Law.

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

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

> objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

More recently, 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).

In this instance, it appears that PANDA was created by five municipalities and that, despite its corporate status, it is a public body required to comply with the Open Meetings Law.

In an effort to enhance compliance with and understanding of the Open Meetings Law, as you requested, a copy of this opinion will be sent to PANDA.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: PANDA

STATE OF NEW YORK
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June 18, 1999

Mr. Charles L. White
[redacted]

The staff of the Committee on 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. White:

I have received your letter of May 19 in which you raised issues relating to various actions recently taken by the Mayor and Trustees of the Village of Valatie.

You referred initially to a meeting held on April 17. There was no notice of the meeting "what so ever", and the minutes of that meeting indicate that a motion was made and carried to "wave [sic] the notice as according to Public Information Law."

In this regard, there is nothing in the Open Meetings Law or any other statute of which I am aware that would authorize a public body to waive the notice requirements imposed by the Open Meetings Law. Section 104 of that statute 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.

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

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

However, the same provision states further that:

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

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional". In this instance, since the Board took action to waive the notice requirements, it appears that the failure to provide notice as required by law was purposeful rather than unintentional.

Second, as I understand the matter, action was taken by three Board members without informing the other two, one of whom was yourself as Mayor. You suggested that it "appears that some type of illegal meeting was held in the development of this letter and the typing and sending of it to various recipients." If indeed three board members either met and took action or took action by means of a series of phone calls or similar communications and failed to notify the remaining two members, no action, in my opinion, could validly have been taken.

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 gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law.

Viewing the matter from a different perspective, 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.

In a recent decision that dealt with a similar situation, the court dealt with a letter signed by four of five members of a town board who essentially took action by means of a series of telephone calls without informing the fifth member. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), the court stated that:

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102 [1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions do invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner as formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 affd 45 NY2d 947).
>
> The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five-member board discussed the issue in a series of telephone calls. As a result, a quorum of members

> of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

Again, if three of the five members either met to take action outside the context of the Open Meetings Law or took action by means of a series of oral or written communications conducted outside of a meeting, I believe that a court would determine such action to have been a nullity.

Lastly, with respect to your question concerning the ethics of certain activities, that kind of issue is beyond the jurisdiction of this office. It is suggested that you might contact the Office of the Attorney General at 474-3429. Although that agency will not prepare an opinion on your behalf, I believe that it will share opinions previously prepared that may be pertinent to the issues.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
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June 18, 1999

Ms. Lillian Parsons
[redacted]

The staff of the Committee on 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. Parsons:

I have received your letter of May 24 in which you sought assistance concerning your ability to tape record meetings of the Wynantskill School District Board of Education.

You wrote that you have tape recorded Board meetings "for the last ten years", but that a Board member recently "announced that anyone with a 'taping device' had ten minutes to turn the machine into the clerk or leave the building." When you questioned the reason for the statement, you were informed that "a policy was passed last year that [you] had to get permission from the board to tape."

From my perspective, the tape recorder and the tape are your personal property, and the District would have no right to confiscate those items. Moreover, the policy as you described it is inconsistent with judicial decisions. In this regard, I offer the following comments.

It is noted that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. There are, however, several judicial decisions concerning the use of those devices at open meetings. In my view, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, the Committee on Open Government 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.

With respect to the requirement that the Board or a committee be informed in advance of a meeting of the intent to record, I note that the Court in Mitchell referred to "the unsupervised recording of public comment" (id.). In my view, the term "unsupervised" indicates that no permission or advance notice is required in order to record a meeting. Again, so long as a recording device is used in an unobtrusive manner, a public body cannot prohibit its use by means of policy or rule. Moreover, situations may arise in which prior notice or permission to record would represent an unreasonable impediment. For instance, since any member of the public has the right to attend an open meeting of a public body (see Open Meetings Law, §100), a reporter from a local radio or television station might simply "show up", unannounced, in the middle of a meeting for the purpose of observing the discussion of a particular issue and recording the discussion. In my opinion, as long as the use of the recording device is not disruptive, there would be no rational basis for prohibiting the recording of the meeting, even though prior notice would not have been given. Similarly, often issues arise at meetings that were not scheduled to have been considered or which do not appear on an agenda. If an item of importance or newsworthiness arises in that manner, what reasonable basis would there be for prohibiting a person in attendance, whether a member of the public or a member of the news media representing the public, from recording that portion of the meeting so long as the recording is carried out unobtrusively? In my view, there would be none.

Based on the foregoing, I believe that you have the right to record open meetings of the Board, without "permission" to do so from the Board, so long as the recording device is used in a manner that is not disruptive.

In an effort to enhance compliance with and understanding of the matter, 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
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June 21, 1999

Mr. Sam Pratt
[redacted]

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

Dear Mr. Pratt:

I have received your letter of May 25 in which you sought an opinion concerning two matters involving the City of Hudson.

First, it is your contention that the Common Council frequently conducts executive sessions without stating a reason, or by citing "personnel matters" as the basis for excluding the public from a meeting.

In this regard, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or

causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

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

It is noted that the Appellate Division 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)]

Next, you wrote that when you sought copies of minutes of meetings, reference was made to only one of many motions to enter into executive session, and the City Clerk indicated that "she is not present to keep minutes of the Council's 'informal meetings', explaining that if the Council enters executive session from an informal meeting, no record is made of the motion to do so."

Here I point out that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be

characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. It is noted that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions", "agenda sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law.

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

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

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Nevertheless, one of the items that must be included in minutes of meetings is a motion, and I believe that motions for entry into executive session, including the votes of the members on those motions, must recorded. When a public body discusses a matter in executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

Lastly, you wrote that:

> "The Mayor of Hudson, Richard Scalera, recently made tape recordings from his home of phone conversations with members of the board of the Hudson Development Corporation, of which he is also a member. These tapes were made without their knowledge. The tapes were played for the Common Council during an executive session; the Council then voted to let the public hear the tapes, though only

> portions thereof were played. The Mayor has states that he made the tapes 'for personal use.'"

You have asked whether the tapes are "records" that must be made available under the Freedom of Information Law.

As you may be aware, §86(4) of that statute defines the term "record" expansively to include:

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

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

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

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

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

creating an easy means of avoiding compliance, should be rejected" (id., 254).

Further, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Based on the foregoing, I believe that the tape recordings at issue constitute "records" that fall within the coverage of the Freedom of Information Law.

Without knowledge of the contents of the tapes, I cannot advise as to the extent to which they must be disclosed. I note, however, 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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 21, 1999

E-Mail

TO: Herbert Lehmann

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Lehman:

I have received your letter of June 20. You wrote that the East Ramapo Central School District Board of Education, upon which you serve, conducted an executive session "to discuss construction work which would remove asbestos from one of [y]our buildings." When you asked why an executive session should be held, the Superintendent indicated that "not having taken care of the asbestos earlier could lead to a law suit by people in that building." You have sought my view concerning the propriety of the executive session.

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

The provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the description of the general intent of the grounds for entry into executive session suggested in my remarks in the preceding paragraph, i.e., that they are intended to enable public

bodies to avoid some sort of identifiable harm. For instance, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

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

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Again, §105(1)(d) would not permit a public body to conduct an executive session due to a possibility or fear of litigation. As the court in Weatherwax suggested, if the possibility or fear of litigation served as a valid basis for entry into executive session, there could be little that remains to be discussed in public, and the intent of the Open Meetings Law would be thwarted.

I hope that I have been of assistance.

RJF:jm

OML-AO-3040

From: Robert Freeman
To: [redacted]
Date: Tue, Jun 22, 1999 5:08 PM
Subject: Dear Mr. Reimer:

Dear Mr. Reimer:

I have received your letter of June 21 in which you indicated that the Mayor of Sloatsburg has threatened to have you arrested if you continue to use your camcorder at meetings of the Village Board of Trustees.

In this regard, as you are aware, the courts have determined that a public body, such as a village board of trustees, cannot prohibit the use of recording devices at open meetings, so long as those devices are used in a manner that is not disruptive. The most recent decision on the subject involved the use of a video recorder at meetings of a village board, and the court determined that the board's "distaste" regarding the use of the recorder did not constitute disruption or a valid basis for prohibiting its use [Peloquin v. Arsenault, 616 NYS2d 716 (1994)].

You asked that I recommend someone to help you in the matter. I cannot recommend anyone specifically. However, you might contact the NY Civil Liberties Union at (212) 344-3005. In addition, there are advisory opinions on the subject available via our website. In the index to advisory opinions rendered under the Open Meetings Law. you can click onto "V" and scroll down to "Video equipment, use of". The opinions with the highest numbers will be available in full text and can be shared with Village officials in an effort to enhance compliance with and understanding of judicial decisions pertinent to the situation.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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June 23, 1999

Ms. Robin Smith
[redacted]

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

Dear Ms. Smith:

As you may be aware, I have received your letter of June 16 and attempted without success to telephone you in an effort to offer clarification.

In brief, as I understand the matter, you and others have attempted to offer support to a teacher in the Liverpool School District who was suspended. You indicated that letters have been sent to the Board of Education with a request that they be read at open meetings. The Board has refused to do so and has failed to honor requests for the letters. Further, at a recent meeting, the Board, according to your letter, "informed the attendees that they, as a board in a public meeting, have the right to refuse to accept public comment during that time or at any time in the future, and also have the right to refuse to read letters specifically requested to be read 'in open session'."

In this regard, I offer the following comments.

First, there is nothing in any law of which I am aware that would require a public body, such as the Board of Education, to read letters aloud at an open meeting, even if the writer asks that a letter be read.

Second, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to

answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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

Lastly, with respect to the letters sent to the Board, I direct your attention to the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to mean:

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

In view of the foregoing, records sent to the District clearly constitute "records" that fall within the scope 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.

Ordinarily, I believe that names or other personally identifying details relating to those who send letters to a school district in the kind of situation that you described could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. Similarly, the federal Family Educational Rights and Privacy Act (20 UCS §1232g) prohibits a school district from disclosing information identifiable to a student without the consent of a parent of the student. However, if the author of a letter, whether a parent or otherwise, consents to disclosure or asks that the letter be read or disclosed during a public forum, I do not believe that there would be a basis for withholding the letter when it is sought under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3042

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June 24, 1999

Ms. Joan Homovich
[redacted]

The staff of the Committee on 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. Homovich:

I have received your letter of May 25, as well as the materials attached to it. You expressed a variety of concerns relating to the implementation of the Open Meetings Law by the Town Board of the Town of Colchester.

You referred initially to an executive session held to discuss the purchase of property "next to the covered bridge." In this regard, by way of background, the Open Meetings Law is based upon a presumption of openness. Specifically, the Law requires that meetings be conducted open the public, except to the extent that an executive session may be held in accordance with the provisions of paragraphs (a) through (h) of §105(1). The only provision that appears to have been relevant concerning the executive session at issue is §105(1)(h). That provision permits a public body to enter into executive session to discuss:

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

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

Next, you referred to "the regular practice of the Town Board of calling committee meetings without posting notification to the public." A committee consisting of two or more members of the

Town Board would in my opinion be subject to the requirements 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."

Based on the foregoing, again, a committee consisting of Board members would constitute a "public body" that is required to give notice to news media and post notice of the time and place pursuant to §104 of the Open Meetings Law prior to all meetings.

You also referred to a meeting held by a majority of the Board prior to a scheduled meeting. If your description of the facts is accurate, that gathering should have been held in accordance with the Open Meetings Law. I point out the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

Lastly, you referred to meetings held at peoples' homes. Assuming that those gatherings involve a majority of the Board for the purpose of discussing Town business, for reasons described earlier, I believe that they would be subject to the Open Meetings Law. Moreover, a meeting held in a person's home is, in my opinion, inappropriate.

It is noted that §103(b) of the Open Meetings Law states that:

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

Based upon that provision, I believe that the law imposes 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.

Aside from the issue of access by handicapped persons, many may be reluctant to enter a private home due to a sense that he or she may be invading one's privacy and property. In short, I believe that holding a meeting of a government body in a private home presents an impediment to access that does not otherwise exist when a meeting is held in a government facility, a public place, such as a town hall or similar venue.

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:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 29, 1999

Ms. Shirley J. Hicks
[redacted]

The staff of the Committee on 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. Hicks:

I have received your letter of May 26 in which you sought an advisory opinion concerning certain action taken by the Town of Schodack. In brief, you questioned the propriety of a new policy that was "never raised, discussed or voted on" at a meeting of the Town Board. Based on your letter, it appears that the policy was adopted by a majority of the Board by means of a series of separate conversations conducted by phone.

If that was so, and if the matter required action taken by the Town Board as a condition precedent to its adoption, I believe that it should have been considered at a meeting of the Board held in accordance with the Open Meetings. Law. In this regard, I offer the following comments.

It is noted at the outset that there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, 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 confer one on one, 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" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

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

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

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 by means of a consensus reached outside of a meeting or through a vote by phone or by mail.

Last but perhaps most importantly, a recent judicial decision, the first dealing with the issue of taking action outside of a meeting by telephone, reached the same conclusion as offered here and

cited an opinion rendered by this office. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), the court stated that:

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102 [1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions do invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner as formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 affd 45 NY2d 947).
>
> The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five-member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

In sum, I do not believe that a public body may validly conduct a meeting or take action by means of a series of individual discussions or telephone calls among the members.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 29, 1999

Ms. Marcie Haskell
Trojans for Troy
[redacted]

The staff of the Committee on 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. Haskell:

I have received your letter of May 30 in which you wrote as follows:

> "On a routine basis Democrat and Conservative Troy Council Members hold a private joint caucus to go over legislature matters in Troy City Hall. The caucus is composed of 4 enrolled Democrat Councilmen and 2 enrolled Conservative Councilmen....There are a total of 9 members on the Troy City Council."

In this regard, I offer the following comments.

First, the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a majority 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 Council is present to discuss the City business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law.

Second, the Open Meetings Law provides two vehicles under which a public body may meet in private. One is the executive session, a portion of an open meeting that may be closed to the public in accordance with §105 of the Open Meetings Law. The other arises under §108 of the Open Meetings Law, which contains three exemptions from the Law. When a discussion falls within the scope of an exemption, the provisions of the Open Meetings Law do not apply.

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

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

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

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

With respect to the situation that you described, if Democrat and Conservative party members who serve on the Council constituting a majority of the Council's membership gather to discuss public business, because they are members of two political parties, I do not believe that the gathering could be characterized as a political caucus that is exempt from the Open Meetings Law; on the contrary, that kind of gathering would in my view constitute a "meeting" subject to the Open Meetings Law. A political caucus by definition is in my opinion restricted to members or adherents of a single political party. Webster's New Collegiate Dictionary defines caucus as:

> "a closed meeting of a group of persons belonging to the same political party or faction usu. to select candidates or to decide on policy."

Since the gathering described in your letter is attended by members of two political parties, I do not believe that it can be described as a political caucus exempt from the Open Meetings Law. Again, it would appear to be a "meeting" that falls within the coverage of that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council
Mayor Pattison

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 6, 1999

Ms. Janet L. McCauley
[redacted]

The staff of the Committee on 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. McCauley:

I have received your letter of June 2 and the materials attached to it. You have sought assistance in relation to issues concerning the Queensbury Union Free School District arising under both the Freedom of Information and Open Meetings Laws.

You wrote that you have served as the Clerk of the Board of Education and as Assistant Superintendent for Business since 1996. Your request for records made under the Freedom of Information Law pertained to two items, one of which was disclosed. In response to your request for the other item, a "copy of letter to BOE from Administrators concerning [your] performance" that was read at an open meeting of the Board, you were informed that "there was nothing in written form handed out to Board." You indicated that the acting clerk "had a written statement that she read in public at the meeting."

You also referred to an emergency meeting of the Board of Education scheduled on May 24 for the following day. Although notice of the meeting was posted in one location, "[a]t no point in time was the official newspaper notified of the meeting." During the latter meeting, the Board took a number of actions, including a rejection of a motion by means of an "advisory vote" in which you were recommended for tenure. No notice of that meeting was given to you.

In this regard, I offer the following comments.

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

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

Based on the foregoing, if the District maintains documentation containing the content of what was read at the meeting, irrespective of whether the documentation was "handed out to the Board", it would constitute a "record" subject to the Freedom of Information Law. Moreover, insofar as it was read aloud at an open meeting, I do not believe that there would be any basis for a denial of access.

I note that 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)].

Second, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a board of education. Specifically, §104 of that statute provides that:

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

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

Although you might have been the subject of a discussion at a meeting, there is no requirement imposed by the Open Meetings Law that you be given notice of such a meeting. Further, while the news media must be given notice of meeting, the law does not specify which media outlet should be given notice. In my view, notice should be given to the news media outlet most likely to reach those who might have an interest in attending, even if that outlet is not the official newspaper.

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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July 6, 1999

E-Mail

TO: Barry Ginsberg

FROM: Robert J. Freeman, Executive Director RJF

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

I have received your letter of June 4. You have asked whether "public officials who are unable to be physically present at a public meeting [may] participate via telephone if the other officials of the body are physically present at the meeting site, which is open to the public."

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

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

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

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:jm

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July 7, 1999

Ms. Mary Ann Durantini
[redacted]

The staff of the Committee on 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. Durantini:

I have received your letter of June 2, as well as the materials attached to it. You have sought an opinion concerning various events and practices relating to the implementation of the Open Meetings Law by the Board of Education and Superintendent of the East Syracuse-Minoa Central School District.

You referred initially to "an unposted meeting [held] solely to go into Executive Session and discuss the case of a Board member accused of threatening a coach." In this regard, even if the only topic to be considered could validly have been discussed during an executive session, I believe that the Board was required to provide notice in accordance with §104 of the Open Meetings Law. That provision states that:

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

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

It is unclear on the basis of the materials whether the Board voted during the executive session referenced above. Here I point out that, as 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 my view, based on its nature, the action should have been taken in public.

I note that in an "administrative memorandum" including agenda items for a meeting, an executive session was scheduled to discuss "personnel." 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..."

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

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

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

Further, throughout the materials and your comments, the term "personnel" is used or cited frequently. In this regard, the term "personnel" does not appear in the Open Meetings Law, and that law does not forbid a public body from discussing personnel issues in public. Moreover, there are many personnel related issues that must be discussed in public. In short, I believe that the term is overused and misleading.

By way of background, 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 issues involve the budget, it is possible that "personnel" may be impacted. However, those issues typically involve resources, needs and the allocation of public monies, rather than the performance of a particular employee. When that is so, even though the issue might involve personnel, there would be no basis for entry into executive session. If the issue pertains to the creation, retention or elimination of a position, again, the matter should be discussed in public, for it would not involve a particular person in terms of his or her performance, but rather the need or ability to carry out a certain function or meet a certain need.

Similarly, discussions regarding the election of officers generally do not fall within any of the grounds for entry into executive session. 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 be 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 not ordinarily among them.

Because the use of the term "personnel" is imprecise, 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.

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; 207AD 2d 55, 58 (1994)]

It is emphasized that there is no provision of law that generally requires personnel records be kept confidential or that discussions involving personnel be considered only in executive session or kept private. 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, the state's highest court, 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)].

Even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

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

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

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally.

Also on the subject of "personnel", you wrote that the Superintendent:

> "...refused to let residents speak or ask questions regarding the recent budget vote and Board member election. He, however, stood up to defend a Board member by name who sent out re-election campaign material to the parents of Special Education students in the district (see enclosed). Following the completion of the Board's regular business, the Board went into executive session to discuss 'personnel' issues that only certain Board members were previously informed of. During the executive session, Dr. Afton made Board members leave the session if any of the topics discussed involved that particular Board member or a spouse. This pertained to three Board members that night and the members have not been informed of what took place or was decided in their absence."

In conjunction with the foregoing, first, §105(2) of the Open Meetings Law states that:

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

Based on the foregoing, the Superintendent would have had no authority to have "made Board members leave the session"; on the contrary, every member of the Board has the right to attend every executive session.

Second, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to 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.

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

With regard to the information that you offered, there are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited.

It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

> "In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

The court in Schuloff determined that a "compelling state interest" involved the ability to protect students' privacy in an effort to comply with the Family Educational Rights Privacy Act, and that expressions of opinions concerning "the shortcomings" of a law school professor could not be restrained.

In short, if the Superintendent "defends" a Board member or employee during an open meeting, based on the decisions cited above, I do not believe that there can be a valid restriction on comments, whether neutral, positive or negative, regarding the same or other Board members or employees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Board of Education
Dennis Afton

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July 14, 1999

Mr. William J. Kemble
Daily Freeman
[redacted]

Mr. Thomas Lambert
Daily Sentinel
[redacted]

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

Dear Messrs: Kemble and Lambert:

I have received your letter of June 4, as well as the materials attached to it. You have sought an advisory opinion "on whether the Griffiss Local Development Corporation is required to conform with the Open Meetings and Freedom of Information laws." You wrote that the issue has arisen due to "the contention by GLDC Executive Director Steve DiMeo and GLDC board Chairman Ralph Eannace, who is also Oneida County Executive, that the board is not subject to the law because is a not-for-profit corporation."

By way of background, according to its Certificate of Incorporation, the Griffiss Local Development Corporation (hereafter "GLDC"):

> "...is a not-for-profit local development corporation organized under Section 1411 of the Not-for-Profit Corporation Law and operated exclusively for the charitable and public/quasi-public purposes of participating in the development and implementation of a comprehensive strategy to maintain, strengthen and expand the uses and viability of the former Griffiss Air Force Base..."

You indicated that the Board of the GLDC consists of fifteen members, five of whom are appointed by the Governor, three by the Oneida County Legislature, three by the Mayor of the City of Rome, two by the Speaker of the Assembly and two by the Senate Majority Leader. In short, all of the members of the Board are designated by officials of state or local government.

In this regard, while I know of no judicial decision concerning the status of a local development corporation under the Open Meetings Law, the State's highest court has considered the matter under the Freedom of Information Law.

The Freedom of Information Law pertains to agencies, 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" [§86(3)].

Specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations. The cited provision describes the purpose of those corporations and states in part that:

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

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

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

> "The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program';

> thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Since the entire membership of the GLDC Board is designated by government officials, it is clear in my view that there is "substantial governmental control" over GLDC's operations and, based on the decision rendered by the Court of Appeals, that it is an "agency" required to comply with the Freedom of Information Law.

If the GLDC is an agency that falls within the scope of the Freedom of Information Law, I believe that its board would also 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 the GLDC is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. Further, based upon the language of §1411(a) of the Not-for-Profit Corporation Law, which was quoted in part earlier, and the degree of governmental control exercised over the GLDC, I believe that it conducts public business and performs a governmental function for the state and several public corporations, in this instance, i.e., Oneida County, the Cities of Rome and Utica, and the Oneida County Industrial Development Agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Ralph Eannace
Steve DiMeo

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July 14, 1999

E-MAIL

TO: [redacted]

FROM: Robert J. Freeman RJF

The staff of the Committee on 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. DiRienzo:

As you are aware, I have received your correspondence concerning the propriety of an executive session held by the Village of Depew Planning Board. As I understand the matter, the "petitioner", the applicant before the Board, was invited to discuss his application with the Board during the executive session.

If my interpretation of the situation is accurate, 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 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 . Further, that statute 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.

It would appear that the only pertinent ground for entry in executive session would have been §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". Based on judicial decisions, 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)].

In view of the foregoing, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as not to divulge its strategy to its adversary, who may be present with other members of the public at the meeting. I note, too, that the Concerned Citizens decision cited in Weatherwax involved a situation in which a town board involved in litigation met with its adversary in an executive session to discuss a settlement. The court determined that there was no basis for entry into executive session; the ability of the board to conduct a closed session ended when the adversary was permitted to attend.

In the context of the situation that you described, even if there would otherwise have been a basis for entry into executive session, and that does not appear to be so, once the petitioner was invited to join the Board, the Board, in my view, would have lost its authority to conduct a private session.

Second, you referred to an opinion prepared by this office upon which an attorney for the Village apparently relied as a means of justifying an executive session (OML AO 2926). That opinion dealt with the status of committees and advisory bodies under the Open Meetings Law. In this instance, the Planning Board is a statutory creation (see Village Law, §7-718) that carries out functions imposed by law. From my perspective, it is clearly a "public body" that must comply with the Open Meetings Law in all respects.

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."

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)].

As suggested earlier, the Planning Board clearly performs necessary and integral functions concerning use of land in the Village, particularly in conjunction with §7-722 of the Village Law.

In my opinion, the conclusion that a planning board is a public body can be reached by viewing the definition of "public body" in terms of its components. A planning 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, a village.

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

I hope that I have been of assistance.

RJF:tt

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3049

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July 26, 1999

Mayor Michael H. McLaughlin
Mayor of Scotia
4 North Ten Broeck Street
Scotia, NY 12302-2287

The staff of the Committee on 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 McLaughlin:

I have received your letter of June 18 in which you referred to questions concerning the legality of a meeting held on May 26. The meeting was attended by officials of the Village of Scotia, the Metroplex Authority, the Scotia Business Improvement District (BID) and others.

According to the notes attached to your letter, you asked the President of the (BID) to invite other BID members, invited the Village Planner and Building Inspector to attend and "mentioned meeting to two trustees", and you notified the Metroplex members from Scotia and Glenville of the gathering. The meeting was held in Village Hall, and the Metroplex Chair, the BID President and yourself sat at the "front table"; the "rest [were] in general audience." Your notes state that "approx. 15-17 people total in audience including 2 trustees and many persons active in Village politics (from both major parties); nobody was denied access." Following a short presentation by the Metroplex Chair, "the floor was open to questions from anyone present." You added that "[t]he Mayor and two trustees were there to listen and each acted independently", that "[t]here were no Village actions taken" and that "[t]here was no consultation among the three other than to say good-bye at the end."

Based on your description of the gathering, it was not a "meeting", and the Open Meetings Law would not have applied. In this regard, I offer the following comments.

The Open Meetings Law pertains to meetings of public bodies, and §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be

characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

I point out that similar questions have arisen at workshops and seminars during which I have spoken and which were attended by many, including perhaps a majority of the membership of several public bodies. Some of those persons have asked whether their presence at those gatherings fell within the scope of the Open Meetings Law. In brief, I have responded that, since the members of those entities did not attend for the purpose of conducting public business as a body, the Open Meetings Law, in my opinion, did not apply. It would appear that the same conclusion could be reached with respect to the matter that you described.

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- 11593
OML-AO- 3050

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July 28, 1999

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 25, as well as the materials attached to it. You have raised questions concerning the status of a "working group" created by resolution of the Chili Town Board under the Open Meetings and Freedom of Information Laws. According to the Town Clerk, the working group was designated "to investigate, evaluate and make recommendations regarding further expansion of public water within the Town of Chili." She added that the working group "did not act as a 'Public Body' within the meaning of the Open Meetings Law. No quorum was required and no minutes were taken."

As I understand the matter, the working group would not be subject to the Open Meetings Law, and its designation as a "working group" rather than a "committee" would not alter its status. In this regard, I offer the following comments.

As you may be aware, 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 the Senate, the Assembly, a county legislature or a town board, 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 legislative bodies consisting solely of their 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)]. In short, based on judicial determinations interpreting the Open Meetings Law, the working group would not constitute a "public body" and, as such, would be outside the coverage of the Open Meetings Law.

Notwithstanding the foregoing, I believe that any records prepared or acquired by the working group would be subject to the Freedom of Information Law, which is more extensive in its coverage than the Open Meetings Law. The former pertains to agency records, and §86(4) of that statute defines the term "record" expansively to mean:

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

Since the definition includes information in any physical form produced for an agency, such as a town, again, any records prepared or acquired by the working group would in my view constitute town records that fall within the coverage of the Freedom of Information Law. The extent to which any such records might exist is unknown to me.

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: Hon Carol O'Connor, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11603
OML-AO-3051

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August 3, 1999

Mr. Jeffrey Shankman
J.M.J. Associates, Inc.
P.O. Box 3338
New York, NY 10163

The staff of the Committee on 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. Shankman:

I have received your letters of June 28 addressed to the Secretary of State and myself. As indicated above, the staff of the Committee on Open Government is authorized to respond on behalf of the Committee in relation to matters within the advisory jurisdiction of this office.

In your letter to the Secretary of State, you contended that the Public Service Commission violated the State Administrative Procedure Act. In this regard, neither the Secretary, nor the Department of State or the Committee on Open Government determines or advises with respect to the kinds allegations that you offered concerning compliance with the State Administrative Procedure Act.

You referred in the same letter to a "one-Commissioner ruling" issued on June 16 that was later confirmed by the Public Service Commission at a regularly scheduled meeting held on June 24. You wrote that no minutes were taken in relation to the earlier event and contended that "this is a violation of the Open Meetings Law." From my perspective, the Open Meetings would not have applied and, consequently, there would have been no violation. That statute pertains to meetings of public bodies, and §102(2) provides that a "public body" is, in brief, an entity consisting of two or more members that conducts public business and performs a governmental function. While the Public Service Commission is a public body required to comply with the Open Meetings Law, when a function is carried out by a single member of the Commission, there is no public body involved, and the Open Meetings Law is inapplicable.

I point out that the kind of "ruling" or "order" to which you referred is interim in nature and is authorized by §11 of the Public Service Law. That provision states in relevant part that:

> "Any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before the commission... All investigations, inquiries, hearings and decisions of a commissioner or specially authorized officer or employee shall be and be deemed to be the investigations, inquiries, hearings, and decisions of the commission and every order made by a commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be and deemed to be the order of the commission."

In the letter addressed to me, you referred to a determination of your appeal rendered by Chief Administrative Law Judge Judith A. Lee following a partial denial of access to records under the Freedom of Information Law. Although Judge Lee offered descriptions of the records that were withheld, you contended that you are "entitled to...either a copy of the original document redacted, or if a list is supplied, the dates of the memos and whom those memos were sent." In this regard, under §87(2) of the Freedom of Information Law, an agency may withhold "records or portions thereof" that fall within the grounds for denial that follow. Therefore, unless a record may be withheld in its entirety, I believe that an agency would be required to disclose a copy of the record following the appropriate redactions or deletions and payment of the requisite fee for copies.

You also referred to a claim by Judge Lee that certain documents are subject to "the attorney work product privilege" and contend that you "are entitled to an Affidavit showing that the information was generated by an attorney for the purpose of litigation." In short, there is nothing in the Freedom of Information Law that requires the preparation of such an affidavit. Further, a claim that records consist of the work product of an attorney may be asserted in my view concerning matters unrelated to litigation.

Next, you wrote that an exception to rights of access can not be based on an agency's regulations and that only a statute can exempt records from disclosure. That issue was considered in the opinion addressed to you on May 17. I do not believe that reiterating the commentary offered then would serve any useful purpose.

Lastly, you wrote that documentation withheld was earlier "divulged by a Department employee either in a pleading or a response to a FOIL request." In my opinion, if a disclosure made in a pleading or in response to a request made under the Freedom of Information Law was not inadvertent and was made "intelligently and voluntarily" [McGraw-Edison v. Williams, 509 NYS2d 285, 287 (1986)], an agency would have waived its right to withhold the same material sought later under the Freedom of Information Law. In Williams, among records inspected was a document that an agency believed was exempt from disclosure and should have been withheld, and the court held that an inadvertent disclosure of exempt records did not create a right of access to the records. Based on the foregoing, if indeed records may justifiably be withheld but were inadvertently made available, it appears that an agency may properly deny an ensuing request for the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Hon. Judith A. Lee
Steven Blow

OMC - AO-302

does not exist

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3053

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August 6, 1999

Ms. Stacey Kowalewski
[redacted]

The staff of the Committee on 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. Kowalewski:

I have received your letter of June 30, which reached this office on July 8. You questioned the propriety of certain actions of the Board of Education of the Akron Central School District.

The meeting at issue was convened in a cafeteria, and the Board entered into executive session in a location "down the hall." You wrote that you were told that action would be taken after the executive session, and that you and others waited two and a half hours until its conclusion. You added that the Superintendent and various members came out of the executive session periodically, and that you informed them that you would remain until the open meeting reconvened after the executive session. You added that after waiting for a lengthy time:

> "...a board member informed us that they were ready to 'wrap up' the executive session, she returned to the board room thinking we were in tow. We, on the other hand; returned to the place of public meeting (the cafeteria) thinking that they would return there to vote, a bit of a misunderstanding I think. I should point out that we had moved to the hallway outside the cafeteria because the air conditioning had been a bit too cold. When we did not show up in the board room, they proceeded to vote, knowing full well we were waiting."

You asked whether the Board should have returned to the cafeteria to vote and whether "common courtesy" should have "command[ed] that when we didn't follow they should have had the decency to return to get us, before they voted."

In my opinion, if the meeting open to the public began in the cafeteria, the resumption of the open meeting should also have occurred in that location. By moving the location of the meeting to a different room, the Board essentially would have held that portion meeting without having given

notice. Pursuant to §104 of the Open Meetings Law, every meeting must be preceded by notice of the time and place. Under the circumstances, I believe that the Board was obliged to return to the site of the meeting where it was initially held or to give notice to those in attendance that the end of the meeting would be held in a different, specified location.

Lastly, the action taken by the Board in my opinion is binding unless and until a court renders a determination to the contrary. It might contended in a challenge to the Board's action that its vote was effectively taken in private. If such an assertion is accurate, a court would have the discretionary authority to invalidate the Board's action.

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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August 6, 1999

Mr. Robert Bluey
Clinton Courier
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. Bluey:

I have received your letter of July 14 in which you requested an advisory opinion concerning the propriety of an executive session held by the Town Board of the Town of New Hartford.

According to the notice given prior to the meeting, the primary issue for consideration was described as " review consultant proposal (cable franchise)." When you arrived at the meeting, you were informed that it was an "executive working session" and that no action would be taken. In terms of the substance of the discussion, you wrote that the Town Supervisor "said the town received a proposal with three options from Monroe Telecom, a consultant that deals with cable television franchise agreements."

In this regard, I offer the following comments.

First, the phrase "executive working session" does not appear in the Open Meetings Law, I note that the terms "work session", "working session" and "workshop" have been used to describe gatherings in which there is an intent to discuss public business, but no intent to take action. The courts determined more than twenty years ago that those kinds of gatherings are "meetings" that fall within the coverage of the Open Meetings law when a majority of a public body attends [see Orange County Publications v. City of Newburgh, 60 AD2d 409, aff'd 45 NY 2d 947 (1978)].

Since four members of the Town Board were present (the Supervisor and three other members), the gathering in my view was clearly a "meeting" that fell within the requirements of the Open Meetings law, irrespective of its characterization.

Second, 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. Further, §105(1) requires that a procedure be accomplished, during an open meeting, prior to entry into executive session. The cited provision states in part that:

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

Thereafter, paragraphs (a) through (h) of §105 (1) specify and limit the subjects that may validly be considered during an executive session.

From my perspective, it is questionable whether any of the grounds for entry into executive session could validly have been asserted. If the consultant described three possible options or courses of action that might be followed or adopted by the Board in relation to a prospective cable television franchise agreement, and if those options or courses of action did not involve any particular cable company, in my view, none of the grounds for entry into executive session would have applied.

If , on the other hand, the consultant referred to specific cable companies, it is possible that some aspects of the discussion might properly have been conducted in private. Relevant in that situation might have been §105(1)(f), which permits a public body to enter into executive session:

> "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 considered the financial history of a particular cable company, for instance, an executive session could properly have been held. If the language of §105 (1)(f) did not apply, I do not believe that any other ground for entry into executive session would have been pertinent or applicable.

Lastly, since the phrase "contract negotiations" appeared in the notice, I point out that the only provision in the Open Meetings law that deals directly with contract negotiations is §105(1)(e). However, that provision deals solely with the ability to conduct an executive session to discuss collective bargaining negotiations involving a public employee union. Clearly, the issue considered by the Board could not have appropriately been considered in executive session pursuant to that provision.

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
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August 6, 1999

Ms. Linda Petrosino
Chairman Montgomery
County IDA
[redacted]

The staff of the Committee on 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. Petrosino:

I have received your letter of July 4 and the materials attached to it. You asked that I confirm the substance of a telephone conversation concerning a closed session held by the Montgomery County Industrial Development Agency (IDA) and the status of a report prepared by a consultant for the IDA.

With respect to the closed session, as I understand the situation, the IDA held a meeting during which one of the subjects to be considered involved the report prepared by the consultant. The IDA's attorney advised that there would be no basis for discussing the report during an executive session. Thereafter, the meeting was adjourned and two members left the premises leaving three members. The three constituted less than a quorum, and they apparently remained and discussed the matter in private.

In this regard, the Open Meetings Law pertains to meeting 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-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, the governing body of the IDA is clearly a public body subject to the Open Meetings Law.

When a majority of a public body has gathered for the purpose of conducting public business, the gathering constitutes a "meeting" required to be held in accordance with the Open Meetings Law [see definition of "meeting", §102(1)]. If less than a majority is present, there is no quorum, and the gathering is not a meeting. In that situation, the Open Meetings Law would not apply, and there would be no right on the part of the public to attend.

In the context of your correspondence, when the meeting adjourned and less than a majority of IDA Board was present, the Open Meetings Law based upon its terms, no longer would have applied.

With regard to the report prepared by the consultant, it is likely in my opinion that portions of the record must be disclosed, while others might property be withheld.

As you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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, the state's highest court, expressed its general view of the intent of the Freedom of Information Law most recently in Gould v. New York City Police Department [87 NY 2d 267 (1996)], 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)" (id., 275).

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 agency contended that complaint follow up reports, also known as "DD5's", 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). The Court then 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, directing 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 v. 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.).

The provision at issue, §87(2)(g), permits an agency to withhold records that:

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

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

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

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

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

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I hope that the foregoing serves to clarify your understanding of the issues and 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-3056

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August 9, 1999

E-Mail

TO: David Sokolowski, News Edition, Lockport Union-Sun & Journal

FROM: Robert J. Freeman, Executive Director RJF

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

I have received your letter of July 15 in which you raised a variety of issues relating to a meeting of the Personnel Committee of the City of Lockport Common Council. It is my understanding that the Committee consists of members of the Common Council. In brief, according to your letter, the Chair of the Committee indicated that she was advised that there is no requirement that the news media be informed of a meeting if notice is posted in City Hall. Further, the matter under consideration "dealt with positions, but not particular individuals", and an executive session was held because it dealt with "personnel." You have sought clarification concerning the ability to cite "personnel" as a basis for conducting an executive session in the situation described.

In this regard, I offer the following comments.

First, when a committee consists solely of members of a public body, such as the Common Council, I believe that the committee is required to comply with the Open Meetings Law in all respects.

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 city council, 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 Common Council consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

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

Second, with respect 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.

And third, as you are aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) 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.

It is noted that the term "personnel" appears nowhere in the Open Meetings Law, and that 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.

If the issue discussed by the Committee involved positions, it is unlikely that §105(1)(f) would have served as a valid basis for consideration of the matter in executive session. Only to the extent that an issue focuses on a "particular person" in relation to the qualifiers appearing in that provision may an executive session properly be held.

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 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 Common Council.

I hope that I have been of assistance.

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3057

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August 10, 1999

TO: "RaeAnn Fitch" <[redacted]>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Fitch:

I have received your letter of July 20. You have asked whether a Board of Fire Commissioners is subject to the Open Meetings Law.

In this regard, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

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

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

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3058

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August 19, 1999

Ms. Dee Britton
[redacted]

The staff of the Committee on 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. Britton:

I have received your letter of July 21 in which you raised questions concerning the applicability of the Open Meetings Law to the Fayetteville Free Library.

In this regard, first, the Library, despite its status as a not-for-profit corporation, is, in my view, clearly required to comply with the Open Meetings Law. That statute, 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 the Fayetteville Free Library, must be conducted in accordance with that statute.

Second, assuming that the Open Meetings Law is applicable, you questioned the scope of one of the grounds for entry into executive session, §105(1)(h), for the Library "is considering the acquisition of numerous sites", two of which have been identified in published reports and at public meetings. The Library, according to your letter, has an option to purchase one of the sites, and the other is village property.

The provision to which you referred 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 what usually is a governmental entity, but in this instance is a public library, 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 an entity 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.

When the general public is aware of the location and nature of the parcel under consideration for a possible transaction, it is difficult to envision how public discussion of the matter would have 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. In the context of the situation as you described it, since there is an option to buy one parcel and the other is village property, and since those parcels have been publicly identified, it is doubtful in my opinion that §105(1)(h) could validly be asserted as a basis for conducting an executive session.

As you requested, copies of this opinion will be forwarded to the officials named in your correspondence.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Henry McIntosh
David Marnell
Ann Moore

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3059

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August 23, 1999

Mr. Robert S. Thompson
Massapequa School Board 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 Mr. Thompson:

I have received your letter of July 26. In your capacity as a member of the Massapequa School District Board of Education, you have raised a variety of issues relating to the Open Meetings Law.

First, you indicated that you read that minutes of executive session are required to be prepared and made available within a certain time, but that you " have never seen any executive board minutes taken, much less made available to the BOE or the public."

In this regard, 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. Since no vote or action may be taken during an executive session, there would be no obligation on the part of a board of education to prepare minutes of its executive sessions.

Next, you referred to incidents in which you asked that an executive session be held and that an item be placed on an agenda, but in which the President of the Board "vetoed" your requests, "indicating that she and two other board members (three out of five) had decided" against them.

With specific respect to the Open Meetings Law, as you may be aware, that statute requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

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

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

I note that a motion to enter into executive session must be made in public, and that the Board's action on that motion, to accept or reject it, must also occur in public. Similarly, in my view, the Board cannot validly take action to reject your request to place an item on the agenda except at a meeting of the Board.

As a general matter, a public body is empowered to act only by means of an affirmative vote of a majority of its total membership taken at a meeting. 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 the 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 or purportedly take action 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.

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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August 23, 1999

Mr. Joseph W. Gott *et al*

[redacted]

The staff of the Committee on 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. Gott, *et al.*:

I have received your letter faxed to this office on July 23 in which you described a series of difficulties involving the actions of the Goshen Town Board, as well as a news article focusing on an executive session held by the Board.

In this regard, since your letter raises a variety of issues, I note that the duties of the Committee on Open Government are limited to matters relating to the public access to government information, primarily under the Open Meetings and Freedom of Information Laws. Consequently, my remarks will be limited to the propriety of the executive session as the matter is described in the news article. The issue involves the relationship between the Town and the Al Turi Landfill, a private company. According to the article, that company and the Town "disagree on whether the landfill must withdraw five years of tax assessment appeals and pay tipping fees." The article also indicates that the Board entered into an executive session with Al Turi's attorney to discuss "litigation."

As reported in the article, it is my view that there was no basis for conducting an executive session.

By way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings must be conducted open to the public, except to the extent that the subject matter may properly be considered during an executive session. Paragraphs (a) through (h) of §105(1) of that statute specify and limit the subjects that may properly be discussed during an executive session.

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

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

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as not to divulge its strategy to its adversary. I note that the Concerned Citizens decision cited above dealt with an executive session held to attempt to settle litigation, and that the court determined that an executive session could not validly be held with the adversary in litigation present at the executive session.

In my view, the basis for the litigation exception involves the ability of a public body to discuss litigation without the presence of its actual or potential adversary in the litigation. Once the adversary has joined the public body, I believe that the basis for the executive session essentially disappears.

In short, it is reiterated that the Board in my opinion could not validly have conducted an executive session with the attorney for Al Turi.

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

FOIL-AO-3061

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August 27, 1999

Mr. William F. McGowan
McGowan and Brownell
37 Seneca Street
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. McGowan:

I have received your letter of July 30, as well as a videotape of a meeting recently held by the City of Geneva Human Rights Commission. You raised a series of questions concerning compliance with the Open Meetings Law by the Commission, and in this regard, I offer the following comments.

First, municipal commissions on human rights are created pursuant to Article 12-D of the General Municipal Law. Based on a review of Article 12-D and consideration of the general powers, duties and obligations of those entities, I believe that the Geneva Human Rights Commission is clearly a "public body" [see Open Meetings Law, §102(2)] subject to the requirements of the Open Meetings Law.

Second, having watched the videotape of the meeting, while it was difficult in some segments to hear clearly what was said, it does not appear that the Commission complied with the Open Meetings Law. Following discussion of various items, the Commission determined to conduct an executive session. However, while a motion to enter into executive session appears to have been made and seconded, I do not believe that there was a vote on the motion. More importantly in my opinion, there was no statement indicating the reason for conducting the executive session.

Here I point out that the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before it may enter into 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 indicated in the language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session. The ensuing provisions of subdivision (1) of §105 specify and limit the subjects appropriate for consideration in executive session. Absent an indication of the subject matter in a motion for entry into executive session, neither the public nor the members of the Commission can know whether a topic may validly be considered in private. Further, to be carried, such a motion must be approved by an affirmative vote of a majority of the total membership of a public body. Again, based on my review of the tape, there was no vote taken prior to entry into executive session.

In short, in conjunction with the preceding analysis, the Commission, in my view, failed to comply with the Open Meetings Law.

You asked whether the Commission properly closed its executive session and returned to public session. As I understand the manner in which events transpired, the Commission moved to an office for the purpose of conducting the executive session, and you "just followed along." Although you were asked to leave, you, in your words, "politely disagreed", and the Commission then adjourned and arranged to conduct its next meeting at a member's home.

From my perspective, there is nothing in the Open Meetings Law or any other law that prescribes the manner in which an executive session must end. 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. Consequently, if an executive session is followed by the continuation of an open meeting, a public body will typically inform those in attendance that the open meeting will be resumed and either return to the location of the open meeting, or if the public was excluded from the meeting room, invite the public to reenter the meeting. If an executive session is held at the end of a meeting and no other business is conducted, the end of the executive session is generally the end of the meeting. Further, if the number of members who depart leave less than a quorum, the meeting is effectively adjourned, even if there is no motion or formal action to adjourn.

I note that one of the members made reference to Roberts Rules of Order. Roberts Rules is not law. Morever, in my view, many of the rules are difficult to comprehend and unnecessarily complex.

Lastly, while the Open Meetings Law does not specify where a public body must conduct its meetings, it does provide direction concerning the site of meetings. Section 103(b) of the Law states that:

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

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the public body has the capacity to hold its meetings in a first floor room that is accessible to handicapped persons rather than a second floor room, I believe that the meetings should be held in the room that is most likely to accommodate the needs of people with handicapping conditions.

Since the next meeting of the Commission was scheduled to be held at a member's home, that kind of site would generally not be an appropriate location in my view for a meeting of a public body. Aside from the issue of barrier-free access to physically handicapped persons, a home is not a public facility, and many have suggested that entry into a home to attend a meeting involves a sense of intrusion or intimidation. In my view, every law, including the Open Meetings Law, should be implemented in a manner that gives effect to its intent. Holding a meeting at a member's home would, in my opinion, be unreasonable and inconsistent with the intent of the law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Human Rights Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 27, 1999

Mr. Stewart S. Lilker
c/o Donart
[redacted]

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

Dear Mr. Lilker:

I have received your letter of July 29 and the materials attached to it. You have raised a variety of issues concerning compliance with the Freedom of Information and Open Meetings Laws by the Village of Freeport.

You referred initially to an appeal that you submitted under the Freedom of Information Law and asked whether the Village sent copies of the proper records to this office as required by §89(4)(a) of that statute. The cited provision states in relevant part that:

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

Based on a review of our records relating to appeals for the month of July, the Village apparently did not send the requisite documentation to this office.

Next, you referred to the acknowledgment of the receipt of requests that do not include an approximation of when a request might be granted or denied. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

I note that although 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.

Notwithstanding the foregoing, it appears that some aspects of your requests do not meet the requirements imposed by the Freedom of Information Law. In a request of May 28, you asked for all resolutions brought before the Board of Trustees dealing with its rules of procedure, laws, rules, decisions and the like relating to those rules that may be in possession of the Village, and any decisions rendered by this office since 1993.

One issue in relation to the request involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to

reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

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

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the Village, to extent that the records sought can be located with reasonable effort, a request, in my opinion would meet the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of a request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

If, for example, minutes of meetings are not indexed by subject matter, locating minutes that include reference to a particular subject would likely require a review of all the minutes, line by line, covering the period that you described. In my view, a request of that nature would not "reasonably describe" the records.

Similarly, a request for laws, rules, regulations and the like is not, in my view, a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be "applicable", and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Further, people, and perhaps attorneys in particular, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 10 of the Village Code", no interpretation or judgment is necessary, for sections of law appear numerically and can readily be identified. That kind of request, in my opinion, would involve a portion of a record that

must be disclosed. Again, a request for laws that might be "applicable" is not, in my view, a request for a record as envisioned by the Freedom of Information Law.

Other issues relate to the Open Meetings Law and minutes of meetings. Section 106 pertains to minutes and states that:

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

Further, in my opinion, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

Lastly, one of the issues relates to matters involving a real property transaction, and the pertinent provision concerning the ability to conduct an executive session to discuss such matters 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 indeed publicity would substantially affect the value of real property, records, i.e., minutes of executive sessions, could likely be withheld in accordance with §106(2) of the Open Meetings Law to the extent authorized by §87(2)(c) of the Freedom of Information Law. That provision permits an agency to withhold records insofar as disclosure "would impair present or imminent contract awards..." As in the case of the rationale of §105(1)((h) of the Open Meetings Law, the cited provision of the Freedom of Information Law in my view authorizes an agency to withhold records insofar as disclosure would place a government agency at a disadvantage in negotiations or would otherwise preclude the agency from engaging in an agreement optimal to taxpayers.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Anna Knoeller, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 2, 1999

Mr. Philip Christe
[redacted]

The staff of the Committee on 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. Christe:

I have received your letter of August 6 in which you sought an opinion concerning "the propriety of the Bedford Central School Board holding an unannounced closed-door meeting which the board president qualified as a 'development workshop.'" According to a Board member with whom you spoke, "role playing" was conducted and "case studies" were presented.

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

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

In short, if the session was held solely for the purpose of educating and training Board members, and if the members did not conduct Board business collectively as a body, the activities occurring during that event would not in my view have constituted a meeting of a public body subject to the Open Meetings Law.

I point out that similar questions have arisen at workshops and seminars during which I have spoken and which were attended by many, including perhaps a majority of the membership of several public bodies. Some of those persons have asked whether their presence at those gatherings fell within the scope of the Open Meetings Law. In brief, I have responded that, since the members of those entities did not attend for the purpose of conducting public business as a body, the Open Meetings Law, in my opinion, did not apply.

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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September 3, 1999

Mr. Richard E. Slagle
Planing Board Chairman
Town 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 Mr. Slagle:

As you are aware, I have received your letter of August 5. Please accept my apologies for the delay in response.

You have raised questions concerning the status of "work sessions" under the Open Meetings Law, the right of the public to speak at meetings, and the ability to gain access to records of a volunteer fire company. In this regard, I offer the following comments.

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

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law.

Unless a public body has adopted a rule to the contrary, it may take action at a work session. With respect to minutes of work sessions and other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

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

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

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during workshops, technically I do not believe that minutes must be prepared.

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

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., Village Law, §4-412), 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.

And third, the status of volunteer fire companies had been unclear in the initial stages of the Freedom of Information Law. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for

> performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to 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."

In sum, volunteer fire companies are required to disclose pursuant to the Freedom of Information Law in the same manner as municipal agencies.

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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September 14, 1999

E-Mail

TO: "Joe" [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear "Joe":

As you are aware, I have received your letter of July 24. In all honesty, it was misplaced, and I hope that you will accept my apologies for the delay in response.

You referred to the Town Board of the Town of Rotterdam and indicated that it has developed a "yearly schedule" of meetings, which in the Board's view "satisfies the 72 hour rule" concerning notice given under the Open Meetings Law. You wrote that the notice is posted and asked whether the Board's practice is consistent with the Open Meetings Law.

In this regard, 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.

In the context of your inquiry, if a series of meetings have been scheduled in advance to be held at particular times, the posting of a notice of a schedule of those meetings in a conspicuous public locations and transmittal of that notice to the news media would in my view satisfy §104 of the Open Meetings Law regarding those meetings. The only instances in which additional notice would be required would involve unscheduled meetings that are not referenced in the notice.

You also wrote that the Board "never notif[ies] the public at all of 'caucus meetings', which are held a few days prior to the board meeting." If the Town Board consists of members of more than one political party, the caucuses would be outside the coverage of the Open Meetings Law; if, however, the Board consists entirely of members of one political party, the Open Meetings Law would apply when the Board meets to discuss public business.

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

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

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

> that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

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

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

Based upon the direction given by the courts, when a majority of the Board is present to discuss the Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law.

As you may be aware, the Open Meetings Law provides two vehicles under which a public body may meet in private. One is the executive session, a portion of an open meeting that may be closed to the public in accordance with §105 of the Open Meetings Law. The other arises under §108 of the Open Meetings Law, which contains three exemptions from the Law. When a discussion falls within the scope of an exemption, the provisions of the Open Meetings Law do not apply.

With regard to political caucuses, since the Open Meetings Law became effective in 1977, it has contained an exemption concerning political committees, conferences and caucuses. Again, when a matter is exempted from the Open Meetings Law, the provisions of that statute, including the notice requirements, do not apply.

Section 108(2)(a) of the Law states that exempted from its provisions are: "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

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

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

However, it has been held that a legislative body consisting of members of a single political party may conduct closed caucuses only to discuss political party business; if they seek to discuss public business, the gathering would not be exempt from the Open Meetings Law, but rather would constitute a "meeting " covered by the Open Meetings Law [see Buffalo News v. City of Buffalo Common Council, 585 NYS2d 275 (1992)]. Buffalo News involved a political caucus held by a public body consisting solely of members of one political party, and the court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, stating that:

> "In a divided legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it would be fair to assume the meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless. Therefore, the meeting of February 8, 1992 was in violation of Article 7 of the Open Meetings Law...
>
> "When dealing with a Legislature comprised of only one political party, it must be left to the sound discretion of honorable legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of Public Officers Law Article 7" (id., 278).

The court, however, continually referred to the term "meeting" and the deliberative process, not merely the act of "adopting" or taking action. In fact, the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.
>
> > "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain

> informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.
>
> "A literal reading of Section 108, as urged by Respondent, could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a 'political caucus' which would have no public input, and the public meetings decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. The Legislature could not have contemplated such a result by amending Section 108 and at the same time preserving Section 100" (id., 277).

Based on the foregoing, if the Board consists of members of a single political party, to the extent that the caucuses are held to discuss public business, I believe that the Open Meetings Law would apply and that the Board would be required to provide notice in accordance with §104 of the Law.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
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September 15, 1999

Mr. Neil VanderWoude
[redacted]

The staff of the Committee on 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. VanderWoude:

I have received your letter of August 19. You described a situation in which the President of the Carmel School District Board of Education "contacted a retiring member and proposed that she serve another year." According to your letter, "[a]fter securing her tentative agreement, he called other board members, one by one and suggested this action to each of them." You have questioned the propriety of the foregoing in relation to the Open Meetings Law.

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 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 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 its total membership.

It is noted, too, that the definition of "public body" refers to entities that are required to conduct public business by means of a quorum. 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 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 language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only at meeting during which a quorum has convened.

I also direct your attention to the legislative declaration in 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.

Lastly, a recent judicial decision, the first dealing with the issue, reached the same conclusion as offered here and cited an opinion rendered by this office. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), the court stated that:

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings law. A meeting is defined as 'the official convening of a public body for the purpose of conducting

> public business' (Public Officers Law §102[1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions do invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner as formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five-member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

In sum, I do not believe that a public body may validly conduct a meeting or take action by means of a conference call or a series of calls among the members.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
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September 15, 1999

Mr. Kevin Mazuzan
[redacted]

The staff of the Committee on 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. Mazuzan:

I have received your letter of August 19 and the news article attached to it. You have sought my views concerning the propriety of an executive session held by a committee of the City of Kingston Common Council to consider a parking plan. The article indicates that the executive session was held due to the "possible impact on city personnel..."

From my perspective, there was no basis for conducting an executive session. In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. 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 of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In the circumstance that you described, the issue would not have focused on any "particular person", nor would it have involved the subjects relating to a particular person delineated in §105 (1)(f). In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal

with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

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

It is noted that the Appellate Division confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

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

particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Common Council
Law and Rule Committee

STATE OF NEW YORK
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September 30, 1999

MEMORANDUM

TO: G. Robert Witmer, Esq.
Hon. Ralph Eannace, Oneida County Executive
Hon. Larry Carpenter, Chairman, Madison County Board of Supervisors
John Campanie, Madison County Attorney
Michelle Breidenbach, Syracuse Newspapers

FROM: Robert J. Freeman, Executive Director RJF

SUBJECT: Indian Land Claims Settlement Negotiations

Earlier this week, I offered statements to Michelle Breidenbach of the Syracuse Newspapers concerning the status of settlement negotiations under the New York Open Meetings Law. At that time, I was unaware of an order issued by Judge McCurn of the U.S. District Court for the Northern District of New York that includes the following directive:

> "The settlement process is a confidential process. That process, including any documents submitted to or prepared by the Settlement Master, and any statements made during that process are for settlement purposes only, are confidential, and shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence."

Based upon the foregoing, I ask that you consider my statements to Ms. Breidenbach to have been retracted. In view of the court order, in my opinion, the negotiating process must be confidential, and I note that §108(3) of the Open Meetings Law exempts from its coverage "matters made confidential by state or federal law."

In addition, it is my understanding that the subcommittees representing Madison and Oneida Counties were designated at the direction of the Special Master pursuant to the court order; those subcommittees are not standing committees of either the Oneida County Legislature or the Madison County Board of Supervisors. It is also my understanding that the members of the subcommittees were not chosen by legislative bodies, but rather, pursuant to the order of the Special Master, by County Executive Eannace and Chairman Carpenter. If that is so, those subcommittees would not constitute "public bodies" subject to the Open Meetings Law [see Poughkeepsie Newspaper v.

Mayor's Intergovernmental Task Force on new York City Water Supply Needs, 145 AD2d 65 (1989); American Society for the Prevention of Cruelty to Animals v. Board of Trustees of SUNY, 79 NY2d 927 (1992)].

I hope that the foregoing serves to clarify the matter.

RJF:jm

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October 4, 1999

Ms. Lindy Hatzmann
[redacted]

The staff of the Committee 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. Hatzmann:

I have received your letter of September 13, as well as a copy of a notice and agenda of a meeting held by the City of Peekskill "Committee of the Whole", which is the Common Council. The notice states: "There will be an Executive Session Only of the Committee of the Whole on Monday, August 23, 1999. The meeting will begin in the City Manager's office at 7:30 P.M." The notice also indicates that the executive session was to begin at 7:30.

You wrote that, in your view, the foregoing reflects a failure to comply with the Open Meetings Law and that: "There was NO public meeting at that time, there was NO vote to go into Executive Session and there was NO agenda at all describing the events of that meeting. Needless to say, there are NO minutes either" (emphasis yours).

In this regard, having contacted the City Manager to learn more of the matter, I was informed that the Committee of the Whole convened in public, and that a motion to enter into executive session, including reference to the subjects to be considered, was also made in public. As such, your description of the events of August 23 differs from that of the City Manager.

Irrespective of the accuracy of either description of events, for the purpose of ensuring that you and Peekskill officials understand the Open Meetings Law, I offer the following comments.

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

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

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

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

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

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

Often public bodies or their staffs have the capacity to recognize in advance of a meeting that a topic to be considered at a meeting falls within one or more of the grounds for entry into executive

session. In those kinds of situations, in consideration for the public, some have sought to schedule executive sessions so that members of the public will know in advance that they need not attend while an executive session is ongoing. As expressed in the remarks offered earlier, I do not believe that a public body can know with certainty that an executive session will be held. In short, it cannot be known with certainty that a motion to enter into an executive session will indeed be carried. For those reasons, it has been advised that a public body cannot schedule an executive session but may in its notice indicate that a motion to enter into executive session may be made to discuss a certain topic. When it is known that a certain topic will in fact be considered and that there is a basis for discussing that topic in executive session, I believe that a public body would be acting in a manner consistent with the Open Meetings Law.

Third, when a public body enters into an executive session and merely engages in discussion but takes no action, there is no requirement that minutes of the executive session be prepared. With respect to minutes of an open meeting, §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."

Based on the foregoing, to fully comply with the Open Meetings Law, I believe that minutes should have been prepared to indicate that a motion to enter into executive session, including the subjects to be discussed and the votes of the members on the motion, was made and approved.

Lastly, while many public bodies prepare agendas, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires the preparation of an agenda.

I hope that I have been of assistance and appreciate your kind words.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council
Patrick J. Garvey, City Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-3069

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October 4, 1999

Ms. Anna M. Scricca
Ingerman Smith, L.L.P.
167 Main Street
Northport, NY 11768

Dear Ms. Scricca:

I have received your letter of September 10 in which you asked that I confirm our conversation of September 10 concerning an advisory opinion addressed to Ms. Patricia Rudolph on April 12. That opinion involved Ms. Rudolph's ability to attend what she described as a PTA meeting held at a school in the Seaford School District. In brief, it was advised that a PTA is not a "public body" and, therefore, is not subject to the Open Meetings Law. However, it was also advised that "if a meeting is held on school property for a 'civic' purpose", such as a meeting of a PTA, such a meeting should be held open to the public pursuant to paragraph (c) of §414(1) of the Education Law.

You wrote that the event in question was not a PTA meeting, but rather "an instructional program on hygiene sponsored by the P.T.A. for fourth grade mothers and their daughters." That kind of event would appear to have been authorized by paragraph (a) of §414(1) of the Education Law, which pertains to the use of school property "For the purpose of instruction in any branch of education, learning or the arts."

While paragraph (c) of §414(1) states that the events described in that provision "shall be open to the general public', there is no similar right of public access to the events described in paragraph (a). Because the event in question involved instruction and education, it appears that Ms. Rudolph could properly have been denied access.

I hope that the foregoing serves to confirm our conversation and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Patricia Rudolph

STATE OF NEW YORK
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October 13, 1999

Mrs. Helen M. Lafferty
Mr. Robert M. Pavacic
Mr. Thomas J. Walsh
Ms. Carole A. Lawson
[redacted]

The staff of the Committee on 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. Lafferty *et al.*:

I have received your letter of August 28 and the documentation attached to it.

You referred to policy #2360 of the Hicksville Union Free School District, which states in part that "[t]he District Clerk will tape record the proceedings of all public meetings of the Board of Education." You added that the Board has designated several standing committees which hold meetings that have regularly been tape recorded but added that the current Board "decided to discontinue taping the committee meetings because they do not consider them to be regular public meetings."

You have raised a series of questions in relation to the foregoing, and in this regard, I offer the following comments.

In this regard, I offer the following comments.

First, the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public meeting" 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 board of education, 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 Board 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)]. If, for example, the Board of Education consists of seven members, a quorum of the Board would be four. If a standing committee consists of three members, because the committee is a public body separate and distinct from the Board, its quorum would be two.

Second, there is nothing in the Open Meetings Law or any other statute of which I am aware that would require a public body to tape record its meetings. With respect to any requirement that meetings of committees be tape recorded in accordance with Policy #2360, I note that the advisory jurisdiction of this office involves the Freedom of Information and Open Meetings Laws; it does not extend to matters involving the interpretation of an agency's internal policies that do not fall within the scope of those statutes.

Lastly, if "a quorum, or more, of school board members attends a standing committee meeting", you asked whether that meeting becomes a meeting of the Board of Education. As indicated earlier, a committee of a public body is itself a public body required to comply with the Open Meetings Law. If members of the Board attend committee meetings, and they attend, listen and observe in the same manner as others who might do so, their presence in my view would be as members of the public. In that circumstance, even if a majority of the Board attends, the presence of Board members who are not members of the committee conducting the meeting would not transform the gathering from a committee meeting to a meeting of the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Board of Education
Gary Steffanetta

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3071

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

October 13, 1999

E-MAIL

TO: Ibis Communications <ibis@epix.net>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Davis:

I have received your letter of August 26 in which you expressed frustration concerning your inability to acquire information or attend meetings concerning negotiations relating to Indian land claims.

In this regard, an order issued by Judge McCurn of the U.S. District Court for the Northern District of New York includes the following directive:

> "The settlement process is a confidential process. That process, including any documents submitted to or prepared by the Settlement Master, and any statements made during that process are for settlement purposes only, are confidential, and shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence."

In view of the court order, in my opinion, the negotiating process must be confidential, and I note that §108(3) of the Open Meetings Law exempts from its coverage "matters made confidential by state or federal law."

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 13, 1999

Mr. Michael P. 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 letter of September 1. You referred to a Fort Ann Town Board meeting during which a "Republican Members Caucus" was held "in order to discuss a contentious issue...out of view of the public." You wrote that the "entire board left the room to talk in private" and then returned to open session to "re-vote" on a certain matter. You have sought my views on "this type of practices in relationship to the law concerning open meetings by public bodies."

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

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

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

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

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

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

Based upon the direction given by the courts, when a majority of the Board is present to discuss the Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law.

Second, the Open Meetings Law provides two vehicles under which a public body may meet in private. One is the executive session, a portion of an open meeting that may be closed to the public in accordance with §105 of the Open Meetings Law. The other arises under §108 of the Open Meetings Law, which contains three exemptions from the Law. When a discussion falls within the scope of an exemption, the provisions of the Open Meetings Law do not apply.

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

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

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

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

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

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

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

Perhaps most similar to the situation to which you referred is the case of Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992), which involved a political caucus held by a public body consisting solely of members of one political party. The court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, stating that:

> "In a divided legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it would be fair to assume the meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless. Therefore, the meeting of February 8, 1992 was in violation of Article 7 of the Open Meetings Law...
>
> "When dealing with a Legislature comprised of only one political party, it must be left to the sound discretion of honorable legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of Public Officers Law Article 7" (id., 278).

The court continually referred to the term "meeting" and the deliberative process, not merely the act of "adopting" or taking action. In fact, the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.
>
> > "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.
>
> "A literal reading of Section 108, as urged by Respondent, could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a 'political caucus' which would have no public input, and the public meetings decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. The Legislature could not have contemplated such a result by amending Section 108 and at the same time preserving Section 100" (id., 277).

Based on the foregoing, I believe that consideration of the matter must focus on the overall thrust of the decision. To reiterate a statement in the Buffalo News decision: "any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278).

If the all of the members of the Board are from a single party, based on the judicial interpretation of the Open Meetings Law, a closed political caucus cannot be held when the members discuss public business. Only when the matter involves purely political party business could a political caucus validly be held in private.

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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October 26, 1999

Mr. T. Shah
[redacted]

Dear Mr. Shah:

Your recent letter addressed to the Secretary of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to provide advice and opinions concerning the Open Meetings Law.

You have complained that a notice of a meeting of the Jain Center of America was inadequate and did not comply with that entity's constitution and asked that the Secretary "stop" the Jain Center of America "from holding such kind of meeting."

In this regard, the Secretary of State has no jurisdiction or authority with respect meetings of non-profit organizations. Further, the Open Meetings Law is not applicable. 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."

Based on the foregoing, the Open Meetings Law includes governmental bodies (i.e., a city council, a board of education, etc.) within its coverage; it does not include private or not-for-profit organizations.

It is suggested that you review provisions of the Not-for-Profit Corporation Law for the purpose of obtaining information concerning the course of action that might be taken.

I regret that the Department of State cannot be of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3074

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October 28, 1999

Ms. Lindy Hatzmann
[redacted]

The staff of the Committee on 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. Hatzmann:

I have received your letter of September 8, as well as the materials attached to it. You have questioned the propriety of rules adopted by the City of Peekskill Common Council indicating that regular meetings "shall commence at 8:00 p.m." (§14-2), that persons wishing to speak at meetings "may speak only once and must limit their remarks to 3 minutes on topics which are on the agenda", and that "[t]he first segment will end no later than 9:00 p.m. to allow the City business to begin in a timely and consistent manner" (§14-12).

In this regard, as you may recall, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), it 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 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."

From my perspective, it is not unusual for a public body to place a limit on the amount of time that it permits individuals to speak or the period during which it will authorize the public to speak. In my experience, a limitation of three minutes per person is quite typical, and a public participation period of an hour is more than many public bodies authorize. In short, if the provisions adopted by the City of Peekskill concerning the ability of the public to speak were challenged, they would, in my view, be found to be reasonable and upheld.

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: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11776
OML-AO-3075

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October 28, 1999

Ms. Ralene 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 September 9 in which you raised a series of questions concerning access to meetings and records of the Great Neck Library and its Board of Trustees. You indicated that the Library is a "free association library" and that, pursuant to its by-laws, the Library has determined to comply with the Freedom of Information Law.

In this regard, I offer the following comments in response to your questions.

First, having written to you on March 2, 1998, you are aware the board of trustees of a free association library is subject to the Open Meetings Law, even though it may be a not-for-profit corporation rather than a governmental entity. To reiterate, 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 in the same manner as public bodies subject to that statute.

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". It is emphasized that the definition 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, or a library board of trustees, 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. As you described them, the gatherings held by the trustees with the consultant would constitute "meetings" that fall within the coverage of the Open Meetings Law.

Third, meetings held in accordance with the Open Meetings Law are presumed to be open to the public. Only to the extent that an executive session may properly be held can the public be excluded from a meeting. I note that §102(3) of the Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and that paragraphs (a) through (h) of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

With respect to notice, as indicated above, §260-a of the Education Law states in part that notice of the time and place of a meeting scheduled at least two weeks in advance must be given to the public and the news media at least one week before the meeting. With regard to meetings scheduled less than two weeks in advance, I believe that the Open Meetings Law would apply. Section 104 of that statute, which had been §99, provides that:

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

Based on the foregoing, if a meeting is scheduled at least a week in advance but not more than two weeks in advance, notice of the time and place must be given to the news media and to the public by means of posting 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, assuming that the Library acts as if it is an agency required to comply with the Freedom of Information Law, the materials to which you referred would be subject to rights of access. That statute pertains to agency records, and §86(4) defines the term "record" to include:

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

Based on the foregoing, information in any physical form kept or produced by or for the Library would constitute a record subject to rights of access. This is not to suggest that all such records would be accessible. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Great Neck Library

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3076

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October 28, 1999

Hon. Rose Mary Christian
Councilwoman
City of Batavia
[redacted]

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

Dear Councilwoman Christian:

I have received your letter of September 14 and the materials relating to it. According to a newspaper article, the Batavia City Council President discussed various possible outcomes of an "EPA settlement" before a meeting of the Rotary Club and indicated that the Council "discussed the landfill issue in closed session and would be talking about it publicly at its Sept. 13 meeting." You expressed the belief that "he disclosed confidential information from [a] closed session" and asked whether he is "in violation of state law according to 805-a".

In this regard, some elements of the issue were addressed in an opinion addressed to you on December 2, 1994. Nevertheless, I offer the following comments, some of which were expressed in that opinion.

It appears that your reference to a statute involves §805-a of the General Municipal Law, which states in subdivision (1)(b) that "no municipal officer or employee shall...disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests." From my perspective, the term "confidential" 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. Stated differently, an act of Congress of the State Legislature must forbid disclosure in order to characterize information as confidential.

While a variety of subjects may properly to discussed during executive sessions and numerous records or portions thereof may validly be withheld under the Freedom of Information Law, the ability to exclude the public from a meeting or withhold records does not necessarily represent or

signify a requirement of confidentiality. I note that both the Open Meetings Law and the Freedom of Information Law are permissive. Under §105 of the former, a public body, such as a city council, may enter into executive session to discuss one or more of the subjects appearing in paragraphs (a) through (h) of subdivision (1); there is no requirement that those subjects be discussed in executive session. Moreover, as you are aware, in order to conduct an executive session, a motion to do so must be made and carried by a majority vote of the total membership of a public body. If such a motion does not carry, even though a public body might have the authority to discuss an issue in executive session, it would not have the obligation to do so. Similarly, under the Freedom of Information Law, §87(2) provides that an agency may withhold records in accordance with the grounds for denial of access that follow. The State's highest court has found that an agency may choose to disclose records even though it has the ability to deny access [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

In sum, as a general rule, even though discussions by a public body may in appropriate circumstances be conducted in private and certain records may justifiably be withheld, the matters considered might not be "confidential", but rather beyond the scope of public rights of access. In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). While §805-a of the General Municipal Law may be useful for providing guidance, for the reasons described above, I do not believe that the use of the term "confidential" is entirely clear.

Whether it is good, wise or ethical to divulge information acquired during an executive session may be questionable and subject to a variety of points of view; nevertheless, unless a statute prohibits disclosure, I do not believe that doing so would constitute a violation of law.

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: Hon. George Spinnegan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3077

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October 29, 1999

Ms. Marie Clancy Ginnane
Trustee
Carmel Board of Education
P.O. Box 296
Patterson, NY 12563

The staff of the Committee on 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. Ginnane:

I have received your letter of September 15. I apologize for the delay in response and hope that you will appreciate that responses to inquiries are prepared in the chronological order of receipt.

You forwarded a copy of draft "Operational Guidelines" under consideration by the Board of Education of the Carmel Central School District and expressed the belief that item #5 "is policy and needs to be discussed during open session." Item #5 states that:

> "The Board and Superintendent will review the structure and organization of the Public Meeting Agenda and consider changes to expedite business and improve communication (one immediate suggestion is to schedule citizen comments at the beginning of the meeting on agenda items only. Citizen comments at the end of the meeting may be on any topic or issue."

From my perspective, discussions concerning policy must generally be discussed in public. The kind of issue referenced in item #5, when considered by the Board at a meeting, could not, in my view, properly be discussed during an executive session. In short, meetings held in accordance with the Open Meetings Law are presumed to be open to the public; only to the extent that an executive session may properly be held can the public be excluded from a meeting. I note that §102(3) of the Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and that paragraphs (a) through (h) of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice. Again, in view of the subject matter of the item in question, I believe that it must be discussed in public.

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-3078

41 State Street, Albany, New York 1
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Website Address: http://www.dos.state.ny.us/coog/coogwww.l

October 29, 1999

Mr. Charles Bentley, Sr.
[redacted]

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

Dear Board Member Bentley:

I have received your letter of September 15 and the materials attached to it. As a resident and a member of the Petersburgh Town Board you have described a series of issues and concerns relative to meetings of the Board, your role and your treatment by the Board and its attorney. In an effort to respond to your questions, I offer the following comments.

The initial area of inquiry pertains to notice of special meetings held by the Board. In this regard, the phrase "special meeting" is found in §62(2) of the Town Law, which states in relevant part that:

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

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

The Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, 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 in advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

If a written notice was transmitted to the news media and the Town maintains a copy, that record would, in my view, be clearly accessible under the Freedom of Information Law. If, for example, notice was given by phone, there would be no requirement that proof that such notice was given be recorded.

If you "find out that [meetings] were not publicized", you asked whether you may "give citizens this information without being punished under the law." From my perspective, there would be no law that would either prevent you from disseminating that information or that would serve as a basis for "punishing" you.

Second, with respect to executive sessions held to discuss "personnel", by way of background, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

In my view, a discussion held to criticize or berate you would not fall within the scope of §105(1)(f). Similarly, if the discussion had related to the "Hud program", as you described the matter, there could have been no basis for conducting an executive session.

Further, 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; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as a "personnel matter" is inadequate, for it fails to enable the public or even members of the Board to know whether subject at hand may properly be considered during an executive session.

Next, there is no law that prohibits you from disclosing what occurred during an executive session. I point out that the Open Meetings Law is permissive. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has the right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session can be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

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

In sum, unless a statute specifically prohibits disclosure of certain information or records, I do not believe that statements made during an executive session or information derived from an executive session could be characterized as "confidential" or that there would be a prohibition against disclosure by a person present at the executive session.

This is not to suggest that it would be wise or ethical in every instance to divulge what transpired during an executive session; rather, I am suggesting that there is no general law that precludes you from disclosing.

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 addition, subdivision (2) of §107 states that a court may award attorney's fees to the successful party.

Lastly, "if executive sessions were held for purpose of threatening and intimidating" you, you asked whether there is any legal action that you can take. In my view, the most appropriate action would involve an effort to ensure that the Board complies with the Open Meetings Law and holds executive sessions only when it is clearly legal to do so. As stated by Justice Louis Brandeis more than a century ago: "Sunlight is the best disinfectant."

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
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November 1, 1999

Mr. Richard W. Hallock
[redacted]

The staff of the Committee on 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. Hallock:

I have received your letter of September 21 in which you asked that this office investigate with respect to special meetings of the Chatham Town Board. You referred to several so-called special meetings and referred specifically to a meeting held on September 16 prior to which the Board, according to your letter, "failed to give any notice...except a small note taped to the inside of the main door window of the Town Hall." Further, upon your arrival at the meeting, "which had yet to be called to order", you were informed that the Board was in "executive session." Thereafter, you were told that the Board would discuss "potential litigation."

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, which states in relevant part that:

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

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

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

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

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.

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, merely posting a single notice would fail to comply with the Open Meetings Law, for the Law requires that notice be given to the news media and posted "conspicuously" in one or more "designated public locations" prior to meetings. Moreover, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

Third, 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 Town of Chatham."

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3080

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November 1, 1999

Mr. Todd M. Kerner
[redacted]

The staff of the Committee on 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. Kerner:

I have received your letter of September 21 and the materials attached to it. One of the attachments is a notice of a meeting of the Town of Clifton Park Water Authority indicating that an executive session would be held at 7pm to be followed by an open session to begin approximately a half hour later. You have questioned the legality of that practice.

In this regard, I offer the following comments.

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

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

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

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

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

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

With respect to minutes, §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, a motion to enter into executive session must be included in the minutes of an open meeting. As indicated earlier, such a motion must state the reason for conducting an executive session.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Clifton Park Water Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3081

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November 2, 1999

Ms. Sandra Aery
Sole Assessor
Town of Harrietstown
Office of Assessment
30 Main Street
Saranac Lake, NY 12983

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

Dear Ms. Aery:

I have received your letter of September 22. You have requested an advisory opinion concerning a meeting held by the Harrietstown Town Board "in which notice of the meeting was distributed to the news media announcing that an executive session was being held regarding a 'Personnel Matter.'" Following the executive session, from which you were excluded, the Board discussed budget issues. In addition, you wrote that the "personnel matter" involved "advisory appraisals requested by the assessor and completed by a certified appraiser for purposes of obtaining a '2nd Opinion' on the value of 10 select parcels."

Based on your description of the matter, 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, 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 Authority on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Second, 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.

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.

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 (<u>See</u>, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely

reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

"Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 297 AD2d 55, 58 (1994)].

I hope 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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COMMITTEE ON OPEN GOVERNMENT

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November 18, 1999

Mr. Michael Wiplich
[redacted]

The staff of the Committee on 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. Wiplich:

I have received your letter of October 5 in which you raised a series of issues concerning so-called "pre-meeting" meetings routinely held by the Babylon Village Board of Trustees. Based upon your remarks, I offer the following comments.

First, as you are aware after having read opinions rendered by this office, I believe that "pre-meetings" are clearly subject to the requirements of the Open Meetings Law. I note 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.

Further, because the "pre-meeting" is a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law. Therefore, if a pre-meeting has been scheduled, notice must be given indicating the time and the place of the gathering. Section 104 of the Open Meetings Law includes requirements concerning notice 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."

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

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals,

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

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during "pre-meetings", technically I do not believe that minutes must be prepared.

Lastly, since you made reference to an executive session held to discuss "personnel matters", I point out that a description of the subject to be considered as "personnel matters" is, according to case law, inadequate. As a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly

considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

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

It is noted that the Appellate Division confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

"...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

"Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD2d 55, 58 (December 29, 1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. E. Donald Conroy, Mayor
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 19, 1999

Mr. Harry Bourletos
[redacted]

The staff of the Committee on 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. Bourletos:

I have received your letter of October 7, as well as the correspondence attached to it. You have sought assistance in relation to a request to the Town of Kent for a variety of materials concerning "the process whereby the town board of Kent decided to kill Canada Geese." The records sought included surveys or opinion polls used to obtain the views of residents and the documentation describing the statistical factors associated with the distribution and response to the surveys or polls, documentation indicating the Town's intent to kill the geese, notices of meetings by the Board informing the public of its intent to consider killing the geese, correspondence on the matter between Town official and other governmental officials, as well contractors, "threatening letters" and similar materials received by Town officials and others pertaining to the killing of geese, documents relating to allegations of illness caused by contact with geese, invoices relating to the use of "non-lethal methods" of dealing with geese and a "copy of permit issued by the DEC and the U.S. Fish and Wildlife Service authorizing the slaughter of the geese."

In response to the request, the attorney for the Town denied the request in its entirety, stating that "your request is in the nature of a discovery demand." He added that "at present we are unaware of any statistical data associated with the Canadian geese."

From my perspective, that the request may be in the nature of a "discovery demand" is irrelevant. The issues, in my view, involve the extent to which the records exist and are maintained by or for the Town; the extent to which the request "reasonably describes" the records as required by §89(3) of the Freedom of Information Law; and the extent to which any such records may properly be withheld pursuant to §87(2) of that statute. In this regard, I offer the following comments.

It is noted at the outset that the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings, and discovery in criminal proceedings under the Criminal Procedure Law (CPL).

The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the disclosure provisions of the CPLR or the CPL, for example, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

As stated by the state's highest court, 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)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding.

Second, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there are no statistics that have been prepared in relation to a survey or poll, the Town would not be required to prepare such records on your behalf.

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)].

Third, it is emphasized that the Freedom of Information Law is expansive in its scope, for it pertains to all agency records, including those of a town. Section 86(4) of the Law defines the term "record" broadly to include:

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

Fourth, as suggested earlier, §89(3) requires that an applicant "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

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

> potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the Town, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records.

Next, insofar as the records sought are maintained by or for the Town and the request has met the standard of reasonably describing such records, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The Court of Appeals has stressed that the Freedom of Information Law should be construed expansively. Most recently, in Gould v. New York City Police Department [87 NY 2d 267 (1996)], the Court reiterated its general view of the intent of the Freedom of Information Law, 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)" (id., 275).

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 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), an exception separate from that cited in response to your request. 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, while some aspects of the records might properly be withheld, I believe that the blanket denial of access by the Town's attorney was inconsistent with law. In considering the records sought, the following grounds for denial may be pertinent.

Many of the records sought would appear to consist of documentation prepared by or sent to Town officials that were prepared by Town or other state government officials. To that extent, §87(2)(g) would be applicable. While that provision potentially serves as a ground for denial, due to its structure it often requires disclosure. Section 87(2)(g) states that an agency may withhold records that:

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

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

I note that the definition of the term "agency" in §86(3) makes reference to entities of state and local government. Consequently, communications between the Town and the U.S. Fish and Wildlife Service, a federal agency, would not constitute "inter-agency or intra-agency" material, and §87(2)(g) would not apply. Similarly, a private contractor or company would not be an agency, and communications between the town and those persons or entities would fall outside the scope of that provision as a basis for denial.

Further, the issuance of a license or permit, for instance, would reflect a final agency determination by either the Department of Environmental Conservation or the Fish and Wildlife Service and would clearly be available even if §87(2)(g) were applicable.

Also potentially significant is §87(2)(b), which permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." Any information that could be characterized as medical in nature could in my view be withheld [see §89(2)(b)]. Therefore, if, for instance, a resident informed the Town in writing that he or she contracted an illness, any identifying details regarding that person could, in my opinion, be deleted to protect his or her privacy.

Since you requested notices of meetings informing the public of the Town Board's intent to discuss the matter of the geese, I point out that the Open Meetings Law would not require that notices of meetings include that information. Section 104 of that statute requires that notice of the time and place of every meeting of a public body be given to the news media and by means of posting; there is no requirement that the notice include an agenda or reference to the subjects to be considered.

Lastly, when a request for records is denied, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing

the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk
Timothy J. Curtiss
Ann Fanizzi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 19, 1999

Mr. Peter Parisi
[redacted]

The staff of the Committee on 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. Parisi:

I have received your letter of October 8 in which you sought my views concerning "a condition that exists within the Whitesboro School District..."

According to your letter, the Board of Education conducts its meetings in the District's Administrative Building, which houses District officials' offices and a small meeting room. You indicated that there are no handicapped toilets in the building, nor are there "reserved positions to accommodate wheelchairs." You added that the "seating layout" for Board meetings is such that when the meeting is well attended "there is a lot of commotion when someone in a wheelchair tries to gain access to the room"; furniture must be moved to accommodate those persons, and because of equipment at the rear of the meeting room, it is often difficult to hear the Board. You also indicated that the Board could hold its meetings in other District facilities that offer "superior parking, general access, comfort, seating capacity and better acoustics." Lastly, you wrote that during the portion of the meeting in which the public is permitted to speak, a person wanting to do so "is asked to stand up and state their name and address prior to speaking." You suggested that doing so "results in an awkward and sometimes discriminatory and impossible situation, if someone is unable to stand."

In this regard, I offer the following comments.

First, I note that §103(b) of the Open Meetings Law states that:

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

Based upon the foregoing, there is no obligation imposed 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 would better accommodate handicapped persons, I believe that the meetings should be held in the location that is most likely to accommodate the needs of those persons.

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

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

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

Next, in a related vein, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

With respect to all of the foregoing, 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)].

From my perspective, requiring persons to "stand", particularly in the circumstance that you described would be unreasonable, and I believe that such a rule or procedure is inappropriate.

Similarly, 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 or speak at a meeting of a public body.

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

I hope that I have been of 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-3085

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November 22, 1999

Ms. Mary Lou DeForest
Town Clerk
Town of Union Vale
Tymor Park, Duncan Road
LaGrangeville, NY 12540

The staff of the Committee on 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. DeForest:

I have received your letter of October 7, which was faxed to this office on October 13. You have raised a series of issues concerning minutes and tape recordings of meetings of the Town's Board of Ethics.

In this regard, a board of ethics is clearly a "public body" required to comply with the Open Meetings Law. That statute, as you are likely aware, includes provisions concerning the content of minutes and the time within which they must be prepared and made available. 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 the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that

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

Based upon the foregoing, although minutes need not consist of a verbatim account of every comment made at a meeting, it is clear that minutes must be prepared and made available within two weeks of the meetings to which they pertain.

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

Whether the minutes of the meetings are filed with you as Clerk and Records Management Officer would, in my view, be determined on the basis of the direction provided by the Town Board. Irrespective of the location in which they are filed, as Clerk, I believe that you have legal custody of all Town records, including the minutes of the Board of Ethics (see Town Law, §30); as Records Management Officer, it is your responsibility under §57.19 of the Arts and Cultural Affairs Law to "coordinate the development of and oversee" a "program for the orderly and efficient management of records..."

Lastly, with respect to tape recordings of the Board's meetings, I direct your attention to 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."

A tape recording of a meeting would constitute a "record" that falls within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87 (2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of

Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

OML-AO-3086

From: Robert Freeman
To: [redacted]
Date: Mon, Nov 22, 1999 10:03 AM
Subject: Dear Mr. Donnelly:

Dear Mr. Donnelly:

I have received your question concerning whether the situation that you described constitutes "an emergency" that would justfiy a special meeting held by a board of education.

In this regard, there is nothing in the Open Meetings Law, the statute within the advisory jurisdiction of this office, that pertains directly to "emergency meetings." The only provision of that statute that is relevant to your inquiry involves notice of meetings. Under §104, notice of the time and place of every meeting must be given to the news media and by means of posting. When a meeting is scheduled less than a week in advance, subdivision (2) of §104 states that such notice "shall be given, to the extent practicable...at a reasonable time" prior to the meeting. In my view, if indeed there is need to convene quickly, the notice requirments may generally be met by telephoning the local news media, indicating the time and place of the meeting, and by posting notice in the location(s) where notice is routinely posted, as soon as possible after it known that a meeting will be held.

If you would like to discuss the matter, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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November 23, 1999

Mr. James Fowler
[redacted]

The staff of the Committee on 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. Fowler:

I have received your letter of October 11 and the news article attached to it. You have asked whether there are laws that prevent a private company from imposing itself on the Town of Saugerties.

In this regard, the jurisdiction of the Committee on Open Government is limited to matters involving public access to records under the Freedom of Information Law and meetings of governmental bodies subject to the Open Meetings Law. In many instances, the former can be used as a means of acquiring information concerning a company, a proposal, environmental impact, traffic and the like. Similarly, the Open Meetings Law enables the public to observe the deliberative process of decision-making bodies.

I note that the advisory panel designated by the Town and Village Boards appears to be outside the coverage of the Open Meetings Law. That statute 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 county legislature consisting of fifteen members, eight 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 the legislature 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.

I point out, however, that 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.).

Based on the foregoing, although the advisory panel could choose or be directed to conduct open meetings, it would not be required to comply with the Open Meetings Law. Similarly, meetings involving representatives of various units of government in which there is no quorum of any particular body present would fall outside the coverage of the Open Meetings Law.

I hope that the preceding remarks serve to enhance your understanding of the Open Meetings Law, and I regret that I cannot be of greater 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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November 23, 1999

Ms. Betsy Calhoun
Garrison Union Free School Board of Education
[redacted]

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

Dear Ms. Calhoun:

I have received your letter of October 18 and the materials attached to it. In your capacity as a member of the Board of Education of the Garrison Union Free School District, you have asked that I discuss relevant principles of law in relation to certain aspects of its School Board Code of Ethics.

Based on §806 of the General Municipal Law, the pertinent portion of the Code provides as follows:

> "Confidential information: An officer or employee shall not disclose confidential information acquired by him or her in the course of his or her official duties or use such information to further his or her personal interest.
>
> "*In addition, he/she shall not disclose information regarding any matters discussed in an executive session of the Board of Education whether such information is considered 'confidential' or not.*"

In view of the attachments, it appears that you are familiar with opinions rendered by this office that deal with the matter. While some of the ensusing commentary may be duplicative of points known to you, I offer the following remarks.

By way of background, §805-a of the General Municipal Law states in subdivision (1)(b) that "no municipal officer or employee shall...disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests." From my perspective, the term "confidential" 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. Stated differently, an act of Congress of the State Legislature must forbid disclosure in order to characterize information as confidential.

While a variety of subjects may properly to discussed during executive sessions and numerous records or portions thereof may validly be withheld under the Freedom of Information Law, the ability to exclude the public from a meeting or withhold records does not necessarily represent or signify a requirement of confidentiality. I note that both the Open Meetings Law and the Freedom of Information Law are permissive. Under §105 of the former, a public body, such as a board of education, may enter into executive session to discuss one or more of the subjects appearing in paragraphs (a) through (h) of subdivision (1); there is no requirement that those subjects be discussed in executive session. Moreover, as you are aware, in order to conduct an executive session, a motion to do so must be made and carried by a majority vote of the total membership of a public body. If such a motion does not carry, even though a public body might have the authority to discuss an issue in executive session, it would not have the obligation to do so. Similarly, under the Freedom of Information Law, §87(2) provides that an agency may withhold records in accordance with the grounds for denial of access that follow. The State's highest court has found that an agency may choose to disclose records even though it has the ability to deny access [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Even though discussions by a public body may in appropriate circumstances be conducted in private and certain records may justifiably be withheld, the matters considered might not be "confidential", but rather beyond the scope of public rights of access. In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). While §805-a of the General Municipal Law may be useful for providing guidance, for the reasons described above, I do not believe that the use of the term "confidential" is entirely clear, or that information acquired during an executive session may generally be characterized as "confidential."

The situation in which information considered by a board of education might validly be characterized as "confidential" would relate to matters pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.). In those instances, I believe that a discussion would have to occur in private and that records would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both

contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

Although there may be no prohibition against disclosure of information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies 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.

Disclosures made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government. On the other hand, however, if a public body has inappropriately discussed an issue during an executive session, a disclosure of the nature of the discussion may, in my view, be warranted.

Lastly, a portion of the Code indicates that a person who "knowingly and intentionally" violates its provisions "may be removed from office..." In this regard, due to the limited jurisdiction of this office, I cannot offer guidance or comment with respect to the capacity of a board of education to seek removal of a member from office.

As you requested, this opinion will be sent to the Board of Education.

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
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November 23, 1999

E-MAIL

TO: ibis@epix.net

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Davis:

I have received your letter of October 16 concerning the Indian land claims negotiations and your contention that public bodies must comply with various aspects of the Open Meetings Law in relation to the negotiations.

In this regard, as you are aware, Judge McCurn of the U.S. District Court for the Northern District of New York has ordered that:

> "The settlement process is a confidential process. That process, including any documents submitted to or prepared by the Settlement Master, and any statements made during that process are for settlement purposes only, are confidential, and shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence."

As the foregoing pertains to the Open Meetings Law, I emphasize that there are two vehicles that potentially enable a public body to exclude the public from a meeting. One involves the ability to enter into an executive session. Section 102(3) of that statute 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 matter is §108(3), which exempts from the Open Meetings Law:

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

From my perspective, based on the court order, the negotiation or settlement process is a matter made confidential by law and is outside the coverage of the Open Meetings Law. If that is so, again, the procedure for entry into executive session would not apply. Similarly, the requirements regarding notice, the taking of minutes and other aspects of the Open Meetings Law would be inapplicable.

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

RJF:tt

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December 2, 1999

Mr. Davyd T. Bullock
[redacted]

The staff of the Committee on 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. Bullock:

I have received your letter of October 19 in which you asked the following questions:

> "Whether a Fire District Board of Commissioners is subject to the Open Meetings Law;
>
> Whether a Fire District Board of Commissioners may disallow video-recording devices from a Public Meeting which they conduct."

In this regard, I offer the following comments.

First, as you are aware on the basis of your research, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

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

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

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

In addition, subdivision (1) of §66 defines the phrase "public corporation" to include "a municipal corporation, a district corporation, or a public benefit corporation." Since the entity in question is a district corporation or a public benefit corporation, it constitutes a "public corporation" that falls within the coverage of the Open Meetings Law.

Second, with respect to the use of recording devices at open meetings, 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).

In an effort to assist you, copies of this opinion will be sent to the LaGrange Fire District Board of Fire Commissioners and its attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Fire Commissioners
Thomas A. Reed

There is

not an

OMC- 3091

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3092

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 9, 1999

Ms. Sylvia B. Rozzelle
Town Clerk
Town of Olive
P.O. Box 96
West Shokan, NY 12494

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

Dear Ms. Rozzelle:

I have received your letter of October 20 in which you sought an opinion concerning a town clerk's "sole responsibility of taking minutes" and whether "a Town Board member has the right to alter minutes, ie, change wording, require definitions, explaining what they meant to say versus what they actually said, wanting minutes changed to include statements or explanations of statements – just to name a few."

From my perspective, a member of a town board has no authority to compel the town clerk to alter minutes in the ways that have been suggested. In this regard, I offer the following comments.

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

In my opinion, inherent in each of the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate.

More specifically, §106 of the Open Meetings Law provides that:

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Most importantly, I believe that minutes must be accurate. Alteration of minutes in a manner that does not accurately reflect what occurred or what was said at a meeting, would, in my view, be inconsistent with law.

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

Additionally, I do not believe that a member of the board may unilaterally alter or direct that minutes be altered. That person is one among five members; in my view, minutes may be amended only pursuant to action taken by a majority of vote of the total membership of a town board. Moreover, as suggested earlier, any such alteration must accurately reflect what transpired at a meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-3093

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December 13, 1999

TO: [redacted]

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Anello:

I have received your letter of October 26. As I understand your comments, a revised city charter was proposed in the City of Niagara Falls in 1988, but it was never ratified by the City Council. Recently, however, an attorney was retained to review the "official" charter, and he apparently found that various administrations directed that amendments to the charter be made. You wrote that "[t]he new rendition was then presented, by word of mouth, as the official law of Niagara Falls" and that "fifty of the eighty changes that he [the attorney] found substantively changed the balance of power between the City Council and the Administration, in effect changing our government, without the peoples voice being heard in the process."

It is your view that "laws were broken and that this matter needs to be resolved", and you have requested guidance in so doing.

In this regard, it unclear how the changes to which you referred were made. It is assumed that any change in the City Charter would have to have been preceded by some action or vote by the City Council. If that is so, the Open Meetings Law would have required that minutes of meetings be prepared indicating the nature of the action take and the vote of the members. 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 on the foregoing, it is suggested that you review minutes of City Council meetings beginning in 1988.

If action that should have been taken at meetings of the City Council was taken in private in a manner inconsistent with the Open Meetings Law, it is possible that a court could invalidate any such action. Section 107 (1) of that statute provides in part that:

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

I note that the statute of limitations regarding the initiation of a lawsuit under Article 78 of the Civil Practice Law and Rules is generally four months from the date of an agency's final determination. However, in the case of the Open Meetings Law, it may be extended when action is taken during an executive session, which is a portion of a meeting from which the public has been excluded. Subdivision (3) of §107 states that:

> "The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3094

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December 13, 1999

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 October 22 in which you sought a "ruling" concerning your belief that the Lynbrook Architectural Review Board ("the Board") "makes no public notifications of their meetings and keeps no records, minutes or file regarding the same."

It is noted at the outset that the Committee on Open Government is authorized to offer advisory opinions concerning the Open Meetings Law; it is not empowered to issue "rulings" or otherwise compel an entity to comply with law. As such, the following comments should be viewed as advisory.

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

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

If the Board has the authority to make determinations or performs a necessary step in the decision making process (i.e., if it must review certain proposed actions as a condition precedent to action taken by a different entity), I believe that it would constitute a "public body" required to comply with the Open Meetings Law.

Second, assuming that the Board is a public body, it is required to provide notice prior to its meetings pursuant to §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."

Lastly, when action is taken, minutes must be prepared in accordance with §106 of the Open Meetings Law, which provides that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Architectural Review Board
Hon. Eugene Scarpato

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OMI-3095

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 20, 1999

Ms. Cathy Medina
GROW
[redacted]

The staff of the Committee on 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. Medina:

I have received your letter of October 27 in which you expressed concerns relating to the implementation of the Open Meetings Law by the Board of Managers of the Massena Memorial Hospital. The Board's attorney has contended that there is no requirement that cases be identified in motions to enter into executive session to discuss litigation. You also questioned whether Board members must keep information acquired during an executive session confidential when the matter considered should have been discussed in public.

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". 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 Hospital."

Another provision that is frequently cited is the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law. It is emphasized, however, that its language 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 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.

Since you referred to closed sessions to discuss "quality assurance", I point out that 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.

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

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

In this regard, §2805-j of the Public Health Law pertains to quality assurance by hospitals and states in part that:

> "1. Every hospital shall maintain a coordinated program for the identification and prevention of medical, dental and pediatric malpractice. Such program shall include at least the following:
>
> (a) The establishment of a quality assurance committee with the

> responsibility to review the services rendered in the hospital in order to improve the quality of medical, dental and pediatric care of patients and to prevent medical, dental and pediatric malpractice. Such committee shall oversee and coordinate the medical, dental and pediatric malpractice prevention program and shall insure that information gathered pursuant to the program is utilized to review procedures. At least one member of the committee shall be a member of the governing board of the hospital who is not otherwise affiliated with the hospital in an employment or contractual capacity."

Other provisions of §2805-j involve the development of procedures concerning competence, the periodic review of credentials, and the collection of information concerning a hospital's experience with "negative health care outcomes and incidents injurious to patients." Section 2805-k involves investigations undertaken by hospitals prior to the granting or renewal of professional privileges. Section 2805-l requires that hospitals report certain kinds of "incidents" to the Health Department, and that investigations be performed and reported to the Department concerning those incidents.

Perhaps most important in terms of your inquiry is §2805-m, which states in part that:

> "1. The information required to be collected and maintained pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-k of this article, reports required to be submitted pursuant to section twenty-eight hundred five-l of this article and any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be kept confidential and shall not be released except to the department or pursuant to subdivision four of section twenty-eight hundred five-k of this article.
>
> 2. Notwithstanding any other provisions of law, none of the records, documentation or committee actions or records required pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-k of this article, the reports required pursuant to section twenty-eight hundred five-l of this article nor any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be subject to disclosure under article six of the public officers law or article thirty-one of the civil practice law and rules, except as hereinafter provided or as provided by any other provision of law."

Article six of the Public Officers Law is the Freedom of Information Law. Therefore, when records involve quality assurance pursuant to §§2805-j, k or l of the Public Health Law, they must be kept confidential, notwithstanding the provisions of the Freedom of Information Law.

Since the records concerning a quality assurance function are made confidential under the Public Health Law, a discussion of information acquired in carrying out that function would be

exempted from the Open Meetings Law.

Lastly, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality, such as §2805-m of the Public Health Law.

In response to your question, if a matter discussed during an executive session should have been discussed in public, there is no law of which I am aware that would preclude a person in attendance from disclosing information relating to the matter.

As you requested, copies of this opinion will be forwarded to the persons that you identified.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John Mereau, President, Board of Managers
Hon. Jack Sauve, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3097

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December 22, 1999

Ms. Elaine Borgeest
[redacted]

The staff of the Committee on 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. Borgeest:

As you are aware, I have received your letter of October 29, as well as the materials relating to it. You have sought my views concerning the propriety of an executive session held by the Board of Trustees of the Village of Victor.

According to draft minutes of the meeting, the executive session was held to discuss "financial/promotions of employees." The minutes also indicate that after the executive session, a resolution was adopted that states in relevant part that:

> "**Whereas**, it has been the intent of the Village Board of Trustees to create a compensation structure within the Village's Department of Public Works/DPW that is equitable, externally competitive with similar departments in the region, and provides adequate incentives for employees to continually improve their individual knowledge skills and abilities and
>
> **Whereas,** Trustee Anthony Gullace and John Holden provided leadership in this effort by seeing the DPW Wage and salary Administrative Program Study Committee, which, following considerable research, issued recommendations for wage and salary administrative restructure within the DPW..."

Based on the terms of the resolution, I believe that the discussion conducted in executive session should have occurred in public in great measure, if not in its entirety. 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.

The language of the only ground for entry into executive session of apparent relevance is the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

The resolution quoted earlier indicates that the Village intended to "create a compensation structure" for employees in certain department that is "competitive with similar departments in the region..." By its terms, the resolution suggests that the study used to adopt new salaries involved consideration of positions, irrespective of who holds the positions. The Board's consideration apparently did not involve a review of each employee's performance individually to ascertain whether he or merited an increase in salary. On the contrary, by comparing other departments and the salaries accorded to positions in those departments, the action taken by the Board evidences an intent to make salaries accorded to positions in its Department of Public Works "equitable" and "competitive with similar departments."

If my understanding of the matter is accurate, §105(1)(f) could not validly have been asserted as a means of entering into executive session, for the issues would not have involved any "particular person"; again, they appear to have involved positions, not the performance of the employees who hold them.

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:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3098

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December 28, 1999

E-MAIL

TO: "Martin Chipkin" <[redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Chipkin:

I have received your letter of November 10 in which you raised questions concerning the implementation of the Open Meetings Law by the Town of Mexico Town Board. In this regard, I offer the following comments.

First, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may 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.

Three of the grounds are most commonly cited, and they will be considered in the following paragraphs.

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 Mexico.

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.

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.

Second, with respect to attendance at an executive session, §105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, although the Town Board could choose to enable the town clerk or others to attend an executive session, only the members of the Town Board have the right to attend an executive session. However, §30(1) of the Town Law specifies that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..." In my opinion, §30 of the Town Law is intended to require the presence of the clerk to take minutes in situations in which motions and resolutions are made and in which votes are taken.

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

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

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.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 1999

Mr. William M. Cullen
Behrens, Loew & Cullen
[redacted]

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

Dear Mr. Cullen:

I have received your letter of November 4 and the materials attached to it. In your capacity as attorney for the Board of Trustees of the Great Neck Library, you referred to an advisory opinion prepared on October 28 at the request of Ms. Ralene Adler and suggested that Ms. Adler "misunderstood the nature and composition" of what you characterized as "focus group interviews with small groups of individuals representing a wide spectrum of community interests." You also referred to the records prepared by a consultant retained by the Board and asked that I confirm our discussion in which it was advised that such records constitute "intra-agency materials" that would fall within the scope of §87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, while I do not fully understand the role of members of the Board of Trustees in relation to serving as a focus group, it is reiterated that a gathering of a majority of the members of the Board, in their capacity as Board members, for the purpose of conducting the business of that body would, in my view, constitute a "meeting" that falls within the framework of the Open Meetings Law. If the gathering does not involve conducting the business of the body, the Open Meetings Law would not apply.

Second, the provision in the Freedom of Information Law to which reference was made earlier permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

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

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

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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December 28, 1999

Mr. Ernest R. Stolzer
Rains & Pogrebin, P.C.
210 Old Country Road
Mineola, NY 11501

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

Dear Mr. Stolzer:

I have received your letter of November 16 in which you seek an advisory opinion under the Open Meetings Law in response to the following question:

> "Whether a town board member may be excluded from a meeting between other town board members and legal counsel where that meeting is to obtain advice regarding pending litigation and where the excluded member is a separately named defendant in the litigation with a conflict of interest and separate counsel?"

You referred to an opinion rendered 1992 involving a similar issue, and you asked whether the principles offered therein would be applicable to the facts presented in your letter. In my view, those principles would be applicable in the context of the situation that you described.

As you are aware, I have received correspondence from Mr. Jason L. Abelove, the attorney for the "excluded member", who has contended that the member has the right to be present.

[redacted]

In view of the foregoing, it is your view that the Councilwoman may be excluded form meetings between the remaining four members of the Board and their legal counsel for the purpose of discussing legal strategy and seeking legal advice. In short, it is your belief that "it would be adverse to its interests for the Town to be required to waive its attorney-client confidences and

disclose litigation strategy and advice by allowing the Councilwoman to attend the meetings with its own separate legal counsel.:"

As suggested earlier, I believe that the Councilwoman may be excluded from the gatherings described in the preceding paragraph based on the principles offered in the opinion referenced earlier. To reiterate those points, I offer the following remarks, most of which appeared in that opinion.

Specifically, the Open Meetings Law provides two vehicles under which the public, in appropriate circumstances, may be excluded from meetings of public bodies. One is an executive session, a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §102(3)]. Members of a public body have the right to attend executive session of the body [see §105(2)].

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

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

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

The other vehicle that authorizes private discussion arises under §108 of the Open Meetings Law. Section 108 contains three "exemptions", and if a matter is "exempted" from the Open Meetings Law, that statute is not applicable.

Pertinent to the situation that you described is §108(3), which exempts from the Open Meetings Law:

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

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

It has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1989); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

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

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

Therefore, insofar as the Town Board seeks legal advice from its attorney and the attorney offers legal advice, the communications between the Board and the attorney would, in my opinion, have been confidential and outside the coverage of the Open Meetings Law.

Further, to the extent that you, or the Town Attorney discuss litigation strategy, provide legal advice to or otherwise engage in an attorney-client relationship with your clients, the four members of the Board, the disclosure of which to the councilwoman would be adverse to the interests of the Town, I believe that your communications would be privileged and therefore, outside the requirements of the Open Meetings Law. In that kind of situation, I believe that the councilwoman could be excluded from the gathering, for based upon the facts, she could not be characterized as your client, but rather as an adversary in the litigation. In my opinion, the exclusion of the councilwoman would be consistent with the thrust of decisional law concerning the intent of §105 (1)(d), the "litigation" exception for entry into executive session.

Lastly, I disagree with Mr. Abelove's contentions. The opinion of the Attorney General (Opn. No. I 97-32) in my view generally stands for the notion that a member of a public body who is named individually in a lawsuit against that body or the municipality it serves generally cannot be excluded from a meeting of the public body. That would be so according to the opinion when " the members' interests appear... to coincide with that of the board", and I concur. However, the opinion also specified that "[i]f at any time during the course of the litigation, a board member's interests are at odds with those of the [board or municipality], recusal may be necessary."

Based on the facts that you provided, insofar as the Councilwoman's interests may be "at odds" with those of the Town, it is reiterated that the other members of the Board may meet, in my opinion, without her presence based on the assertion of the attorney-client privilege.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jason L. Abelove

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December 30, 1999

E-MAIL

TO: Herman<calgary@worldnet.att.net>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Friedman:

I have received your letter of December 2. In your capacity as a member of the Town of Ramapo Zoning Board of Appeals, you asked whether the Board may deliberate in private. You added that you raised the question because members of the public have recently begun to "make verbal outbursts to the board during its deliberations."

In this regard, I offer the following comments.

First, by way of background, I note that 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.

Due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108 (1). Paragraphs (a) through (h) of §105 (1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a zoning board of appeals must conduct its business in public.

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

I point out that public bodies generally have the authority to adopt rules to govern their own proceedings, and it is suggested that the Board consider the establishment of rules specifying when members of the public may have the privilege of speaking and indicating that the kind of outbursts to which you referred may result in ejection from the meeting. Consideration might also be given to having a uniformed police officer at a meeting. Often the mere presence of an officer enhances decorum.

I hope that I have been of assistance.

RJF:tt